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Cal.Rep. 31–32 P.2d—a

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31 P.2d – 32 P.2d

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CALIFORNIA REPORTER

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SECOND SERIES

220 Cal. 383

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. HARRISCOLOR FILMS, Inc., et al.

L. A. 13967.

Supreme Court of California.
March 27, 1934.

1. **Appeal and error 🔑966(1).**
Continuance 🔑7.
Motion for continuance is addressed to sound discretion of trial court, and ruling thereon will not be disturbed on appeal in absence of clear showing of abuse of discretion.

2. **Continuance 🔑19.**
Where cause was set down for trial in April, approximately 2½ months after bringing of cause to issue, denial of corporate defendant's motion for continuance, supported by affidavit that corporation's president was out of state, but not showing physical or financial inability to be present at trial, *held* not abuse of discretion.

3. **Judgment 🔑518.**
In mortgage foreclosure action, affirmative defense that mortgagee agreed to transfer exclusive patent license to mortgagor, and that, by judgment in a prior action, it was adjudged that mortgagor had acquired exclusive license, and averring that mortgagor had since ascertained existence of prior transfers of licenses to third persons, *held* properly stricken out as collateral attack on a final judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Bank of America National Trust & Savings Association, as executor of the will of Bessie Handschiegl, deceased, and others, against the Harriscolor Films, Inc., and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Victor F. Collins, of Los Angeles, for appellants.

Raphael Dechter, Goudge, Robinson & Hughes, and David A. Sondel, all of Los Angeles, for respondents.

SEAWELL, Justice.

This is an appeal by the defendants from a judgment foreclosing a mortgage on real property.

It is first urged that the trial court erred in denying defendants' motion for a continuance of the trial. This motion was supported by an affidavit of defendants' counsel to the effect that the principal office of the defendant corporation was in the city of Newark, N. J., and that the president of the corporation, who alone was asserted to be familiar with the facts involved in this litigation and whose presence was averred to be essential to a proper defense of the action, had left the state upon the advice of counsel that the cause would not be reached for trial until approximately July, 1932.

Inspection of the record discloses that the

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

complaint was filed July 16, 1931. The corporation defendant filed its original answer on August 27, 1931, and its amended answer on September 28, 1931. The individual defendants, who were joined merely for the purpose of foreclosing any interest they might have in the mortgaged property and not as debtors on the principal obligation, which was purely a corporate debt, filed their answer on February 10, 1932. Thereafter and on March 5, 1932, counsel for the plaintiffs filed an affidavit and notice of motion for "short cause setting." The motion to set was made on March 11, 1932, at which time the cause was set down for trial on April 22, 1932. On April 8, 1932, two weeks prior to the time set for trial, counsel for the defendants filed the affidavit above referred to requesting a continuance until July or August, 1932.

[1, 2] A motion for continuance is, of course, addressed to the sound discretion of the trial court and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the ruling thereon. We find no abuse of discretion in the present case. It was not unreasonable to require the defendants to be ready for trial approximately two and one-half months after the filing of the last answer and the bringing of the cause to issue. Moreover, the affidavit filed in support of the motion merely refers to the absence of the corporate officers and makes no attempt to aver or establish physical or financial inability to be present at the trial.

At the time set for trial, the defendants, through counsel, renewed the motion for a continuance. The request was again denied, whereupon the defendants declined to offer any evidence in opposition to plaintiffs' showing. Judgment followed for the plaintiffs, Defendants contend that plaintiffs' evidence is insufficient to show ownership in them of the note and mortgage. The contention lacks merit. We have examined the transcript and find that the evidence, both oral and documentary, definitely establishes plaintiffs' ownership in these instruments in the respective undivided shares or interests claimed by them in the complaint and approved by the court in its findings.

[3] It is finally urged that the court below erred in striking out an affirmative defense of the corporate defendant, wherein it was alleged, in substance, that the mortgage sought to be foreclosed had been executed by the defendant corporation as a purchase-money mortgage in consideration for which the mortgagee agreed and undertook to transfer to the mortgagor an exclusive license in and to the use of certain inventions and patents; that it was subsequently decreed and adjudged in an action between the parties thereto or their representatives that the corporate defendant (mortgagor), in consideration of the execution and delivery of said note and mortgage, "had lawfully acquired an exclusive license" in and to the use of said inventions and patents; that said judgment is now final; that the defendant corporation, as mortgagor, has since ascertained that the mortgagee perpetrated a fraud upon it and by reason of prior transfers to third persons was unable to and in fact failed to transfer to it an exclusive license to use said inventions and patents; and that this evidence of fraud was unavailable to it at the time of the entry of the judgment referred to which undertook to and did adjudicate the respective rights of the parties. In support of this affirmative defense, the defendants now urge that the prior suit and judgment proceeded upon the theory or assumption that the mortgagee had transferred such exclusive license to the mortgagor and that the issue was neither presented nor adjudicated therein. In view of defendants' allegation and concession that the judgment, now final, entered in the prior action decreed that the corporate defendant herein, in consideration of the execution of the note and mortgage here sued on, "had lawfully acquired an exclusive license" in and to the use of the inventions and patents covered by the agreement, it is immediately apparent that the affirmative defense and the argument here made in support thereof constitute, at best, a collateral attack upon a final judgment, valid upon its face. This being so, it was proper for the court below to strike out such abortive affirmative defense. Assuming the facts to be as alleged in the stricken defense, there are other and sufficient remedies available to the mortgagor.

What has been said sufficiently disposes of defendants' further contention that it was error for the trial court to subsequently refuse to allow the filing of an amended answer intended to reinstate this defense.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

220 Cal. 386

PEOPLE v. SHORTEN.

Cr. 3627.

Supreme Court of California.
March 28, 1934.

Homicide ⚷313(1).

Where court informed jury that jury had discretion of fixing punishment in first-degree murder case at life imprisonment or death, and that if verdict was silent as to punishment, sentence of death was obligatory, first-degree murder verdict, silent as to punishment, *held* not, under record, to show that jury did not agree on penalty of death.

In Bank.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Arthur Shorten was convicted of murder in the first degree, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and W. B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SHENK, Justice.

The defendant was prosecuted for the murder of his wife, Sally Shorten. From a judgment imposing the death penalty and from an order denying his motion for a new trial, the defendant appeals.

The defendant and his wife, the deceased, with two children, formerly resided at Port Arthur, Texas. The wife with the children removed to Los Angeles in August, 1931. The defendant followed them in December of the same year, and resided with his family on 114th street in that city.

John Finney, a brother of the deceased, was an eyewitness to the tragedy and testified at length for the prosecution. In April, 1932, Finney was living with his family also on 114th street and opposite the place of residence of the defendant. Finney's family included his wife and four small children, one of whom was a baby ten days old. Mrs. Finney and another child were ill and the deceased was temporarily residing with them and assisting in the care of the mother, the babe, and the sick child.

On the evening of April 25, 1932, the defendant went to the Finney house and requested his wife to come to her own house for the night, and she refused to comply with the defendant's request. She retired for the night before the defendant, about midnight, left for his own home, taking one of his children, a boy, with him. At about ten minutes of six on the following morning, the 26th, the defendant appeared again at the Finney home and found his wife in the kitchen preparing breakfast. He said "good morning" to those present and was asked to have breakfast, which he declined, and announced that he was about to leave for Imperial Valley and intended to take his boy with him. The deceased objected to his leaving home, for the reason that he was then employed and had no prospect of employment in Imperial Valley. She also objected to the boy's leaving home. The defendant was standing next to the drainboard, behind his wife, when he fired a shot from a .38-caliber revolver. The effect of this discharge is not disclosed except that it caused the deceased to run to another room. The defendant followed her, striking her on the head with the barrel end of the revolver, and continued shooting. The deceased fell to the floor. One of the bullets struck the left hand of the defendant and lodged in his knee, whereupon he fell to the floor beside the body of his wife. While in this position he stripped the gun of the empty shells, reloaded the chambers, and continued to fire into the body of his wife.

The foregoing facts were corroborated by other witnesses and there is no contradiction in the evidence. The autopsy surgeon found evidence that nine bullets had entered the body of the deceased, six in her head and face and three in her arms and shoulders, and that the skull was fractured. After the shooting, a doctor was called. Upon his arrival he summoned an ambulance and the wife died as her body was being moved on the stretcher. Shortly after the doctor's appearance the defendant exclaimed, "You don't understand; she left me; please kill me."

Before the body of the deceased was removed, a police officer, responding to a call, found the defendant on the dining-room floor, with the wife's body beside him. The officer, among other things, asked the defendant what was the cause of the trouble and the reply was, "family troubles."

After his arrest the defendant stated to the officers that he had had a quarrel with his wife; that he went to the Finney house in

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the early morning armed with a revolver, intending to do something; that rather than go on living as they had been he "went with the thought in mind to kill her," and that he meant to kill her.

The defendant entered pleas of "not guilty" and "not guilty by reason of insanity." After the trial on the first plea, the jury returned the following verdict: "We, the jury in the above entitled action, find the defendant guilty of murder as charged in the information and find it to be murder of the first degree." On the trial of the second plea before another jury about two months later the defendant was found to have been sane at the time of the commission of the offense.

On the appeal no question is raised as to the sufficiency of the proof, either as to the commission of murder of the first degree, or as to the sanity of the defendant at the time in question. The only assignment of error in the record is that, by their verdict on the plea of "not guilty," the jury did not agree upon the penalty of death. The basis of the argument in that behalf is the proceedings had when the jury returned to court in the course of its deliberations. After the instructions were given, the jury retired at 3 o'clock in the afternoon. At 4:30 on the same afternoon the bailiff informed the court that the jury requested the statement of the defendant given to the police officers shortly following his arrest. This statement had been reduced to writing, and the police officers testified by referring to it but the statement itself was not filed as an exhibit. The jury was thereupon brought into court and was informed by the court that said statement was not an exhibit in the case. A juror then requested that the testimony of the officers as to the contents of said statement be read. This was done, and the jury returned to the jury room for further deliberations. A verdict was not reached that night. At 11:48 on the following morning the jury was brought into court and the court inquired whether a verdict had been found. A negative answer was given. The record then shows the following:

"The Court: Is there any question of law that is bothering you, that the court can be of assistance to you on?

"The Juror: The question is, your Honor, can we bring in a verdict without recommending as to the punishment?

"The Court: Yes, you can bring in a verdict without recommending the punishment, but that casts the burden and duty upon the court of imposing a sentence of death. The court then has no discretion of any kind except to impose judgment that the defendant suffer death. The jury has the discretion of fixing the punishment in a first degree murder case at either life imprisonment or at death. Have I made myself clear, ladies and gentlemen?

"The Juror: I wonder if we could have another blank that has nothing on it here about fixing the punishment? I understand we are not to erase anything on this form.

"The Court: I can ask the clerk to prepare a form of verdict which will not carry any recommendation whatever. You may use it, if you find that that is the verdict you want to arrive at.

"Now, I am handing you another form of verdict, ladies and gentlemen of the jury, which you may use if you find the defendant guilty at all of anything, as follows: With the title of the court and cause, 'We, the jury in the above entitled action, find the defendant guilty of murder as charged in the information, and find it to be murder in the first degree.' If such be your verdict, you will cause it to be signed and dated by your foreman and return it into court.

"May I add one more statement to you so that there will be no error or misunderstanding about the law on the subject: You have the right, ladies and gentlemen of the jury, to determine the punishment, if you find the defendant guilty of murder in the first degree at all. If you find a verdict of guilty of the first degree, you have the right to fix the punishment at either life imprisonment or at death. So forms for each of those verdicts have been handed to you. If you fail to fix the punishment in your verdict, and you merely find the defendant guilty of murder in the first degree as charged in the indictment, it then becomes the duty of the court, and it has no discretion but to impose a judgment of death."

At 2:25 p. m. of the same day the jury returned the verdict in the language above quoted. The jury was polled, the verdict recorded and reread, and the trial on the plea of "not guilty by reason of insanity" was set for a later date.

On the foregoing, counsel for the defendant states: "It is apparent from the above record of the proceedings in this case that the jury was seeking to avoid the responsibility of fixing the penalty. It is clear that there was a disagreement in the jury as to the penalty that should be imposed. * * * The evidence in this case as to the guilt of appellant of murder in the first degree (assuming, of course, that he was sane, which is contrary to the opinion of counsel for appellant), is so strong, so positive, and so certain, that it would be stretching the imagination to the breaking point to assume that the jury was disagreeing as to the guilt of the appellant of murder in the first degree. Therefore, we think it is very logical and reasonable to assume that the jury had not agreed and could not agree as to the punishment or penalty."

Counsel for the defendant singles out the statement of the court in answer to the question of the juror: "Yes, you can bring in a verdict without recommending the punishment, but that casts the burden and duty upon the court of imposing the sentence of death," as indicating that the jury understood that the court was withholding from the jury the duty to fix the penalty. We cannot accord to this statement the significance sought to be attributed to it, especially in the light of the context and the other instructions wherein the court was at pains to advise the jury at length in certain and appropriate language, and in several instances, that if the jury should find the defendant guilty of murder of the first degree, it would then be their duty to fix the penalty, and that if the verdict be silent as to the penalty, the duty would be cast upon the court to impose the penalty of death. It may be assumed that the controversy among the jurors in the jury room involved the question of the penalty to be imposed, but it is clear from the record that the jury knew what it was doing and the consequences thereof when it returned a verdict silent as to the penalty. See People v. Hall, 199 Cal. 451, 249 P. 859; People v. Bollinger, 196 Cal. 191, 237 P. 25; People v. Perry, 195 Cal. 623, 234 P. 890. There is no possible basis for the claim that in returning the verdict the action of the jury as to the penalty imposed was not unanimous. The case is not at all like the case of People v. Hall, supra, relied upon by the defendant. There the verdict showed on its face that the jury had not come to an unanimous agreement as to the penalty. Here, the verdict returned under full, fair, and impartial instructions from the court shows by its language that the matter of the penalty was acted upon by the jury and the record otherwise discloses that its action thereon was unanimous.

The judgment and order are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; PRESTON, J.

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220 Cal. 366

SPINKS v. CITY OF LOS ANGELES et al.

DODGE v. SAME.

L. A. 14461.

Supreme Court of California.
March 26, 1934.

Rehearing Denied April 23, 1934.

1. Dedication ⚷58.

City cannot legally divert use of land, donated or dedicated to it solely for park, to purposes inconsistent with terms of grant.

2. Municipal corporations ⚷600.

Municipality may meet changing conditions in its development, though it thereby imposes burdensome restrictions on private property.

3. Dedication ⚷58.

Owner of property abutting on public property has no special right or interest entitling him to insist on continued use of latter property for purpose to which dedicated.

4. Municipal corporations ⚷721(1).

Municipality owning fee of land, acquired without restrictions and set aside for park, *held* authorized to devote portion thereof to public use as street (Los Angeles City Charter, art. 16, § 178).

In Bank.

Appeals from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Actions by W. H. Spinks and by Shailor C. Dodge, respectively, against the City of Los Angeles and others. Judgments for plaintiffs, and defendants appeal.

Reversed and remanded with direction.

Gibson, Dunn & Crutcher and Woodward M. Taylor, all of Los Angeles, for appellant Griffith Co.

Erwin P. Werner and Ray L. Chesebro, City Attys., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland and Robert J. Stahl, Deputy City Attys., all of Los Angeles, for all other appellants.

O'Melveny, Tuller & Myers, John A. Powell, and Louis W. Myers, all of Los Angeles, amici curiæ, for Mid-Wilshire Improvement Ass'n.

Ray C. Eberhard, Henry P. Leavitt, George Winfield Scott, Scott & Eberhard, and L. H. Valentine, all of Los Angeles, for respondents.

WASTE, Chief Justice.

The legal question presented by this appeal is: May a municipality, which is the owner

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

in fee of land acquired without restrictions, and set aside for park purposes, devote a portion of the land to public use as a street? Certain findings of the trial court, relating to an opposition to such action by taxpayers and abutting property owners affected by the proposed change of use, have no bearing on the issue presented in this case for our consideration, and may be disregarded in this discussion.

The city of Los Angeles, as the successor of the Mexican pueblo of the same name, is the owner in fee of land within the corporate limits of the city which for many years has been set apart for and used as a park, known as West Lake park. A freeholders' charter, adopted by the electors of the city in 1888, and approved by the Legislature, provided (section 113): "All lands and real property located in the City of Los Angeles, which have been heretofore, or which may be hereafter, set apart or dedicated for the use of the public as a public park or parks, shall forever remain to the use of the public as such park or parks, inviolate and no part of said lands or real property shall ever be used or occupied for any other purpose." This provision was later amended, and became section 119b, which read: "All lands belonging to the city which have heretofore or which may hereafter be set apart or dedicated for the use of the public as a public park, shall forever remain to the use of the public inviolate; *provided*, however, that the Board of Park Commissioners may, with the approval of the Council, given by ordinance * * * *authorize the opening, establishment and maintenance of streets or other public ways in or through such parks.* * * *" (Italics supplied.) Stats. 1917, pp. 1686, 1692. Twice since the adoption of section 119b it has been amended in matters not here material, and is now section 178 of article 16 of the charter of the city.

Proceedings were initiated by the city council and the board of park commissioners for the extension of Wilshire boulevard, in part approximately across the center of West Lake park, as part of the major traffic street system of the city. A contract for the extension and construction of the street was entered into when the plaintiffs brought these actions to perpetually enjoin and restrain the construction of the street across the park. Judgment was entered for the plaintiffs, and the defendants have appealed. The foregoing are the facts, and only the one question of law heretofore stated is presented.

[1] Where a tract of land is donated to a city with a restriction upon its use—as, for instance, when it is donated or dedicated solely for a park—the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant. A less strict construction is adopted as to dedications made by the public. Slavich v. Hamilton, 201 Cal. 299, 303, 257 P. 60. The case here is not one of the type first referred to, in which a donor transfers property to a municipality for a fixed and definite purpose defined in the grant, and where the rule of strict construction is to be applied. Acting under authority of its charter, and through the action of its legislative body, the city is only dedicating its own property to a different public use than that to which it has been heretofore subjected.

[2-4] The right of a municipality to meet changing conditions in its development cannot be denied, even though in so doing it imposes burdensome restrictions upon private property. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479, and Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225, 48 A. L. R. 509, are leading cases in this state on that subject. The authorities establish, also, that an abutting owner has no special right or interest which entitles him to insist upon the continued use of public property for the purpose to which it has been dedicated. Reichelderfer v. Quinn, 287 U. S. 315, 53 S. Ct. 177, 77 L. Ed. 331; Polack v. Trustees, etc., 48 Cal. 490; Seattle Land & Imp. Co. v. City of Seattle, 37 Wash. 274, 79 P. 780. The Reichelderfer Case, supra, is particularly pertinent here, because it involved the effort of an owner of land abutting on a park to enjoin the erection of a publicly owned structure in the park. It was squarely held in that case that as it acquired the fee to the park lands, as did the city in this case, the government, by dedicating the lands to a particular use, did not purport to deprive itself of the power to change that use and devote the lands to other purposes, and the abutting owner cannot complain if that be done.

There being no dispute on the material facts, the judgment is reversed, and the cause is remanded to the lower court, with the direction that it enter judgment for the defendants.

We concur: SHENK, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

220 Cal. 398

SUTCLIFFE v. SUTCLIFFE.

L. A. 13943.

Supreme Court of California.
March 28, 1934.

1. Appeal and error ⚷553(2).

Where only record of proceedings was clerk's transcript, which contained notice of motion, affidavits, and minute order denying motion, and there was no bill of exceptions or certificate of attestation by trial court as to what papers, evidence, or affidavits were before court, record was insufficient to warrant review (Code Civ. Proc. § 473; Rules for the Supreme Court and District Courts of Appeal, rule 29).

2. Appeal and error ⚷544(1).

If matters other than those that appear on face of judgment roll are sought to be reviewed, record thereof must be presented by bill of exceptions or by reporter's transcript.

3. Appeal and error ⚷554(1).

In absence of proper record, appeal must be dismissed or order or judgment affirmed.

4. Appeal and error ⚷931(1).

Reviewing court, if authorized to consider cause on merits, will assume that trial court has properly weighed evidence, where affidavits are sharply contradictory.

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In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Pearle A. Sutcliffe against Walter J. Sutcliffe. From an order denying a motion to vacate an interlocutory decree of divorce, plaintiff appeals.

Affirmed.

Weber & Kidder, of Santa Monica, Vincent A. Marco, of Hollywood, and Claude A. Shutt, of Los Angeles, for appellant.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondent.

WASTE, Chief Justice.

Appeal from an order denying a motion to vacate an interlocutory decree of divorce. The appellant commenced an action against the respondent for divorce. She alleged in her complaint that there was certain community property, both real and personal. The respondent filed an answer and a cross-complaint in the divorce action, and also instituted an action against the appellant for partition of the real property involved in the divorce action. The two actions came on together for trial through stipulation that evidence introduced in either case be deemed introduced in the other when relevant, competent, and material to the issues involved. The respondent (plaintiff in the partition suit) introduced evidence and rested his case. The parties then, by their respective counsel in open court, stipulated to a dismissal of the partition suit and to an agreed division of the property described in the appellant's complaint in the event the court granted a divorce. The respondent thereupon, also in open court, dismissed his answer to appellant's divorce complaint and his cross-complaint filed in the action, and appellant dismissed her answer to the cross-complaint.

Evidence in support of the appellant's divorce action was introduced; respondent introduced no evidence; and the court granted an interlocutory decree of divorce to the appellant, and therein ordered the community property divided in accordance with the stipulation previously made in open court. The appellant contends that the court erroneously awarded a valuable parcel of the real property to the defendant, when it was, according to the appellant, stipulated that said property was to be awarded to plaintiff (appellant). Her contention that there was this discrepancy between the stipulation and the decree presents the only situation involved in this appeal.

After the time had passed for moving for a new trial or for an appeal from the decree, the appellant, plaintiff below, through new and substituted counsel, moved the court, under section 473 of the Code of Civil Procedure, to set aside the decree on the ground that it was entered through mistake, inadvertence, surprise, and excusable neglect of herself and counsel, and upon the further ground that the cause was not at issue when the trial was had. In support of the motion, the appellant filed a number of affidavits, including her own, the substance of which is that prior to the day of the court proceedings she had been ill and was suffering great and excruciating pain, because of which, and for other reasons, she was unable to prepare for trial, and also fully expected a continuance because her counsel was busy with other matters; that such continuance was not had; that on the day of trial, while in court, she was still suffering excruciating pain and was in such mental condition that she did not understand the nature of the proceedings or comprehend the effect of the stipulation concerning the division of the community property, or understand the language used by her counsel; that she was of the view that she was awarded the parcel of property which she now complains was awarded erroneously to the respondent, and did not know otherwise until after the adjournment of court when she was informed of the fact by her brother who was in court at the time. Appellant further alleged in her affidavit that, although she made repeated efforts and continued persistently in an effort to get her counsel to endeavor to have the alleged erroneous award corrected, her efforts were unavailing. Counter affidavits were made and filed which were, in turn, followed by affidavits in rebuttal. The trial court denied the motion to vacate and set aside the decree. From that order the appeal is taken.

[1, 2] No record of the proceedings had upon the motion to vacate the decree has been presented, other than the notice of motion, the large number of affidavits, and the minute order denying the motion, all of which were found in the clerk's transcript. There is neither bill of exceptions nor certificate of attestation by the trial court as to what papers, evidence, or affidavits were before the court or were used on the hearing of the motion. The situation therefore comes squarely within the application of rule XXIX of the Supreme Court (213 Cal. LVIII). It is a settled rule that, if any matters, other than such as appear upon the face of the judgment roll are sought to be reviewed upon appeal, the record thereof must be presented by a bill of exceptions or by a reporter's transcript. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 458, 274 P. 748; Jeffords v. Young, 197 Cal. 224, 227, 239 P. 1054; Guyot v. Cassab, 118 Cal. App. 742, 746, 5 P.(2d) 912.

The affidavits found in the clerk's transcript were not merely a part of moving papers submitted to the judge as the basis of an ex parte order, but are evidentiary in character and had as their object the vacation or prevention of the vacation of the interlocutory decree. We are not informed, by any record whether or not these affidavits were submitted or read to the court.

[3, 4] In the absence of a proper record, an appeal must be dismissed or the order or judgment affirmed. Were we in position to give consideration to this cause on its merits, we would be required to affirm the order, for the affidavits are sharply contradictory. It is not incumbent on this court to seek the truth in such a case. That was a duty resting on the trial court, and we will assume that it has been properly performed.

The writ of supersedeas, heretofore ordered to remain in effect until the determination of the appeal, is discharged, and the order appealed from is affirmed.

We concur: SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

220 Cal. 364

STILLWELL et al. v. JACKSON et al.

L. A. 13637.

Supreme Court of California.

March 22, 1934.

1. Appeal and error 🔑763.

Appellants filing supplemental brief, containing substance of pleadings, fact findings, conclusions of law, and decree, parenthetically referring to lines and pages of clerk's typewritten record, sufficiently complied with statute requiring parties to print in briefs portions of record called to court's attention (Code Civ. Proc. § 953c; Supreme Court Rule VIII.)

2. Appeal and error 🔑939.

Supreme Court must assume that appellants have presented all parts of record and evidence they desire to call to court's attention; it being respondents' duty to print parts rebutting or destroying appellants' showing (Code Civ. Proc. § 953c).

In Bank.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by H. S. Stillwell and others against Ann G. Jackson and others. Judgment for defendants, and plaintiffs appeal. On respondents' motion to dismiss the appeal or affirm the judgment.

Motion to dismiss appeal denied.

Butcher & Haines, of Santa Barbara, for appellant H. S. Stillwell.

Butcher & Haines and Norris Montgomery, all of Santa Barbara, for appellant Marguerite Goux.

Butcher & Haines and J. F. Goux, all of Santa Barbara, for appellant Robert E. Goux.

Schauer, Ryon & Goux, of Santa Barbara, for appellant Augustine Charles Goux, an infant, etc.

T. W. Haymond, of Los Angeles, and Heaney, Price & Postel, of Santa Barbara, for respondents.

WASTE, Chief Justice.

[1] Motion to dismiss the appeal or affirm the judgment (the third directed to the same point), made by respondents, on the ground that the appellants have not met the requirements of section 953c of the Code of Civil Procedure, which requires the parties to an appeal to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." In response to the first motion, the appellants filed a supplemental brief, setting out the substance of the pleadings, the findings of fact, and conclusions of law, and the decree, parenthetically referring to the line and page of the typewritten clerk's record. As to that record, therefore, there is a sufficient compliance with the section. (Supreme Court Rule VIII.)

[2] The action is one brought by several plaintiffs against a large number of defendants to quiet title to land fronting on the ocean in Santa Barbara county. The exhibits, and the evidence of the very large number of witnesses, relate back to patent from the United States government issued in 1872. The reporter's transcript consists of four volumes aggregating nearly twenty-two hundred pages of testimony and one volume containing one hundred and sixty-one exhibits. While the appellants, in their opening brief and supplement, have only printed or referred to what appears to be an almost inconsiderable part of the record of the testimony, and have referred to but a few of the exhibits, we yet find nothing tending to rebut the apparent good faith of appellants in presenting their record on appeal. We must assume that appellants have presented all the parts of the record and of the evidence they desire to call to the attention of the court. If other parts of the record and transcript rebut or destroy the showing made by the appellants, it is the duty of the respondents to, and they no doubt will, print such portions.

The motion to dismiss the appeal is denied. Respondents may, within the usual time, dating from this order, file their brief on the merits, the appellants to file closing brief, also in regular time, the cause to then take the regular course on the calendar.

We concur: SHENK, J.; R. L. THOMPSON, J.; CURTIS, J.; PRESTON, J.

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220 Cal. 370

In re PATTERSON'S ESTATE.

RYAN et al. v. RENOE et al.

L. A. 14482.

Supreme Court of California.
March 27, 1934.

1. Wills ⚷356.

Will contest is a "probate proceeding" and not in the nature of a "civil action" so as to warrant appeal as provided for in civil actions (Code Civ. Proc. § 963, subd. 1).

[Ed. Note.—For other definitions of "Civil Action—Case—Suit—etc." and "Probate Proceeding," see Words & Phrases.]

2. Wills ⚷358.

Appeal does not lie from order nonsuiting contestants in contest of will before probate, there being no statutory provision for appeal from order affecting or determining contest before probate (Probate Code, § 1240; Code Civ. Proc. § 963, subd. 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Proceeding by Kate R. Ryan and others against Daisy Ruth Renoe, also known as Daisy Renoe Patterson, to contest the will of George H. Patterson, deceased. From an order nonsuiting the contestants, they appeal, and respondent moves to dismiss the appeal.

Appeal dismissed.

Joseph Scott, A. G. Ritter, Leo B. Ward, and Theodore C. Heyl, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

PER CURIAM.

This is a motion to dismiss an appeal from an order nonsuiting the appellants in a contest of will before probate. The proponents of the will contend that the order is nonappealable in that it is not designated in section 1240 of the Probate Code as one of the probate orders from which an appeal will lie. In opposition thereto the contestants urge that a will contest is "primarily in the nature of a civil action" and that "such a contest is so predominantly civil that it comes within the category of cases for which the legislature intended to provide a right of appeal by subdivision 1 of section 963 of the Code of Civil Procedure."

[1, 2] While a will contest possesses some of the attributes of a civil suit, it is characteristically and essentially a probate proceeding. An order sustaining a demurrer without leave to amend to a contest before probate, not being designated in subdivision 3 of section 963 of the Code of Civil Procedure, the predecessor of the present section 1240 of the Probate Code, was held to be nonappealable in Re Estate of Stierlen, 199 Cal. 140, 142, 248 P. 509. To the same effect, see In re Estate of Rawson, 66 Cal. App. 144, 145, 225 P. 474. In Re Estate of Edelman, 148 Cal. 233, 235, 82 P. 962, 113 Am. St. Rep. 231, trial was had on the issues presented in a contest before probate and an order was made dismissing the contest. The order was held to be nonappealable and a purported appeal therefrom dismissed.

In each of the cited cases it was held that the only appealable orders in probate matters were those designated in subdivision 3 of section 963 of the Code of Civil Procedure and that inasmuch as the respective orders appealed from were not so designated, they constituted mere intermediate rulings or orders which were reviewable only upon appeal from the final order or judgment admitting the will to probate.

This reasoning is applicable to the present inquiry. No provision is made in section 1240 of the Probate Code, the successor to subdivision 3 of section 963, supra, for an appeal from any order affecting or determining a contest before probate. This being so, such intermediate order is reviewable only upon appeal from an order admitting the will to probate.

The present appeal must be, and it is hereby, dismissed.

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220 Cal. 446

SNODGRASS v. HAND et ux.

L. A. 14453.

Supreme Court of California.

March 30, 1934.

Rehearing Denied April 26, 1934.

1. Appeal and error ⚿907(3).

On defendants' appeal on judgment roll alone, it will be presumed that trial court properly instructed jury on respective defendants' liabilities for injuries to plaintiff.

2. Trial ⚿331.

Verdict, finding against one defendant and fixing damages against him in stated sum, and finding jointly against both defendants and fixing damages against codefendant in same sum, *held* not so ambiguous and unintelligible as not to support judgment, but properly construed by court as awarding damages in such sum against first defendant individually and making additional joint award of damages against both defendants in same sum.

3. Appeal and error ⚿928(3).

On appeal on judgment roll alone, it will be presumed that trial court correctly instructed jury on law and use and effect of forms of verdict submitted.

4. Appeal and error ⚿930(2).

On appeal on judgment roll alone, it will be presumed that jury followed court's instructions and that verdict, on which he entered judgment, was clear and intelligible to him in light of instructions.

5. Trial ⚿343.

In construing verdict, reference may be had to pleadings, evidence, and court's charge.

6. Appeal and error ⚿907(3).

On appeal on judgment roll alone, it will be presumed that lower court's interpretation of verdict, on which he entered judgment, was reasonably warranted under evidence and instructions.

7. Appeal and error ⚿930(1).

All reasonable inferences will be indulged on appeal to support, rather than defeat, jury's verdict and judgment thereon.

8. Appeal and error ⚿930(1).

Test of whether verdict is so ambiguous and unintelligible as not to support judgment appealed from on judgment roll alone is not whether appellate court can understand verdict, but whether record affirmatively shows erroneous interpretation thereof by trial court.

In Bank.

Appeal from Superior Court, San Diego County; George H. Thompson, Judge.

Action by Donald Snodgrass, by Carl C. Snodgrass, guardian ad litem, against Henry W. Hand and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 24 P.(2d) 190.

See, also, 125 Cal. App. 265, 13 P.(2d) 769.

Edward J. Kelly, of San Diego, for appellants.

Stickney & Stickney, of San Diego, for respondent.

WASTE, Chief Justice.

Defendants appeal on the judgment roll from a judgment entered in favor of the plaintiff.

The action was instituted to recover money damages for injuries incurred as the result of a collision between plaintiff's bicycle and an automobile operated by the defendant Henry W. Hand with the knowledge and consent of the defendant-owner, Dora B. Hand, his wife. It is not contended that the car at the time of the accident was being operated by an agent of the owner or on the latter's business. This being so, the owner's liability, if any, is limited to $5,000 because of the provisions of section 1714¼ of the Civil Code, which section provides in part that: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner provided that the liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant shall be limited to the amounts of five thousand dollars for the death of or injury to one person in any one accident. * * *"

[1] The appeal being here on the judgment roll alone, it will be presumed, on well-settled principles, that the trial court properly and fully instructed the jury on the liability of the respective defendants, and particularly on the limited liability of the defendant-owner. With these instructions before it the jury brought in the following verdict: "We, the jury in the above entitled cause, find in favor of plaintiff and against defendant Henry W. Hand [operator of the car] and fix plaintiff's damages against said defendant, in the sum of Five Thousand ($5000) and jointly in favor of plaintiff against defendant Dora B. Hand jointly with Henry W. Hand and fix plaintiff's damages against said defendant, in the sum of Five Thousand Dollars ($5000.00)."

[2-8] The court below construed the verdict to be an award of damages against the operator of the car, individually, in the sum of $5,000 and an additional joint award of damages against the operator and owner of the car in the further sum of $5,000. In other words, the trial court concluded that the verdict constituted an award of damages against the operator of the car in the sum of $10,000, for one-half of which sum the owner of the car was to be jointly liable. Judgment was accordingly entered.

Defendants now contend for the first time that the verdict is so ambiguous and unintelligible as to be insufficient to support any judgment. It is urged that the first part of the verdict is clear and definite in its award of damages in the sum of $5,000 against the operator of the car, individually, but that the second part of the verdict, wherein damages in the sum of $5,000 is awarded against said operator and the owner of the car, jointly, is uncertain, in that it cannot be determined therefrom whether the latter award embraces the former.

We do not share this view. In our opinion, the verdict very definitely awards damages in the sum of $5,000 against the operator, individually, and then proceeds to make a second award, the two being joined by the conjunctive "and," "jointly in favor of plaintiff against defendant Dora B. Hand jointly with Henry W. Hand and fix plaintiff's damages against said defendant, in the sum of Five Thousand Dollars ($5000.00)." Had the jury intended but a single award of $5,000, for which the defendants were to be jointly liable, it would have been a simple matter to so state. To achieve such result there would have been no necessity for employing a complicated form of verdict divided into parts which respectively provide for individual and joint liability. The mere form of the verdict suggests to us that the jury intended to do more than render a simple verdict for $5,000 against the defendants jointly. Moreover, the appeal being on the judgment roll alone, it will be presumed that the trial court correctly and properly instructed the jury on the law and on the use and effect of the forms of verdict submitted to them. It will also be presumed that the jury followed the court's instructions, and that the verdict, in the light of such instructions, was clear and intelligible to the trial court. In construing a verdict, reference may be had to the pleadings, the evidence, and the charge of the court. Sitterson v. Sitterson, 191 N. C. 319, 131 S. E. 641, 642, 51 A. L. R. 760; Consol., etc., Min. Co. v. Struthers, 41 Mont. 565, 111 P. 152, 154. Obviously, on an appeal on the judgment roll alone, an appellate court, being wholly unfamiliar with the evidence and the charge to the jury, is not placed at the point of view occupied by the trial court when the latter construed the verdict. This being so, it will be presumed that the lower court's interpretation of the verdict was reasonably warranted under the evidence and instructions. Any and all reasonable inferences will be indulged in to support, rather than defeat, the verdict and judgment. Johnson v. Visher, 96 Cal. 310, 313, 31 P. 106; Ochoa v. McCush, 213 Cal. 426, 430, 2 P.(2d) 357. The test is not whether an appellate court can understand and construe the verdict on a record consisting solely of the judgment roll, but whether such record affirmatively shows that the trial court's interpretation is erroneous. We cannot say on the record now before us that the trial court erred in construing the verdict as it did.

In view of what has been said, we give only passing notice to the fact that appellants failed to voice any objection in the trial court to the form of the verdict. Timely objection in that tribunal might well have served to obviate any uncertainty or doubt entertained by the appellants.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.; IRA F. THOMPSON, J.

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220 Cal. 410

MIDDLECOFF v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 15027.

Supreme Court of California.
March 28, 1934.

Rehearing Denied April 26, 1934.

1. Action 🔑59.

Where prior to filing of account a trustee of private trust and trust created pursuant to decrees in partition proceedings procured consolidation of all three proceedings, consolidated proceeding became one and gave superior court jurisdiction of general petition to remove trustee for alleged violation of trust whether as private trustee or otherwise (Civ. Code, § 2283).

2. Trusts 🔑298.

Where mortgage was given to secure loan of trust funds created by decrees in partition proceedings, and a private trust was created in connection therewith, superior court had power to investigate account of common trustee on showing that he had released mortgage without authority or repayment, and was not bound by trustee's assertion that account filed related solely to private trust (Civ. Code, § 2283).

3. Trusts 🔑167.

Filing of petition by a beneficiary for partition of trust property did not bar petition by another beneficiary for removal of trustee for violation of trust (Civ. Code, § 2283).

4. Courts 🔑207(4).

Original proceeding in mandamus in Supreme Court lies to determine whether superior court had jurisdiction to remove a trustee (Civ. Code, § 2283).

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In Bank.

Writ of Mandate to Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Petition by Eliza F. H. Middlecoff for a writ of mandamus to be directed to the Superior Court, in and for Los Angeles County, and others to compel such court to entertain jurisdiction and to proceed with the hearing of a petition for the removal of respondent Lowell L. Middlecoff, as trustee, and to settle his account.

Alternative writ made peremptory.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for petitioner.

Hewitt & Perkins and Charles W. Dempster, all of Los Angeles, for respondents.

PER CURIAM.

This is an original proceeding in mandamus to compel the respondent Superior Court to entertain jurisdiction and to proceed with the hearing of a petition for removal of the respondent Lowell L. Middlecoff as trustee, and to settle his account.

In 1909 and 1910 judgments in two partition proceedings were entered in the Superior Court in and for the county of Los Angeles, wherein W. W. Middlecoff, the then husband of the petitioner, Eliza F. H. Middlecoff, was appointed as trustee to receive the proceeds from the sales of real property involved in those proceedings, and to invest and reinvest such proceeds and apply the income therefrom to the purposes of the trust. Those partition proceedings were numbered respectively 67314 and 73998 in the records of the respondent court. By those judgments the ownership of the petitioner during her lifetime in all but a small proportion of said properties, and the common ownership in the remainder of her two minor sons, Henry Hubbard Middlecoff and Robert Fitch Middlecoff, were decreed. A sale of the properties was provided for and had, the proceeds to be held in trust with the same rights of ownership as the property sold, the income therefrom to be paid to the beneficiaries in the same proportion. The trustee was directed to discharge the duties of his trust subject to the order and approval of the court as to the matter of investment of the proceeds. The judgment directed the trustee to report to the court as required by the court and by law until his discharge. A bond in the sum of $40,000 was required. The trustee so appointed duly qualified and entered upon the discharge of his duties.

On December 14, 1910, W. W. Middlecoff, as trustee, with the approval and authority of the respondent court in said proceedings, made a loan of the trust funds consisting of the sum of $42,650 to the petitioner. Also, with the approval and authority of the court, the trustee received from the petitioner, as security for the loan, a mortgage on improved property in Los Angeles called the Iris Apartments. This mortgage was duly recorded. W. W. Middlecoff discharged the duties of trustee of said trusts until April 30, 1914, on which date he resigned, and Los Angeles Trust & Savings Bank was appointed by the court to succeed him as such trustee.

On July 20, 1915, the petitioner executed a deed of the fee of the Iris Apartments to Los Angeles Trust & Savings Bank. On July 22, 1915, the bank executed a declaration of the trusts upon which it held said property, which was also signed by the petitioner. It provided that the income from the property was to be paid by the bank, as trustee, to the petitioner during her lifetime. The trustee was given the right to sell the property at any time a sale might be necessary or desirable, with the right to mortgage the property to secure any loan to be used in repairing or improving the property, or in paying taxes or assessments. The declaration provided that the conveyance to the trustee should not have the effect to merge the existing mortgage for $42,650 and the fee, but the mortgage should subsist as a lien against the property and in the event of a sale the loan should be paid by the trustee out of the proceeds of the sale. This trust will be designated herein as the private trust.

In November, 1928, the bank resigned as trustee of the private trust. On November 28, 1928, in a proceeding in the respondent court numbered 266277, the bank's resignation was received and the respondent Lowell L. Middlecoff was appointed by the court to succeed it as such trustee, and to serve without bond. The bank also resigned in proceedings numbered 67314 and 73998, and Lowell L. Middlecoff was also appointed its successor in those trusts to serve without bonds.

On December 24, 1928, Lowell L. Middlecoff, as trustee-mortgagee, without the order or approval of the respondent court and without repayment of the loan of $42,650, released and satisfied of record the mortgage on the Iris Apartments given to secure said loan. On January 9, 1929, as trustee of the Iris Apartments, he obtained a loan of $20,000 from the Pacific Mutual Life Insurance Company and executed as trustee a deed of trust of the Iris Apartments as security.

On July 19, 1932, Lowell L. Middlecoff filed in the respondent court his first report and account as trustee, and entitled his said report in all of said proceedings numbers 67314, 73998, and 266277 consolidated. The matter was set for hearing on August 10, 1932. The petitioner filed her objections to the settlement of the account as rendered. The hearing on the account and the objections thereto was continued from time to time until finally, after repeated applications of the petitioner, it was set for August 4, 1933. On July 18, 1933, the petitioner filed in the respondent court, entitled in all three consolidated proceedings, her petition for removal of Lowell L. Middlecoff as trustee. In addition to said Lowell L. Middlecoff as such trustee, she named as respondents in her petition for removal, her two sons, now adults, as beneficiaries, and her divorced husband, W. W. Middlecoff. An order to show cause was issued and personally served on the respondents. August 4, 1933, was designated as the return date in the order. The petition for removal charges a conspiracy between Lowell L. Middlecoff and W. W. Middlecoff to defraud the petitioner as beneficiary of the trusts, and charges the receipt by W. W. Middlecoff of the proceeds of the loan obtained from the Pacific Mutual Life Insurance Company. The petition for removal, among other things, also alleges that, although a sale of the Iris Apartments is reported by the trustee for the sum of $40,000, in truth the property was sold for the sum of $45,000.

The respondents named in said petition for removal filed their "objection to jurisdiction" entitled in all three proceedings, whereby they entered their objection to the settlement of the account of the trustee on the ground that the respondent court had no jurisdiction of the subject-matter of said account, or of the private trust mentioned therein, or of the parties thereto. The respondents named in said petition for removal filed a demurrer to the petition for removal also entitled in all three proceedings consolidated. Special grounds of demurrer, among others, were that the respondent court had no jurisdiction of the subject-matter involved in case No. 266277, nor of the declaration of the private trust described therein, nor of the parties thereto; and that the court in said proceedings numbered 67314 and 73998 had no jurisdiction of the subject-matter of the private trust mentioned in proceeding numbered 266277. The respondent court made its order declining to hear and determine the account and the objections thereto, or the petition for removal of the trustee and the order to show cause issued thereon, on the ground that it had no jurisdiction thereof; whereupon the petition herein was filed. The matter is submitted on the petition and the answer of the respondents thereto.

In the respondents' answer it is alleged that although the account filed on July 19, 1932, contained the numbers in all three proceedings, said account nevertheless had no reference to the acts done by the trustee under said trusts except with reference to the subject-matter of said private trust of the Iris Apartments, and contains also a statement of receipts and disbursements with respect only to income from said Iris Apartments and property purchased with the proceeds from the sale thereof, and other matters in connection only with said Iris Apartments and said private trust. It is further alleged in the answer that during the course of the hearing on the demurrer to the account and the petition for removal in the respondent court, Henry Hubbard Middlecoff filed a complaint for partition respecting all of the property included in said private trust and in said trusts involved in proceedings numbered 67314 and 73998, and that said complaint in partition is numbered 360833 in the records of the Superior Court in and for Los Angeles county. A copy thereof is annexed to the respondents' answer herein. Said complaint names as defendants, Robert Fitch Middlecoff, an incompetent person, by W. W. Middlecoff, his guardian; Eliza F. H. Middlecoff, the petitioner herein; Lowell L. Middlecoff, as trustee, and several fictitious defendants. It is alleged further that the attention of the respondent court was called to the fact of the initiation of such proceeding by the filing of said complaint in partition, and that Lafayette J. Smallpage, the attorney representing the petitioner, thereupon in open court accepted service of said complaint on her behalf; that prior to the filing of the petition for writ of mandate herein the petitioner filed and served her answer to said complaint. The respondents assert by their answer and by said complaint that prior to the filing of the petition for the writ of mandate the petitioner became chargeable in said court trusts with the sum of $13,150, the difference between the loan to her of $42,650, and the sum realized on the sale of the Iris Apartments; that in the private trust the petitioner became charged with the additional sum of $5,800, which it is alleged is $4,800 more than the petitioner's full interest in that trust. The respondents also allege that the petitioner has a plain, speedy, and adequate remedy at law and in equity in said partition action No. 360833.

The respondents rely principally upon the cases of Gillette v. Gillette, 122 Cal. App. 640, 10 P.(2d) 760, and State v. Muench, 217 Mo. 124, 117 S. W. 25, 129 Am. St. Rep. 536, to support their contention that the respondent court has no jurisdiction to settle the account filed by the trustee or to hear the petition for his removal as trustee. We may take the declaration in the case of State v. Muench, supra, to be a correct statement of the law, where not inconsistent with pertinent statutory provisions, viz., that the court in the matter of a private trust, having appointed a new trustee and provided for his bond and invested him with title, has exhausted its jurisdiction over the subject-matter, and that the court thereafter has no power to administer the trust or settle the account of the trustee. In the case of Gillette v. Gillette, supra, it was determined that the court was without jurisdiction to settle an undisputed voluntary account of the trustee of a strictly private trust, or to fix the amount of compensation to be paid the trustees and their attorneys for their services in such a matter. The court there, however, excluded from the effect of its declaration any such matter as to which there was a dispute or controversy.

[1] We may, on the facts presented, assume that if the account voluntarily filed by the trustee is in truth and in fact an account strictly of his activities, receipts, and disbursements in relation only to the private trust, the court in said proceeding numbered 266277 had no further jurisdiction to act in the matter. We may also assume without deciding that in such a case, where a controversy exists, the processes of the court in an independent proceeding should be invoked. But the case before us is not as simply disposed of as asserted by the respondents. The respondent court has power pursuant to section 2283 of the Civil Code to remove any trustee who has violated or is unfit to execute the trust. If the petition for removal pertained only to the private trust, no contention is or can be made that the jurisdiction of the court would not properly have been invoked on the same steps here pursued, should the petition for removal be considered as having been filed as an independent proceeding. The contention appears to be that because the petition was filed in said proceeding No. 266277, it may not be considered as the initiation of a proceeding to obtain the removal of the trustee pursuant to said section 2283. We find ourselves unable to subscribe to such a proposition, at least on the facts here presented. The respondents do not deny the allegation that prior to the filing of the account, on the application of the trustee, proceeding No. 266277 was, by order of court, consolidated with the other proceedings in which the court unquestionably had jurisdiction, and in contemplation of law the consolidated action is one proceeding. The petition for removal of the trustee, so far as the record shows, is not limited to a petition to remove him as trustee of the private trust alone. The petitioner is apparently seeking to remove him also from the trusteeship of the trusts involved in proceedings numbered 67314 and 73998, as to which there is no question of the continuing jurisdiction of the respondent court. In the consolidated proceeding all of the activities of the trustee have become the subject-matter for investigation by virtue of the filing of the petition for removal which now presents the controversy respecting all three trusts. There is nothing presented on the record before us to show that the petition for removal filed by the petitioner was not properly addressed to the equity jurisdiction of the respondent court. In re Thompson, 101 Cal. 349, 35 P. 991, 36 P. 98, 508; 25 Cal. Jur. 330; 26 R. C. L. 1276.

[2] Moreover, with respect to the account alone, the court in proceedings numbered 67314 and 73998 is not bound by the parties' statement that the account relates exclusively to the subject of the private trust. The trust res in those court proceedings was the mortgage given to secure the loan of the trust funds to the petitioner. Upon the fact being disclosed by the petitioner's objections to the account that the trustee without authority or repayment released and satisfied the mortgage of record, it might well be contended that he was accountable in proceedings numbered 67314 and 73998 for any impairment to the security by virtue of the unauthorized release and the unauthorized negotiation for a further encumbrance on said property to secure the $20,000 loan, and that the respondent court had power in those proceedings to investigate the account of the trustee and his further activities in relation to the property secured by said mortgage. Upon this additional reasoning we think the respondent court was not justified in refusing to proceed to a hearing of the account pursuant to the jurisdiction vested in it in proceedings numbered 67314 and 73998.

[3, 4] In support of their allegation that the petitioner has an adequate remedy at law and in equity, the respondents contend that the petitioner may be afforded in said partition proceeding numbered 360833 all the relief which she seeks in said consolidated proceedings. The respondents rely upon the case of Turney v. Morrissey, 22 Cal. App. 271, 134 P. 335. In that case the petitioner sought by a proceeding in mandamus to obtain equitable relief as to matters which were more appropriately the subject of an action in equity, and it was held that the petitioner was not entitled to a writ of mandate to secure the relief sought. That is not the situation here. On the present record it is shown that the petitioner has invoked an adequate remedy in the appropriate equitable proceeding, i. e., by filing her petition for removal; and the only question before us is whether the respondent court has jurisdiction to grant the equitable relief sought. Mandamus is a proper proceeding in which to determine that question.

The alternative writ hereinbefore issued is made peremptory.

137 Cal.App. 525

PEOPLE v. FRY.

Cr. 1337.

District Court of Appeal, Third District, California.
March 23, 1934.

Rehearing Denied April 7, 1934.
Hearing Denied by Supreme Court April 20, 1934.

1. Criminal law 🔑951(2).

Motion for new trial must be made before judgment, and made only on statutory grounds and privilege is waived where motion is not made before judgment is pronounced (Pen. Code, §§ 1181, 1182).

2. Criminal law 🔑949(1).

Motion for order "annulling, vacating and setting aside the judgment" on ground that it was "indefinite, vague and uncertain and therefore void on its face" *held* not motion for new trial.

3. Criminal law 🔑1202(6).

Judgment determining that defendant had been found guilty of attempted burglary of first degree and of prior conviction of highway robbery declaring he had pleaded "guilty to said prior charge" *held* not void.

4. Criminal law 🔑999(1).

Certificate of commitment issued pursuant to pronouncing of judgment declaring defendant guilty of attempted burglary of first degree with prior conviction of highway robbery *held* defective in failing to mention prior conviction of felony.

5. Criminal law 🔑999(1).

Defective commitment omitting to state that defendant served time in punishment for prior conviction of felony may be corrected by court without formality of subsequent hearing in open court, provided necessary evidence was formally adduced at trial.

6. Criminal law 🔑999(1).

While it is necessary to include in judgment degree of crime, and it is proper to insert in commitment facts fixing degree of crime and finding respecting defendant's possession of weapons, it is not necessary to validity of commitment that either facts on which degree of crime depends or finding respecting possession of weapons be included therein (Pen. Code, §§ 1168, 1192a).

7. Criminal law 🔑999(1).

In prosecution for attempted burglary in first degree with prior conviction, that court included in original commitment finding that defendant entered building "in the nighttime" with intention of committing burglary *held* harmless.

8. Burglary 🔑47.

Jury need not include in verdict statement of facts on which it determined defendant was guilty of attempted burglary in first degree; it being sufficient that jury found degree of crime (Pen. Code, § 663).

9. Indictment and Information 🔑114.

Information was not void as to charge of prior conviction because it failed to allege defendant actually served time therefor in penal institution.

10. Criminal law 🔑163.

Doctrine of former jeopardy *held* not applicable to proceedings on which commitment was amended, since such proceedings did not constitute "trial" and no evidence was adduced.

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

11. Criminal law 🔑290.

Defense of former jeopardy is not available under general plea of not guilty, but must be raised by special plea only.

12. Criminal law 🔑1144(13).

Where appeal from conviction for attempted first degree burglary was not on merits and evidence was not before reviewing court, it assumed that evidence supported implied finding that defendant entered building with intent to commit larceny and every other necessary element to complete crime and that record affirmatively showed that conviction was not result of miscarriage of justice.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Howard Fry was convicted of attempted burglary in the first degree with a prior conviction, and he appeals.

Affirmed.

Howard Fry, in pro per.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal, under the provisions of section 1239 of the Penal Code, from an order of the superior court which was made after pronouncing judgment and sentence upon the defendant following his conviction by a jury of the crime of "attempted burglary of the first degree" and a plea of guilty of a prior conviction of another felony. The defendant also attempted to appeal from an order denying a motion for new trial which he assumes to have then made.

The defendant was charged by an information filed pursuant to section 663 of the Penal Code with the crime of an attempt to commit burglary, together with a charge of a prior conviction of another felony. The information did not allege that the defendant had actually served time for the prior conviction in a penal institution. The defendant pleaded guilty to the prior conviction of felony and admitted that he had served time in a penal institution therefor. Upon trial before a jury, he was also convicted of the attempt to commit burglary. At the time of pronouncing sentence the court recited the fact that he had been charged and convicted of the crime of "attempted burglary of the first degree," together with the charge of a prior conviction of felony, "and of his plea of guilty to the prior charge." The commitment, which was duly certified by the trial judge, inadvertently omitted to state that he had been convicted of the charge of prior conviction of a felony, and merely recited that he had been convicted and was therefore "guilty of attempted burglary of the first degree." He was thereupon sentenced to imprisonment at Folsom State Prison for the term prescribed by law. No appeal was taken from that judgment of conviction. Two months later, upon motion of the defendant, he was taken before the same trial court which went through the form of resentencing him by again informing him that he had been duly charged and convicted of "attempted burglary of the first degree" and of a prior conviction of another felony, stating that "the fact of his having served a term in the state prison was testified to and admitted by the defendant when he was called as a witness on his own behalf in the trial of the action, on the charge of 'attempted burglary.'" He was thereupon again sentenced to imprisonment in the state prison at Folsom for the term prescribed by law. The defendant claims to have then orally moved for a new trial from the proceedings involved in the process of resentencing the appellant. The motion was denied. A modified commitment was thereupon certified to by the trial judge, in which document the court determines that the defendant was duly convicted of "attempted burglary of the first degree" together with a prior conviction of highway robbery for which he actually served a term of imprisonment in the state prison. This appeal from the amended judgment was thereupon perfected. The evidence of the trial is not before this court.

The defendant appears in proper person and contends that the court was without jurisdiction to pronounce the second sentence or amend the original commitment; that the court was without authority to find "that the crime of attempted burglary in the first degree was committed in the nighttime," for the reason that the jury did not find that the crime was committed "in the nighttime"; that the amended commitment is void for the reason that it purports to increase the term of sentence beyond the term provided by law pursuant to the original commitment; that the verdict and judgment are uncertain and void for failure to find that the defendant was unarmed at the time of the commission of the offense, and because the judgment results in a miscarriage of justice.

[1, 2] The effort to appeal from a purported motion for new trial in the present case is ineffectual. A motion for new trial must be made before judgment. Section 1182, Pen. Code. It may be made only upon the grounds enumerated in section 1181 of the Penal Code. If the motion is not made before judgment is pronounced, the privilege is waived. There is a clear distinction between the pronouncing of judgment in a criminal case and the mere certifying of an order of commitment. Judgment was formally pronounced against the defendant in this case on October 10, 1932.

The amended judgment contained all the necessary findings of the court, including the declaration that the defendant had been previously convicted, and was guilty of "an attempted burglary of the first degree," and that he had pleaded guilty to the charge of "prior conviction of another felony." The defendant neither then nor at any other time made a motion for a new trial upon the merits of the case. No appeal from the original judgment was taken. That judgment was not void. The right of the defendant to move for a new trial was therefore waived. There is nothing in the transcript on appeal in this case to show that the defendant ever actually made a motion for new trial. All that does appear is the clerk's recital of proceedings which occurred in the superior court on December 20, 1933, at the time the commitment was amended, which shows that the court then again formally pronounced judgment, and merely added to its former declaration of the guilt of the defendant of attempted burglary of the first degree and of the former conviction of highway robbery that it also appeared at the trial from the admission of the defendant on the witness stand that he had actually served a term in the state prison upon the charge of former conviction of a felony, and that he was not armed with a deadly weapon. After the court had formally made these findings of facts, the defendant orally moved for an order "annulling, vacating and setting aside the judgment" on the ground that it was "indefinite, vague and uncertain and therefore void on its face." This was not a motion for new trial. It was too late to move for a new trial. The defendant waived his right to a new trial by failing to make the motion therefor before the rendering of judgment. The court had no authority to then consider a motion for new trial. There is therefore no merit in defendant's claim that a new trial should have been granted.

[3-5] The original judgment was not void. In pronouncing judgment, the court specifically determined that the defendant had been found guilty of "attempted burglary of the first degree" and of a prior conviction of highway robbery, declaring that he had pleaded "guilty to said prior charge." The certificate of commitment which was issued pursuant to the pronouncing of judgment was defective in failing to mention the prior conviction of felony. We know of no reason why a defective commitment, which contains an inadvertent omission to state that the defendant had actually served time in a penal institution in punishment for a prior conviction of a felony, may not be corrected by the court without the formality of a subsequent hearing in open court, provided the necessary evidence upon which the amendment is made was formally adduced at the trial of the case. Certainly the court had jurisdiction to supply such an omission in a commitment at a formal hearing at which the defendant is present, after receiving notice and appearing with the right to be represented by counsel.

It has been frequently held that, even when the court has failed to ascertain the degree of the crime of which an accused has been convicted, the case may be properly remanded with direction for the court to ascertain and fix the degree and to amend the judgment to conform thereto. People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585; People v. Walker, 132 Cal. 137, 64 P. 133; In re Lee, 177 Cal. 690, 171 P. 958; People v. O'Brien, 122 Cal. App. 147, 9 P.(2d) 902; People v. Scott, 39 Cal. App. 128, 178 P. 398; Ex parte Stroff, 132 Cal. App. 351, 22 P.(2d) 770; People v. Stratton (Cal. App.) 24 P.(2d) 174; People v. Bayne (Cal. App.) 28 P.(2d) 1068.

[6] While it is necessary to include in the judgment the degree of the crime of which one has been convicted, and it is proper to insert in the commitment the facts upon which the court ascertains and fixes the degree of the crime, as well as the finding with regard to the defendant's possession of a weapon, it is, however, not necessary to the validity of the commitment that either the facts upon which the degree of the crime depends, or the finding with regard to the possession of a weapon, be included therein. These last-mentioned facts are merely evidentiary. The statute requires the court to ascertain and report these facts to the prison directors for the purpose of furnishing the board with information upon which it will be enabled to fix the maximum and minimum penalty of law, pursuant to the requirements of section 1168 of the Penal Code. People v. Bayne, supra. Section 1192a of that Code provides in that regard:

> "Before judgment is pronounced upon any person convicted of an offense punishable by imprisonment in the state prison, it shall be the duty of the court * * * to ascertain in a summary manner, and by such evidence as is obtainable, * * * facts * * * calculated to be of assistance to the court in determining the proper punishment of such person, or to the state board of prison directors in the performance of the duties imposed upon it by law. * * *
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> "Within thirty days after judgment has been pronounced by the court one copy of such transcript * * * shall be sent by mail * * * to the warden of the prison to which such convicted person shall have been sentenced."

[7, 8] It was harmless in the present case that the court included in the original commitment a finding that the defendant entered the building "in the nighttime" with the intention of committing burglary. Nor was it necessary for the jury to include in its verdict a statement of the facts upon which it determined that the defendant was guilty of "attempted burglary in the first degree." It was sufficient that the jury found the degree of the crime of which he was convicted.

[9] The information is not void with relation to the charge of a prior conviction because it fails to allege that the defendant actually served time therefor in a penal institution, although it has been said it is better practice in charging a prior conviction to al-

lege the actual service of time. In re Boatwright, 216 Cal. 677, 15 P.(2d) 755.

[10, 11] There is no merit in the defendant's contention that the doctrine of once in jeopardy may be applied to the proceedings upon which the commitment was amended in the present case. Those proceedings did not constitute a trial. No evidence was adduced at that time. Moreover, no such plea was then made. The defense of once in jeopardy is not available under a general plea of not guilty, but must be raised by special plea only. 7 Cal. Jur. 995, § 132; People v. Rogers, 112 Cal. App. 615, 297 P. 924; Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65; People v. Solani, 6 Cal. App. 103, 91 P. 654.

[12] Finally the defendant contends there is no evidence of his intention to commit larceny as a motive for entering the building, and that his conviction results in a miscarriage of justice. This is not an appeal upon the merits of the cause. The evidence which was adduced at the trial is not before us. We must therefore assume there is ample evidence to support the implied finding of the jury that he entered the building with intent to commit larceny, and that every other necessary element to complete the crime was also adequately proved. It follows that we must assume the record affirmatively shows that the defendant's conviction was not the result of a miscarriage of justice.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

137 Cal.App. 654

PEOPLE v. GREEN.

Cr. 2508.

District Court of Appeal, Second District, Division 1, California.

April 3, 1934.

Rehearing Denied April 17, 1934.

Hearing Denied by Supreme Court May 3, 1934.

1. Embezzlement 🔑11(1).

Evidence otherwise showing fraudulent appropriation, it need not also have shown a demand on accused to return money to prosecuting witness to warrant conviction for grand theft (Pen. Code, § 484).

2. Criminal law 🔑829(1).

Refusal of instructions containing points of law stated in given instructions *held* not error.

3. Criminal law 🔑1037(2).

Alleged misconduct of district attorney, to which but general objections were made, and which was such that timely instruction to jury on proper objections would probably have destroyed its prejudicial effect, if any, *held* not to warrant reversal of conviction.

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Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Paul M. Green was convicted for grand theft, and he appeals.

Affirmed.

Entenza & Gramer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which followed his conviction of the crime of grand theft; also from an order by which his motion for a new trial was denied.

Briefly, the pertinent facts adduced on the trial of the action were that a man named O'Conner, who was the driver of an ice wagon, was considering the advisability of his engaging in the operation of a café; and in that connection that defendant stated to O'Conner that he thought he could save O'Conner some money on the purchase of used fixtures that were deemed necessary for the equipment and furnishing of the café; following which, in pursuance thereof, and for that purpose, in circumstances not necessary herein to be detailed, O'Conner placed the sum of $260 in the hands of defendant. Whereupon defendant induced O'Conner to go to a room in an apartment house that theretofore, for the space of a few hours only, defendant had temporarily rented, and which room he had procured to be specially furnished with a table, a deck of playing cards and intoxicating liquor, at which time and place defendant and O'Conner drank some of such liquor. In about ten minutes after they had thus entered the said room they were joined by a man from whom defendant claimed furnishings for the café were to be purchased. Whereupon, on the pretext that the third man had had "a run-in with the missis" and he had "to go over to the house a few minutes," the said man and defendant excused themselves to O'Conner with the understanding that they would rejoin him at the room "within a few minutes." Omitting other circumstances which might be construed as being suspicious in their nature, it may suffice to state that neither defendant nor his companion ever returned to the place where they had left O'Conner; nor did O'Conner ever see defendant again until twenty-four days thereafter, at which time defendant was placed under arrest charged with the commission of the offense of which he was later convicted. In the meantime, he had purchased no equipment or furnishings for the café.

[1] Appellant's first contention is that the evidence was insufficient to sustain the verdict, in that no demand was ever proven to have been made upon defendant for the return of the money to O'Conner.

In the case of People v. Kirk, 94 Cal. App. 378, 381, 271 P. 347, 348, where a similar question was raised, in part the court said: "* * * The test of the crime of embezzlement is whether the evidence shows clearly a fraudulent appropriation by the defendant of the money; and proof of a demand is not required when the evidence otherwise shows the fact of such fraudulent appropriation. It is only in the absence of such other sufficient proof of a fraudulent appropriation that a demand may be necessary to fix the fact of the fraudulent appropriation; but the test of the crime is not thereby altered, but always is: Does the whole evidence establish the crime charged? People v. Blair, 19 Cal. App. 688, 127 P. 657. * * *" To the same effect, see People v. Dewindt, 67 Cal. App. 220, 227 P. 619; People v. Keller, 79 Cal. App. 612, 250 P. 585; People v. Hatch, 163 Cal. 368, 125 P. 907, and cases therein respectively cited.

In recognition of the persuasive force of such authority, it suffices to state that, in the opinion of this court, considering the facts herein, in order to sustain the judgment of conviction of defendant of the crime of grand theft as defined by section 484 of the Penal Code, evidence that in behalf of O'Conner a demand was made upon defendant that the money be returned to O'Conner was not necessary.

[2] Appellant also asserts that error prejudicial to the substantial rights of defendant was committed by the trial court in its refusal to give to the jury certain instructions that were offered by defendant. However, since an examination of the record herein discloses the fact that the points of law contained within such refused instructions were stated to the jury by other instructions which were given to it by the trial court, it is clear that on that account appellant has no just cause for complaint.

[3] Appellant further complains of alleged misconduct of the deputy district attorney in charge of the prosecution of the action that occurred on the trial thereof. On consideration of such specifications, it appears that as to nearly all of them no specific objection was interposed by defendant, and that such objections as were made were neither definite nor certain. In other words, the objections made by defendant were so general in their nature that the trial court could not thereby have been advised of the particular alleged misconduct of the deputy district attorney, to which attention was sought to be attracted. Nor was the misconduct in question of such a character that in all probability, by proper and timely instruction to the jury its prejudicial effect, if any, could not have been destroyed or obliterated. Giving effect to all facts and circumstances connected with the several alleged acts of misconduct of which complaint is made, the conclusion of this court is that, although not to be commended as either proper or ethical, nevertheless they were not of that importance that in consequence thereof the verdict of the jury was thereby at all affected.

It is ordered that the judgment and the order be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

137 Cal.App. 574

MOSIER et al. v. SUBURBAN ESTATES, Inc., Limited (FARMERS' & MERCHANTS' NATIONAL BANK OF LOS ANGELES, Intervener).

Civ. 8958.

District Court of Appeal, First District, Division 1, California.
March 29, 1934.

1. Parties 🔑**6(1).**

Defendant is entitled to prosecution of cause of action by real party in interest, but his concern ends when judgment protects him from action by another, and he may assert all defenses and counterclaims available against real owner of claim (Code Civ. Proc. § 367).

2. Bills and notes 🔑**443(1).**

Trustees for creditors and stockholders of dissolved corporation, which had assigned note sued on by them to bank adopting allegations of their complaint and asking judgment for them by complaint in intervention, were entitled to maintain action; assignee having, in effect, consented thereto (Code Civ. Proc. § 367).

3. Judgment 🔑**672.**

Assignee of note sued on became party to action by complaint in intervention, and hence was bound by judgment for plaintiff.

4. Estoppel 🔑**3(2).**

Bank, adopting all allegations of complaint in action on note assigned to it, and asking judgment for plaintiffs by its complaint in intervention, was estopped from subsequently claiming right to collect note.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by M. H. Mosier and others, as trustees for the creditors and stockholders of the Sunshine Company, against the Suburban Estates, Inc., Limited, and others, in which the Farmers' & Merchants' National Bank of Los Angeles intervened. From a money judgment for plaintiffs, named defendant appeals.

Affirmed.

Farrand & Slosson, and Chapman & Chapman, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robinson, of Los Angeles, for plaintiffs and intervener respondents.

GRAY, Justice pro tem.

In this action plaintiffs sought the collection of two promissory notes, each in the principal sum of $100,000 and the establishment of a vendor's lien upon certain lands, as security therefor. The judgment decreed that plaintiffs should recover from the defendant Suburban Estates, Inc., Limited, a corporation, the sum of $231,676.88 due on the notes, but that they had no lien on the lands. This defendant alone appeals, upon the judgment roll, from the money part of the judgment, contending that the action was not prosecuted in the name of the real party in interest, as required by section 367 of the Code of Civil Procedure, because the facts found by the court show that the intervener, Farmers' & Merchants' National Bank of Los Angeles, and not plaintiffs, was the owner and holder of the notes.

Only the following of such facts need be considered in passing upon this contention. On December 24, 1925, defendant, as part of the purchase price of the lands, executed and delivered to the Sunshine Company, a corporation, the notes, due respectively in two and three years after date. On February 24, 1926, the Sunshine Company, by a written declaration of trust, assigned the notes to intervener, as security for certificates of beneficial ownership which were to be issued in accordance with such declaration. The declaration of trust, briefly stated, authorized the intervener to receive payments on the notes, to sell or to collect them by legal action, and, when received, to disburse the proceeds to the holders of such certificates. On July 16, 1926, the Sunshine Company was dissolved by legal proceedings, and plaintiffs, its then directors, became trustees for the creditors and stockholders of the corporation. The declaration of trust had never been terminated; certificates, in an unstated amount, were outstanding in the hands of unnamed parties, and the notes were due, owing, and unpaid. The intervener, by its complaint in intervention, adopted all the allegations of plaintiffs' complaint, and asked that judgment be given in favor of plaintiffs.

[1-4] "As was said by this court (Philbrook v. Superior Court, 111 Cal. 31, 43 P. 402): 'A defendant's right is to have a cause of action prosecuted against him by the real party in interest, but as has been elsewhere pointed out (Giselman v. Starr, 106 Cal. 651, 40 P. 8), his concern ends, when a judgment for or against the nominal plaintiff would protect him from any action upon the same demand by another, and when, as against the nominal

plaintiff, he may assert all defenses and counterclaims available to him, were the claim prosecuted by the real owner.' See, also, McPherson v. Weston, 64 Cal. 275, 30 P. 842; Grant v. Heverin, 77 Cal. 263, 18 P. 647, 19 P. 493; Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 P. 550; Herman v. Hecht, 116 Cal. 553, 48 P. 611; Greig v. Riordan, 99 Cal. 316, 33 P. 913." Iowa & Cal. Land Co. v. Hoag, 132 Cal. 627, 630, 64 P. 1073, 1074. Plaintiffs were entitled to maintain the action, since the assignee of the notes, by its complaint in intervention, in effect, consented thereto. Reidy v. Young, 119 Cal. App. 322, 6 P.(2d) 112. By its complaint in intervention the assignee of the notes became a party in the action, and the judgment was therefore binding and conclusive on it. 34 C. J. 1005. The adoption of all the allegations of plaintiffs' complaint and the request that plaintiffs recover, contained in the complaint in intervention, will estop the bank from subsequently claiming that it, as assignee, is entitled to collect the notes. The defendant makes no claim that it was deprived of any defense it had against the notes, because the action was not commenced by the intervener. Indeed, it is difficult, to see how such claim could be made, since the plaintiffs stood in place of the payee of the note and the assignee had intervened. Under the above-cited rule, the defendant's technical objection is without merit.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

137 Cal.App.658

PEOPLE v. BRATTEN.

Cr. 2510.

District Court of Appeal, Second District, Division 1, California.
April 3, 1934.

1. Criminal law 🔑**1023(10).**
Appeal from verdict finding accused guilty of grand theft is unauthorized.

2. Criminal law 🔑**1023(3).**
Order denying probation, made before judgment convicting accused of grand theft, is nonappealable (Pen. Code, § 1237).

3. Larceny 🔑**65.**
Evidence that prosecutrix, being engaged to accused, gave him money to buy truck, and that accused, fraudulently converting money to his own use, used money for other purposes, sustained conviction of grand theft.

4. Indictment and Information 🔑**191(5).**
Offense of obtaining money under false pretenses is included in crime of grand theft.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Harlan Bratten was convicted of grand theft, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, Justice.

[1, 2] Appellant was convicted of the crime of grand theft and appeals from the verdict of the jury finding defendant guilty of grand theft. As an appeal from a verdict is unauthorized by law, this appeal is therefore dismissed. He also appeals from the judgment of the court and from the order of the court denying probation. As the order denying probation was made prior to the judgment, it is not appealable under section 1237 of the Penal Code [People v. Neel (Cal. App.) 24 P.(2d) 230], and that appeal is therefore dismissed.

[3] The appeal from the judgment of conviction is apparently based upon an alleged insufficiency of the evidence to support the verdict. The transcript of the evidence discloses a very plain and complete case against the defendant.

[4] Appellant in his brief admits as follows: "Miss Koenig had full confidence in defendant; they were engaged to be married before he knew she had any money; notice of intention to marry had already been given before the money was turned over to him. She trusted him, and believed that he would buy the truck; she gave the money to him voluntarily. He is not guilty of grand theft, but obtaining money under false pretenses." This would avail defendant nothing, because People v. Myers, 206 Cal. 480, 483, 275 P. 219, holds that the offense of obtaining money under false pretenses is included in the crime of grand theft.

The evidence contains ample proof that the defendant, after inducing the prosecuting witness to give him possession of the money, by falsely representing that he was preparing to use and intending to use said money for the stated purpose, fraudulently converted the money to his own use and did not spend any of it in the purchase of a truck which he had agreed to purchase with the money before the prosecuting witness turned it over to him. The evidence does not disclose that he made any effort to purchase the truck at any time, but that he promptly left town, using part of the money to pay his traveling expenses.

The judgment appealed from is affirmed.

We concur: CONREY, P. J., HOUSER, J.

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137 Cal.App.547

In re BAIN'S ESTATE.

BAIN v. DUDLEY.

Civ. 9100.

District Court of Appeal, Second District,
Division 2, California.
March 26, 1934.

1. Executors and administrators 🔑173.
Homestead 🔑136.

Right of testamentary disposition as well as of inheritance is subject to both homestead and family allowance rights.

2. Executors and administrators 🔑189.

Order setting apart probate homestead *held* proper, notwithstanding wife's written acceptance of provisions of husband's will and waiver of claim to share in community property and "any and all claims."

Appeal from Superior Court, Ventura County; William D. Dehy, Judge.

In the matter of the estate of Charles W. Bain, deceased. From an order setting apart a probate homestead, Fred H. Bain, as executor of the last will of Charles W. Bain, deceased, appeals, opposed by Harold K. Dudley as executor of the last will of Anna Bain, deceased.

Affirmed.

Blackstock & Rogers, Merle J. Rogers, and Victor J. Miller, all of Ventura, for appellant.

Thomas Gould, Jr., of Ventura, for respondent.

CRAIG, Justice.

This is an appeal from an order setting apart a probate homestead. During the lifetime of Charles W. Bain he executed a will. Anna Bain, his wife, at the same time executed an agreement witnessed by the same witnesses as the will and termed "Consent of Wife." By this consent she accepted and acquiesced in the provisions of the will and waived all claim to share in the community property and "any and all claims." After the death of the testator, his will, by the terms of which he devised to his widow a life estate in the property in question, was probated.

[1, 2] The legal propositions which are determinative of this appeal have been passed upon by our appellate courts. The right of inheritance is subject to the power of the probate court to carve out a homestead for a limited period not to exceed a life estate. In re Estate of Huelsman, 127 Cal. 275, 59 P. 776; In re Estate of Gray, 159 Cal. 159, 112 P. 890. This also is true of the court's right to make an order for family allowance, and the right to testamentary disposition as well as of inheritance is subject to both homestead and family allowance rights. In re Estate of Whitney, 171 Cal. 750, 154 P. 855.

The last-named authority also decides other points that are controlling here. In fact, the two proceedings are not distinguishable in any essential element. It is there held that where the husband made testamentary disposition of the community property and a consent agreement was executed at the same time as the will, which consent waived all claim to share in the community property and any and all other claims, the waiver of "any and all other claims" is to be interpreted as relating to the particular things which preceded, namely, community property rights. Also, it is there held that under such circumstances the widow is not required to elect between taking under the will or the family allowance, since there is obviously no inconsistency between these two rights. Cases where the spouse expressly waived the homestead right are not in point. In re Estate of Wyss, 112 Cal. App. 487, 297 P. 100, much relied on by appellant, is one of these.

Considering the decisions to which we have above adverted and our opinion as to their application here expressed, other points raised by appellant, such as the claim of estoppel and that the findings do not cover the issues and do not support the order appealed from, do not warrant discussion.

The order is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

* * *

137 Cal.App. 566

CREMER et ux. v. ALBERS BROS. MILLING CO. et al.

CREMER v. SAME.

Civ. 8292.

District Court of Appeal, Second District,
Division 2, California.
March 27, 1934.

Appeal and error 🔑1011(1).

Where there was marked conflict in evidence on several material matters, District Court of Appeal could not interfere with judgment on ground that evidence did not support finding.

Appeals from Superior Court, Los Angeles County; Percy Hight, Judge.

Actions by Oran P. Cremer and wife and by Oran P. Cremer against the Albers Bros. Milling Company and another. The cases were tried by stipulation at the same time, and, from a consolidated judgment against defendants, they appeal.

Affirmed.

George L. Greer, of Los Angeles, and Russell H. Pray, of Long Beach, for appellants.

Lasher B. Gallagher, of Los Angeles, for respondents.

HAHN, Justice pro tem.

Defendants appeal from a consolidated judgment rendered against them in two actions arising out of an automobile accident and which by stipulation were tried at the same time. Both appeals, by stipulation, are before us on the same record.

In support of their contentions for a reversal of the judgments, appellants urge:

(1) That the evidence does not support the implied finding of the jury that the defendants were negligent, but does show conclusively as a matter of law that the plaintiffs were guilty of contributory negligence.

(2) That the court committed reversible error in the matter of giving certain instructions requested by plaintiffs.

The record clearly shows a marked conflict in the evidence on several material matters. That this court may not, under such circumstances, interfere with the judgment, is too well established to require further comment.

Nor is there merit in the point that the trial court committed error in the instructions given. We have examined the instructions given and are satisfied that as a whole they correctly state the law applicable to the case.

Judgments are affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

* * *

137 Cal.App.660

PEOPLE v. CAMPBELL.

Cr. 2460.

District Court of Appeal, Second District,
Division 2, California.
April 3, 1934.

1. Criminal law 🔑1170(4).

In prosecution for incest, refusing cross-examination of prosecutrix as to whether she struck her father in resisting his advances and whether father, although poor, did all he could for her, *held* not prejudicial error, where subject-matter of questions had been covered by other questions and answers.

2. Criminal law 🔑935(1).

Determination of witness' credibility is first assigned to jury, and after conviction, upon motion for new trial, trial judge is given opportunity to weigh evidence.

3. Criminal law 🔑1144(13).

When jury and judge have acted, reviewing court must presume that testimony which amply supports charge was worthy of belief.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Burling Campbell was convicted of incest, and he appeals.

Affirmed.

Frederic H. Vercoe, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Defendant appeals from a judgment of conviction on each of two counts in an information charging him with the crime of incest.

As a ground for reversal of the judgment, he asserts: "The trial court erred in limiting the cross-examination by appellant of the prosecuting witness and thereby prejudiced the substantial rights of the appellant, denied to him a fair and impartial trial and resulted in a miscarriage of justice."

The complaining witness is the 15 year old daughter of defendant. As in most cases involving offenses of this character, evidence supporting the charge is mainly the testimony of the prosecuting witness.

It will serve no useful purpose to rehearse in detail the sordid story as told by the complaining witness. A motherless home, with a 15 year old girl sleeping in the same bed with her father, furnishes a background for the tragedy which the record unfolds. In addition to the daughter's own story, a physician who examined the girl testified that in her opinion the prosecutrix had had sexual relations some time prior to the time of the examination.

[1] The ruling of the trial court complained of by appellant occurred when the complaining witness was being interrogated by defendant's counsel relative to the first act of intercourse she had with defendant in Michigan about two years previous to the occurrences which formed the basis for the charges in the information. She stated that she first resisted her father's advances. When asked if she struck her father in making this resistance, the court refused to permit her to answer. Again, when being questioned as to her father's general treatment of her, after she had testified that, other than the acts of intercourse, her father had always been kind to her, she was asked: "Although you were poor he did all he could for you?" The objection to this question was sustained.

We observe no serious error in these rulings of the court. While both questions might be regarded as coming within the recognized bounds of cross-examination, the subject-matter of both had been fairly covered by other questions and answers. Assuming that answers most favorable to defendant would have been given, we cannot see in what way the result would have been different.

[2, 3] The verdict of the jury and the denial of defendant's motion for a new trial indicate that both jury and judge believed the story as told by the girl. To the jury is first assigned the duty of determining the credibility of witnesses, and after conviction, upon motion for new trial, the trial judge is given the opportunity to weigh the evidence. When jury and judge have acted, this court must presume that the testimony which amply supports the charge was worthy of belief. The record discloses that defendant had a fair and impartial trial.

The judgment and order are affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App.549

PEOPLE v. FAUST.

Cr. 95.

District Court of Appeal, Fourth District, California.

March 26, 1934.

1. Larceny 🔑65.

Evidence sustained conviction for grand theft (Pen. Code, § 487, subd. 3).

2. Criminal law 🔑419, 420(10).

Where defendant prosecuted for grand theft testified that he refused to say anything at conversation between prosecutor and himself, defendant's testimony regarding statements made by various parties present at such conversation *held* inadmissible as hearsay.

3. Criminal law 🔑511(4).

In prosecution for theft of calf, testimony of accomplice *held* sufficiently corroborated, where defendant's testimony supported that of accomplice in respect to killing of calf, removal of carcass, and intention to steal carcass (Pen. Code, § 487, subd. 3, § 1111).

4. Criminal law 🔑829(1).

Refusing instructions, subject-matter of which was sufficiently covered by given instructions, *held* not error.

5. Criminal law ⚷786(1).

Instruction that witness has right to correct his testimony if he so desires *held* properly refused as unnecessary, where defendant prosecuted for grand theft was permitted to correct portion of his testimony and explain reason for correction (Pen. Code, § 487, subd. 3).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Steve Faust was convicted for grand theft, and he appeals.

Affirmed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant, together with one J. F. Davis, was charged in an information filed by the district attorney of Riverside county with the crime of grand theft in that he unlawfully and feloniously took personal property of another, to wit, a bovine animal. Upon arraignment, the defendant entered a plea of not guilty and was tried before a jury, which returned a verdict that he was guilty of the offense charged in the information. Thereafter he presented to the trial court a motion for new trial which was denied and judgment was thereupon rendered which provided that as punishment for the commission of the offense he be confined in the state prison for the term prescribed by law. The defendant then perfected this appeal from the judgment of conviction and from the court's order denying his motion for a new trial.

Appellant specifies four grounds of appeal upon which he relies. These are: First, that the verdict returned by the jury is contrary to law and is not supported by the evidence; second, that the trial court erred in refusing to permit appellant to give certain testimony; third, that there was not sufficient corroboration of the testimony of an admitted accomplice to justify the verdict of conviction; fourth, that the court erred in refusing to give certain instructions offered by appellant.

The record shows that evidence which tended to prove the following facts was submitted to the jury: On September 4, 1933, appellant proposed to his codefendant that the latter accompany him on a fishing trip of several days' duration; that the two men set out in a small Chevrolet truck which was the property of and driven by appellant; that they went to the river, where they remained for a period of about one-half hour; that they left the river and proceeded to another location where they remained for approximately two hours; that they resumed their journey and about sundown they came upon a number of cattle; that among these cattle was a heifer about nine to twelve months old, which was the property of one Wiley Hill, the complaining witness; that appellant suggested to his codefendant Davis that the latter shoot the animal; that Davis acceded to the suggestion and shot the calf; that the two men then removed the entrails and loaded the carcass in the truck; that they went to the home of one John Pedro, where appellant removed the head and one of the shoulders from the carcass and gave it to Pedro; that they went to the house of one Hesser, where appellant left another shoulder; that they then returned to the residence of Davis, where they hung the remainder of the carcass in some trees; that appellant remained at the Davis home during the night of September 4th, and on the following morning he skinned one-quarter of that part of the carcass which remained and took it with him.

[1] Careful perusal of the entire record produces settled conviction that appellant's contention that the verdict is not warranted by the evidence is wholly untenable. Appellant was a witness in his own behalf during the trial and testified that he said to Davis "Shoot that calf and we will get some meat." He did state that the calf was his property, but there was other evidence which tended to show that the calf was the property of Wiley Hill.

In connection with his attack upon the verdict as being contrary to law and unsupported by the evidence appellant contends that there was no showing by the prosecution of the value of the calf and that the mere killing of the animal in the absence of any evidence tending to show that appellant intended to steal the carcass and in the absence of proof that its value exceeded $200 would not justify his conviction of the crime of grand larceny. The statute under which the information was drawn is section 487 of the Penal Code. This statute provides that grand theft is committed when the property taken is of a value exceeding $200 or (3) "When the property taken is * * * any bovine animal." It may be conceded that if it may fairly be said that no evidence indicative of an intent to steal the animal was presented and in the absence of proof that its value exceeded $200 the commission of the offense charged was not established. People v. Smith, 112 Cal. 333, 339, 44 P. 663. The record, however, entirely fails to sustain appellant's contention and no more than a casual examination of it is required to demonstrate that ample evidence was produced from which the jury was fully justified in finding that appellant, who was present at the time the calf was killed, aided and abetted and solicited his codefendant to kill the animal and that the killing was done with the purpose and intention on the part of appellant and his codefendant to steal the calf after it was killed and that in accordance with this previously formed purpose they proceeded to carry away the carcass. Appellant's contention in this regard is therefore entirely devoid of merit. People v. Wilcoxin, 69 Cal. App. 267, 231 P. 377.

Appellant's second contention is also lacking in merit. At the time appellant was testifying in his own behalf he was interrogated on cross-examination by the district attorney with respect to a conversation between the district attorney and himself, which took place in the office of this official on September 16, 1933, and was asked if he had not made certain responses to specified questions propounded to him. Appellant categorically denied that he had given the indicated responses to the inquiries propounded. On rebuttal the prosecution called as a witness a stenographer in the office of the district attorney who testified that she was present at the conversation which took place between appellant and the district attorney on September 16, 1933, and that she took down in shorthand the questions asked by the district attorney and appellant's responses thereto and that appellant had given the responses indicated by the inquiries directed to appellant by the district attorney on cross-examination. Appellant resumed the stand as a witness in his own behalf on surrebuttal and the trial court, over the objection of the district attorney, permitted appellant to reopen his case in chief. Appellant then testified that he was twice called to the office of the district attorney after his arrest and that when he was asked on cross-examination if he had not given the responses indicated to inquiries propounded to him by the district attorney he thought that the cross-examination referred to his second visit; that he had given the indicated responses on the occasion of his visit to the office of the district attorney on September 16, 1933, and that on the occasion of his second visit he had refused to say anything.

[2] It is not easy to discover just what it is of which appellant complains in his objection that the court refused to permit him "to testify in chief in the matter of all statements that he made in the district attorney's office pertaining to the subject matter of the case at bar and to correct his testimony." He was certainly allowed to testify that he was mistaken when he was asked on cross-examination if he had not given designated responses to certain interrogatories propounded to him by the district attorney at the conversation of September 16, 1933; that the reason for the mistake was because he was confused as to the dates of the two conversations in which he participated at the office of the district attorney; that he had given the indicated responses at the conversation of September 16, 1933; that he refused to say anything on the occasion of his second visit.

It appears that the appellant complains because the court sustained an objection to the following inquiry propounded by his counsel: "Do you recall, then, Mr. Faust, what was said by the various parties present?" This inquiry evidently related to the conversation which occurred on the occasion of his second visit to the district attorney's office. Since appellant testified positively that he refused to say anything on this occasion, it would appear that the only possible purpose in making the inquiry was to get before the jury the questions propounded to appellant by the district attorney and statements of other persons who were there present. The bare recital of these inquiries and statements would obviously be hearsay of the rankest character. If the person charged with crime voluntarily confesses his guilt, evidence of his confession is admissible. People v. Rodley, 131 Cal. 240, 63 P. 351; People v. Bliss, 41 Cal. App. 65, 182 P. 63. If, in the course of a conversation between an accused and some other person, it is shown that he gave certain replies not amounting to a confession of guilt to inquiries directed to him respecting the offense or if he remains silent in the face of such inquiries, evidence respecting his replies or his silence is admissible against him under the provisions of section 1870 of the Code of Civil Procedure. We know of no rule of evidence which permits a defendant in a criminal action to testify that, during a conversation which occurred between himself and some other person, certain inquiries were directed to him and certain statements were made by some other person there present particularly when he admits that he refused to answer any of the questions that were asked.

We find ourselves compelled to confess frankly that we are unable to understand the materiality or the competency of the evidence sought to be admitted or what possible benefit appellant could have derived from its admission under the circumstances.

[3] Appellant's third contention is that the testimony of the admitted accomplice, his codefendant Davis, was not sufficiently corroborated to warrant appellant's conviction of the offense having in mind the positive language of section 1111 of the Penal Code that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." No useful purpose could possibly be served by including in this opinion a prolonged analysis of the evidence other than the testimony of the accomplice which, in our opinion, fully and completely corroborated the damaging testimony of appellant's codefendant. It will be sufficient to point to the fact that appellant's testimony most amply corroborated the testimony of the accomplice with respect to the important feature of the killing of the calf and the removal of the carcass. The fact of ownership of the animal was established by evidence wholly apart from the accomplice's testimony. That appellant and his codefendant killed the calf intending to steal the carcass was made evident from the circumstances of the killing as they were narrated by appellant himself. Appellant's contention of insufficiency of corroborative evidence is therefore patently unmeritorious and deserves much slighter consideration than is here given to it.

[4, 5] The fourth and final contention of appellant is that the trial court erred in refusing to give certain specified instructions offered by him. These instructions are five in number. As to four of them an examination of all instructions given by the court indicates that the court was justified in refusing to give them for the reason that the subject-matter of these instructions was sufficiently covered by other instructions given by the court. The fifth instruction offered was in the following language: "You, the jury, are instructed that a witness has a right to correct his testimony if he so desires." The record shows that appellant was permitted to correct certain testimony given by him and that he did fully explain the reason for the correction. There was, therefore, no occasion for the giving of this instruction. It was entirely superfluous and wholly unnecessary and the court very properly declined to give it.

For the reasons stated the judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

137 Cal.App. 324

PEOPLE v. CARNICLE.

Cr. 2437.

District Court of Appeal, Second District,
Division 2, California.
March 12, 1934.

Hearing Denied by Supreme Court April 9, 1934.

1. Perjury 🔑26(½).

Information alleging that defendant, who was sworn to testify truthfully, willfully and knowingly testified falsely, *held* to charge perjury in absence of demurrer for uncertainty (Pen. Code, § 966).

2. Indictment and Information 🔑148.

Where information contained two counts charging perjury and forgery, respectively, demurrer on general grounds, to count charging forgery and demurrer to information as whole for charging more than one offense, not connected, in their commission did not reach alleged defect of uncertainty in charge of perjury (Pen. Code, § 966).

3. Witnesses 🔑274(1).

In prosecution for perjury and forgery, permitting cross-examination of defendant's character witnesses regarding defendant's having made false affidavit and procured others to make false affidavits, charging official with accepting bribe, *held* not error, where prosecutor had basis for believing affidavits were false and asked questions in good faith.

4. Criminal law 🔑1170½(6).

In prosecution for perjury and forgery, cross-examination of defendant's character witnesses regarding defendant's having made false affidavit charging official with accepting bribe *held* not prejudicial, where court instructed that cross-examination testimony was only to help jury to give proper weight to testimony regarding defendant's general reputation.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Vivian H. Carnicle was convicted of perjury and forgery, and she appeals.

Affirmed.

Lorrin Andrews and Edward Moran, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged in an information containing two counts with the crimes of perjury and forgery, respectively. From judgments of conviction entered on verdicts of guilty as to each count, defendant has appealed.

After allegations sufficiently showing that the alleged false statements were made in a trial before a competent tribunal and under oath, the information charges "that the said Vivian H. Carnicle, being so sworn to testify truthfully, she, the said Vivian H. Carnicle, did then and there in said trial, action and proceeding, wilfully, knowingly, corruptly, falsely and contrary to said oath swear, take oath, say and give in evidence among other things answers to the questions then and there propounded to her as a witness in substance as follows, to wit. * * *" The information then sets out a partial transcript of the testimony given by defendant at said former trial, continuing: "That the said false testimony, statements and things sworn to and given in evidence as aforesaid * * * was and were then and there material to the issues tendered in said cause then pending and on trial. That in truth and in fact as she, the said Vivian H. Carnicle, then and there well knew, the said testimony, statements and things so given and sworn to by the said Vivian H. Carnicle, as hereinbefore set forth, were then and there false, untrue and material to the matters then and there on trial. * * *"

[1, 2] Appellant urges that the information is fatally defective, in that nowhere in it is there an averment which negatives the truth of the alleged false swearing by stating facts by way of antithesis. An indictment using substantially the same language in its assignment of perjury as the information here was questioned in the same way in the case of People v. Rodley, 131 Cal. 240, 63 P. 351, and the court on page 249 of its opinion, 63 P. 351, 354, says: "The requirement of the law as to 'assignment of perjury' is found in section 966 of the Penal Code, and requires only that there be 'proper allegations of the falsity of the matter on which the perjury is assigned.' The allegations to the effect that the statements made by defendant were then and there false and untrue, and known by him to be so false and untrue, are, we think, in the absence of a demurrer, a sufficient 'assignment of perjury' under the Code provision above cited. * * * It seems plain here that the indictment states facts constituting an offense, and the worst that can be said of it is that it is not as specific and certain as it should have been in its allegations as to the falsity of the numerous statements of defendant charged to have been perjurious. * * * But an uncertainty of such a character would be waived by the defendant's failure to demur." No demurrer for uncertainty was filed to the information here. One was filed on general grounds directed at count II and one was directed at the information as a whole on the ground "that more than one offense is charged which are not connected together in their commission." This would not reach the defect of uncertainty, if any exists. See, also, the case of People v. Ennis, 137 Cal. 263, 266, 70 P. 84, where similar averments were held sufficient.

The evidence shows that the issues were clear-cut on particular testimony, and that appellant was well informed as to what she was called upon to answer. The matter charged as false in the instant case consists of particular, rather than general, statements, and there could be no uncertainty except for the inclusion in the information of some questions and answers apparently not connected with the statements upon which the issue of falsity was based. As the court in the case of People v. Rodley, supra, said of the defendant there, we say here, necessary changes being made to fit the present case: "He cannot, under our system, lie by until he shall see the result of a trial of his case on its merits, and then be permitted to take advantage of a mere uncertainty in the" information on the appeal.

[3, 4] Four character witnesses produced by the defendant were permitted by the court, over defendant's objection, to be asked by the prosecuting attorney if they had ever heard of the charge that defendant had made a false affidavit herself and caused others to make false affidavits charging Referee Douglas Campbell of the Industrial Accident Commission with accepting a bribe, after he had decided a case against her. Appellant admits that under the authorities, People v. Sieber, 201 Cal. 341, 349, 257 P. 64; People v.

Perry, 144 Cal. 748, 78 P. 284; People v. Gordan, 103 Cal. 568, 573, 37 P. 534; People v. Smith, 100 Cal. App. 344, 347, 279 P. 1022, and others, it would not be misconduct on the part of the district attorney, or error on the part of the court, if such question was propounded in good faith and under a reasonable belief on the part of the prosecutor that the fact is as implied by the question. People v. Perry, supra, page 750 of 144 Cal., 78 P. 284; People v. Buchanan, 119 Cal. App. 523, 526, 6 P.(2d) 538. Appellant urges that, because two of the witnesses who were involved in the making of such alleged false affidavits, and who were also witnesses corroborating appellant's testimony that the loan in question was repaid in their presence, in effect denied on cross-examination that the affidavits they made against Mr. Campbell were false, such denials showed that the district attorney had no reasonable ground to believe that the affidavits were in fact false, and that he did not ask the questions in good faith, but did so solely for the purpose of prejudicing appellant before the jury. We cannot say, simply because these two witnesses in effect denied that the affidavits they made were false as stated by the district attorney, that the prosecutor did not have some very substantial basis for his belief that the affidavits were in fact false, and that the incident may have been discussed in the community in which appellant lived. Moreover, the court several times during the trial, after the questions were asked, told the jury that they were not to draw any inferences from the facts assumed in the questions, and that they must not assume for a minute that such a state of facts ever did exist, or be prejudiced against the defendant by reason of the asking of the questions; that they were only for the purpose of permitting the jury to give proper weight to the testimony of the witnesses as to appellant's general reputation; and in the instructions given to the jury after the close of the evidence the court gave the following: "In the cross-examination of certain character witnesses produced by the defendant the district attorney propounded certain questions relating to certain facts and things which were assumed for the purpose of the question. You must not be prejudiced against the defendant by reason of such questions. You must consider that the facts and things so referred to by the district attorney are not true in reaching your verdict. Such matter has no relation to the issue of guilt or innocence of the defendant in this action."

On the record before us we fail to see any error on the part of the court or misconduct on the part of the district attorney. Even if it were a debatable question as to whether the district attorney was acting in good faith in the instance above mentioned, we fail to see how, under the instructions given in regard thereto, any prejudice could have resulted to appellant.

Judgments affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 332

PEOPLE v. COSBY.

Cr. 1770.

District Court of Appeal, First District, Division 1, California.

March 13, 1934.

Hearing Denied by Supreme Court April 16, 1934.

1. Criminal law 🔑372(1).

In prosecution for assault with intent to commit rape, evidence of similar conduct on former occasions with other women *held* properly admitted to establish common plan of luring women to apartment for purpose of ravishing them.

2. Criminal law 🔑369(1).

General rule is that defendant cannot be tried for any other offense than that with which he is charged in information, and evidence of other distinct offenses is not admissible.

3. Criminal law 🔑371(12), 372(1).

Where several crimes are committed as part of one scheme, all of same general character tending to same common end, they may be given in evidence to show motive and design leading up to particular crime charged, and to show that crime charged was part of common scheme.

4. Rape 🔑59(17).

In prosecution for assault with intent to commit rape, instruction that failure of complaining witness to make outcry had tendency to refute hypothesis of guilt was properly refused, where prosecuting witness was able to resist attack without resorting to outcry.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Ray Cosby was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged and convicted of the crime of assault with intent to commit rape. From the judgment and from the order denying his motion for a new trial he has appealed.

Appellant contends that the trial court erred in admitting certain testimony offered by respondent, in refusing to give certain instructions asked by appellant, and in giving certain instructions for respondent. In order that we may intelligently pass upon these contentions it is necessary that we briefly review the facts. Elinor Bothello testified that about two days before the 17th of August, 1933, she placed an advertisement soliciting work in the Oakland Tribune, stating therein her name and telephone number; that on August 17, 1933, she received a telephone call from a man whom she afterwards discovered to be the appellant. He made some inquiries from her over the telephone and then asked her to come to 1607 Grove street. Shortly thereafter she did this, and found that the building at 1607 Grove street was an old-fashioned residence that had been converted into housekeeping rooms. When she arrived there the appellant was sitting on the steps of the building and after a few words he asked her to step upstairs to his apartment where he could take down some of her references. She went with him to his apartment. She sat down in a rocker and he occupied a chair near a table. He told her he was opening a chain of restaurants; that he was up from Los Angeles to open them and was bringing his own help, but there was an accident and the help were disabled so that they could not go ahead with the work. After some further talk he asked her what wages she would want as cashier and she told him she would accept minimum wages. He replied that he never paid any of his help less than $90 a month. He suggested to her that they would gamble with cards to determine whether or not they would have sexual intercourse. She told him she would not gamble and got up from the chair in which she had been sitting, when he grabbed her and threw her upon a nearby couch. She struggled with him, but he held her down, with one hand on her breast, and leaned over her and slipped the other hand under her clothes and along her leg and about halfway above her knee, and in so doing tore her underclothes. She drew up her legs and kicked him with such force that she threw him off of her and back upon the couch. During the early part of the conversation between them he had stepped out of the room twice; the last time he came in he locked the door. When she had kicked him off of her, she went to the door and tried to open it. He got up, followed her, and tried to grab her. She gave him a push and he fell over the chair in which he had been sitting and she then unlocked the door and left.

[1-3] Over the objection of appellant, but only for the limited purpose of tending to establish that he had a common plan or scheme of luring women to his apartment for the purpose of ravishing them, the trial court permitted respondent to produce testimony that on two previous occasions he had lured women to his apartment under similar circumstances to those adopted with Mrs. Bothello. On one of these occasions, the 25th of May, 1933, he met Mrs. Pearl Banks through the People's Employment Agency, where he had listed himself to obtain women for the purpose of selling chicken pies. Under the pretense of employing her, he induced her to accompany him to his apartment and while there, after a conversation similar to the one he had with Mrs. Bothello, he attempted by force to ravish Mrs. Banks. Again, on August 8, 1933, he lured Miss Miriam Cochran to his apartment under pretense of employing her, and indulged in similar suggestive, lewd talk.

John Mulhern, inspector of the Oakland police department, testified that on August 20, 1933, he had a talk with appellant in the city jail. In that conversation he told Mulhern that he did not know either Mrs. Bothello or Mrs. Banks; that he never told any one he would give them employment.

Appellant, testifying in his own behalf, said that his occupation was that of a gardener and house painter; that he did not seek to employ these women for his own work but for others; that he did not molest Mrs. Bothello or the other women, nor did he attack any of them.

It is apparent, considering the evidence produced by respondent, that appellant devised the scheme or plan of luring women to his apartment for the purpose of gratifying his lust; that he falsely represented to the employment agency that he was engaged in a business that required the employment of women; that in pursuance of such design or plan he called up women who advertised for employment and made appointments with them at his apartment; that his plan or scheme was to lure them to his apartment under promise of providing them lucrative employment; that when he had them there he indulged in lewd and suggestive language, and when these lewd suggestions did not meet with approval he attacked them and endeavored by force to accomplish his purpose. While it is the general rule that a defendant in a criminal case cannot be tried for any other offense than that with which he is charged in the information, and that evidence of other and distinct offenses is not admissible, still there are exceptions to this general rule, one of which is that where several crimes are committed as part of one scheme or plan, all of the same general character, tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, as tending to show logically that the crime in question was part of such common scheme. 8 Cal. Jur. 69; People v. Francisco, 112 Cal. App. 442, 297 P. 34; People v. Robinson, 107 Cal. App. 211, 290 P. 470; People v. Barnes, 111 Cal. App. 605, 295 P. 1045.

In the case of People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A. L. R. 806, the prosecution was permitted to introduce testimony of other similar acts and conduct upon the part of appellant to show the general scheme and plan upon which the appellant operated. At page 652 of 209 Cal., 289 P. 634, 640, the court said: "Appellant next complains of the introduction of certain testimony which it is asserted tended to prove the commission or attempted commission of separate and distinct crimes having no connection with or bearing on the charges then pending against him. * * * Stephen Black, a minor boy called by the People, testified that appellant had taken him to the ranch on divers occasions and on one of these visits had attempted to abuse him. The witness Junior Thompson, also a small boy, testified that appellant had made indecent advances to him. * * * It was for the purpose of establishing this general scheme or plan that the prosecution introduced the testimony above set forth. The testimony of the witnesses last mentioned was, therefore, properly admitted in evidence for the purpose of showing the motive of the defendant in committing the offenses charged, and establishing a well-planned scheme of appellant for abducting young boys in order that he might satisfy his abnormal desires, and then later kill them in order to cover up his crime. People v. Arnold, 199 Cal. 471, 486, 250 P. 168; People v. Nakis, 184 Cal. 105, 114, 193 P. 92; People v. Martin, 50 Cal. App. 71, 73, 194 P. 522." In the Northcott Case, as in the instant case, there was a general scheme and plan under which appellant was operating, and evidence of other similar acts of his were admissible as tending to show such common scheme and plan.

In the case of People v. Knight, 62 Cal. App. 143, 216 P. 96, 97, the court, after stating that it was the general rule that evidence of a distinct crime unconnected with that charged in the indictment cannot be received for the purpose of showing a greater probability that the defendant committed the offense charged, said: "Certain exceptions exist, however, to the rule just stated, which have been permitted from necessity to aid in the detection and punishment of crime. Among these is the rule that evidence of other crimes is competent to prove the specific crime charged when it tends to establish intent, the absence of mistake, or accident, or a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. Wharton's Cr. Ev. (10th Ed.) p. 73; Wigmore on Ev. § 357 et seq.; People v. Sindici, 54 Cal. App. 193, 201 P. 975."

[4] Appellant contends that the court erred in refusing to give the following instruction: "You are instructed that the failure of the complaining witness to make an outcry has a tendency to refute the hypothesis of guilt, but it is not conclusive." Had the appellant been charged with rape, then under certain conditions the instruction might have been proper, but in the instant case the evidence clearly shows that the prosecuting witness was able to resist his attack without the necessity of resorting to an outcry. Had he succeeded in accomplishing the rape despite her resistance, and the location was in a neighborhood where her outcries would have been heard, then the instruction might have been proper. People v. Norrington, 55 Cal. App. 103, 202 P. 932. Appellant further contends that the court erred in giving and refusing certain other instructions. We do not feel called upon to set them forth in detail. We have given them careful examination and

from such examination are satisfied that the trial court fully and fairly instructed the jury.

The order denying appellant's motion for a new trial, and the judgment, are affirmed.

* * *

137 Cal.App. 616

Ex parte LUND.

Cr. 2504.

District Court of Appeal, Second District, Division 2, California.
March 30, 1934.

1. Vagrancy 🔑3.

To support conviction of vagrancy, it is only necessary that there be proof of single act of vagrancy.

2. Vagrancy 🔑3.

Evidence *held* to support conviction of vagrancy, a misdemeanor, precluding release of defendant on writ of habeas corpus on ground imprisonment was illegal.

Evidence tended to show that defendant was seen on streets many times; that on several occasions he was in the company of a known prostitute; that he was drunk in automobile at one time; and that he was at all times idle and without means of support other than by illegal trade known as "hijacking."

Proceedings in the matter of the application of Oscar Lund for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles to secure the release of the petitioner from imprisonment on the ground that he was being illegally imprisoned.

Writ discharged.

Henry C. Huntington, of Los Angeles, for petitioner.

Ray L. Chesebro and Ernest K. Maine, both of Los Angeles, for respondent.

CRAIG, Justice.

By this application for a writ of habeas corpus the petitioner asserts that he is illegally imprisoned by the chief of police of the city of Los Angeles under conviction in the municipal court of that city of having committed vagrancy, a misdemeanor.

[1, 2] There is ample evidence in the record to sustain the charge upon which petitioner was convicted. It is only necessary that there be proof of a single act of vagrancy. People v. Phelps, 189 App. Div. 775, 179 N. Y. S. 289; State v. Gardner, 174 Iowa, 748, 156 N. W. 747, L. R. A. 1916D, 767, Ann. Cas. 1917D, 239; 14 A. L. R. 1498. In this instance it appears that the following facts pertain to petitioner's conduct in the city of Los Angeles: That he was seen on the streets many times by witnesses; that on several occasions he was in the company of a known prostitute; that at one time he was drunk in an automobile; and that he was at all times idle and without means of support other than in a certain illegal trade known as "hijacking," and there is testimony that he was a "hijacker."

Under these circumstances it is unnecessary and unprofitable to consider or decide certain legal questions which petitioner urges.

The writ is discharged.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

* * *

137 Cal.App. 643

MOLENAAR v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 1118.

District Court of Appeal, Fourth District, California.
April 2, 1934.

1. Justices of the peace 🔑160(1).

"Adverse party" required to be served with notice of appeal from justice court is party to whom judgment gives something which may be taken away by reversal or modification thereof.

[Ed. Note.—For other definitions of "Adverse Party," see Words & Phrases.]

2. Justices of the peace 🔑160(1).

Where judgment was rendered against defendant wife but in favor of defendant husband in action for professional services against both, nonappealing husband *held* "ad-

verse party" to be served with notice of wife's appeal from justice court.

> **Facts disclosed that defendant wife against whom judgment was entered appealed from entire judgment on questions of law and fact, and nature of appeal called for trial de novo, during which appealing defendant would have right to prove, either that no money was owed to plaintiff, or that any amount due was owed by husband and not by herself, and in event she proved latter, a judgment should be entered in favor of plaintiff against husband alone.**

3. Justices of the peace ⚿160(1).

That attorney taking appeal for defendant wife in action for professional services against husband and wife had represented both defendants at trial in justice court *held* not to dispense with necessity of serving nonappealing husband with notice of appeal as adverse party.

◆

Application by John B. Molenaar for a writ of prohibition against Superior Court of the State of California in and for the County of San Diego, C. N. Andrews, Judge.

Peremptory writ granted.

John B. Molenaar, in pro. per.

Claude M. Shell, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition seeking to prevent the respondent court from proceeding to hear and determine an appeal from a justice's court.

The petitioner brought an action in a justice court against Harry J. Tilton and Isabel B. Antrim Tilton, who at that time were husband and wife, to recover for professional services alleged to have been performed at the request of each of the defendants. Both defendants were served with summons and through an attorney filed a joint answer in the form of a general denial. On December 18, 1933, a judgment was entered in favor of the plaintiff and against the defendant Isabel B. Antrim Tilton for $200, the judgment providing "that the plaintiff herein take nothing from the defendant Harry J. Tilton." On January 9, 1934, one of the defendants, Isabel B. Antrim Tilton, through the same attorney who had represented both defendants at the trial of the action, filed a notice of appeal, with a bond; the notice stating that the appeal was taken "on the question of law and fact, from the judgment herein rendered by the above entitled court and from the whole thereof." Notice of the appeal was served on the plaintiff in the action by serving the attorney who had represented him at the trial, but no notice was served on the defendant Harry J. Tilton, in whose favor judgment had been rendered. The notice of appeal was addressed to "the plaintiff above named and to C. C. Pease Esq., his attorney." On January 22, 1934, the plaintiff in that action filed in the superior court a motion to dismiss the appeal on several grounds, including the ground that notice of appeal had not been served upon one of the adverse parties, to wit, Harry J. Tilton. The motion to dismiss the appeal was denied and the cause placed on the civil active list to be set for trial and this proceeding followed.

The respondents have answered and filed a brief, the contention being that the defendant Harry J. Tilton was not an adverse party and no service upon him was required, and that, even if he were an adverse party, no service was required because the same attorney had represented both defendants at the trial and, therefore, the attorney for Harry J. Tilton had knowledge of the fact that an appeal had been taken.

The respondents rely upon the following cases: Senter v. De Bernal, 38 Cal. 637; Randall v. Hunter, 69 Cal. 80, 10 P. 130; Terry v. Superior Court, 110 Cal. 85, 42 P. 464; Farrell v. Ontario, 49 Cal. App. 659, 194 P. 69; O'Malley v. Carrick, 60 Cal. App. 48, 212 P. 45; and Jackson v. Superior Court, 20 Cal. App. 638, 129 P. 946. Other than the last case cited, all of these cases come within the exception noted in MacDonald v. Superior Court, 101 Cal. App. 423, 281 P. 672, 673, where the court said: "An examination of these cases will show that the codefendants had defaulted, or consented to the judgment rendered against them, or the action as to them had been dismissed." In all of those cases, by reason of the pleadings, the default of a party, a dismissal as to him, or some similar fact, a further hearing could not affect the parties in question and for that reason it was held that service on them was not necessary. An apparent exception exists in the case of Jackson v. Superior Court. Some of the language used in the opinion in that case supports the contention of respondents. However, the facts in that case, although not fully set forth in the opinion, bring the case within the exception just noted, since the plaintiff in that action had expressly disavowed any claim against the defendant who was not served.

[1] Under the statute, the respondent court had no jurisdiction of this appeal if notice thereof was not served on any adverse party. The general rules for determining who is an adverse party are well settled. Briefly, a party is adverse, within the meaning of the statute, if the judgment gave him something which may be taken away by a reversal or modification thereof. MacDonald v. Superior Court, supra. In that case judgment had been entered against one of four defendants in favor of the plaintiff and of the other defendants. Notice of appeal was not served upon the defendants in whose favor judgment was entered. The court said: "A nonappealing coparty is an adverse party, if his interest may be affected by a reversal or modification of the judgment appealed from. So here the codefendants are adverse parties for the reasons given. They were successful in the justice's court, and a different judgment might take away the fruits of their judgment. If the appeal were properly perfected, they would be required to appear and prepare their defense, as the hearing in the superior court would be a trial de novo, and might result in an entirely different judgment."

[2] In the case before us, the defendant against whom judgment was entered appealed from the entire judgment on questions of law and fact, but did not serve the defendant in whose favor the judgment had been rendered. The nature of the appeal called for a trial de novo, during which the appealing defendant would have the right to prove either that no money was owed to the plaintiff or that any amount due was owed by her husband and not by herself. In the event she proved the latter, a judgment should be entered in favor of the plaintiff against the husband alone. The interest of the husband might be seriously affected by the new judgment and, under established rules, he must be considered an adverse party.

[3] The question remains whether service of notice of appeal on the husband as an adverse party was unnecessary because the attorney who took this appeal had represented both defendants at the trial and therefore had knowledge of the fact that an appeal was taken. It has been held that actual knowledge cannot take the place of service of notice of appeal. In re Estate of Pendergast, 143 Cal. 135, 76 P. 962. Nothing in the record indicates that the unserved defendant was before the court so far as the appeal is concerned, nor that the attorney in question, who had formerly represented that defendant, intended to or was representing him upon this appeal. The record indicates the contrary and the notice of appeal purported to be given by the wife only, and the same was addressed to the plaintiff and to his attorney. Nothing was done to bring the adverse party before the court, and it is difficult to see how a trial de novo could justly be had in his absence. Under these circumstances, the mere fact that the former attorney for the adverse party had knowledge that the appeal had been taken could not change the situation or in any way bring into the case the required element. The attempted appeal was ineffectual, the court was without jurisdiction to proceed in the matter, and the motion to dismiss should have been granted.

A further point raised by the appellant to the effect that he himself was not properly served with notice of appeal is without merit.

It is ordered that a peremptory writ of prohibition be issued as prayed for.

We concur: JENNINGS, J.; MARKS, J.

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137 Cal.App. 559

BEAL v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 1326.

District Court of Appeal, Fourth Appellate District, California.

March 26, 1934.

1. Appeal and error 🔑2.

Appeal from judgment of Fresno police court *held* controlled by statute in force at time appeal was taken, and was not governed by statute in force when judgment was rendered, and, therefore, case was triable de novo on appeal on questions of both law and fact (Code Civ. Proc. §§ 3, 982a; St. 1933, p. 1904).

2. Constitutional law 🔑106.

Party who obtained judgment has no vested right to have appeal by unsuccessful party taken in manner provided by statute in force at time judgment was rendered (Code Civ. Proc. §§ 3, 982a; St. 1933, p. 1904).

Original application by C. F. Beal for a writ of mandate prayed to be directed to the Superior Court in and for the County of Fresno, T. R. Thomson, Judge of Department One thereof, to require the respondent to determine an appeal from a judgment of a police court on the record before it on questions of law alone and without further trial on the issues of fact.

Alternative writ of mandate discharged, and the petition denied.

Galen McKnight, of Fresno, for petitioner.

J. C. Hammel, of Fresno, and G. E. Sandford, of San Francisco, for respondents.

BARNARD, Presiding Justice.

On August 15, 1933, the petitioner herein obtained a judgment in the police court of the city of Fresno in an action in which he was plaintiff. The defendant in that action moved for a new trial, which motion was denied on September 14, 1933, and, on that day, the defendant appealed to the Superior Court on questions of both law and fact.

Under the charter of the city of Fresno the laws applicable to township justice's courts were made applicable to this police court, and that particular judicial township contained a population of more than 30,000. It is conceded that at the time this judgment was entered appeals could be taken from said police court on questions of law alone, and that, by reason of section 982a of the Code of Civil Procedure, such appeals were then governed by the provisions of that Code relating to appeals from municipal courts. On or about August 20, 1933, an amendment to the Code of Civil Procedure repealing section 982a thereof went into effect (Stats. 1933, c. 744, p. 1904). It is conceded that this change had the effect, in subsequent appeals taken on questions of both law and fact and properly coming within its provisions, to subject a judgment of said police court to a trial de novo on questions of both law and fact, instead of leaving the same subject to determination on questions of law alone on a proper record, as theretofore provided.

As noted, the 1933 amendment thus providing for an appeal on both questions of law and fact became effective after the day on which the judgment referred to was entered but before the date on which the appeal was taken. A certified copy of the docket of the police court and all papers and instruments filed in the cause were transferred to the Superior Court, but no bill of exceptions or other record was prepared in accordance with the previous law. On December 2, 1933, this petitioner made a motion in the Superior Court to either dismiss the appeal or affirm the judgment, which motion was based upon the ground that the judgment appealed from was entered before the amendment went into effect and that an appeal could then be taken on questions of law alone and on a record prepared and presented as for appeals from municipal courts. The court denied the motion and refused to either affirm or reverse the judgment on the record then before it on the ground that the appealing party was entitled, under the law, to a trial de novo. The petitioner then instituted this proceeding seeking a writ of mandate commanding the respondent to proceed with the determination of this appeal upon the record before it on questions of law alone, and without further trial on the issues of fact.

[1, 2] The sole question here presented is whether a party appealing after this amendment went into effect, from such a judgment entered prior to the effective date of the amendment, may proceed, and have his appeal considered, according to the law in effect at the time the appeal was taken or whether he is bound by the procedure prevailing at the time the judgment was entered.

At the time of the appeal in question, the law provided for an appeal at any time within thirty days after notice of the judgment on questions of both law and fact, and that when an appeal is so taken the action must be tried anew in the superior court. This appeal was taken in that manner within thirty days from the date of the judgment. The petitioner contends that to permit the changed procedure provided by the 1933 amending statute to be applied in appealing from this judgment entered before that statute took effect would be to give a retroactive effect thereto, and that such a retroactive effect cannot be given to the amending statute, under section 3 of the Code of Civil Procedure, there being no express declaration in the statute that it shall have that effect.

A number of cases are cited, especially those dealing with the amendment which took away the right of appeal from an order denying a motion for a new trial, in which it was held that a statute would not be given the retroactive effect of taking away a right of appeal which had theretofore accrued. The petitioner also relies on Blade v. Superior Court, 102 Cal. App. 375, 283 P. 81, 83. That case had reference to the enactment of section 982a when it was originally adopted, but related to an appeal taken before the effective date of the statute. Under such circumstances, the court said: "To make the new Code section applicable to appeals taken before the section went into operation would be to give its provisions a retroactive effect." In that case the court said:

> "It follows, therefore, that, since the appeal herein was taken prior to the date on which the new Code section became operative, its legal sufficiency could be in no way affected by the provisions of the new Code section, but should be determined by the law in force at the time the appeal was taken."

While it is thoroughly established that a statute taking away a right of appeal will not be given the retroactive effect of preventing an appeal the right to which has already accrued, none of the cases cited are of much assistance in determining the questions now before us. Instead of a party claiming that his right to an appeal has been interfered with, we have here a different and somewhat novel situation in which the party in whose favor the judgment was rendered claims that his rights became fixed on the entry of the judgment and seeks to limit the manner in which his adversary may appeal. As petitioner puts it, the entry of the judgment fixed his rights "subject only to a right in the opposing party to a review of the original proceedings on questions of law alone." In effect, the real question presented is not whether this statutory change acted retroactively, but whether it may not act prospectively because certain rights have already accrued to another party. In other words, the real question is whether the party in whose favor such a judgment is rendered acquires a vested right to have his opponent's appeal taken and considered in the particular manner in effect at the time the judgment is entered.

Petitioner places great reliance on the language used in Hirsch v. All Persons, 173 Cal. 268, 159 P. 712, 713, and in similar cases, to the effect that "'it is the condition of the law at the time of the making the order that controls,'" the order referred to being the order appealed from. The "condition of the law" there referred to was that affecting the right of appeal then under consideration, and the language thus used was not intended to relate to any such question as to whether the procedure on appeal was governed by the law in force at the time judgment was entered or by that prevailing when the appeal was taken. He also argues that the language used in Blade v. Superior Court, supra, to the effect that the legal sufficiency of an appeal should be determined "by the law in force at the time the appeal was taken" is suggestive in his favor because the appeal in that case was taken before the new law went into effect, and the court held that the law in force at the time of the appeal governed because it was also the law at the time judgment was entered. Neither in these cases nor in any others to which our attention has been called was the question before us considered. And the petitioner offers no reason why it should be held that his rights became vested on the entry of the judgment, or why the law regulating the procedure of an appeal should be that in force at the time of judgment rather than that obtaining when the appeal is taken. There should be no vested right in a wrong judgment before the same has become final. An appeal is allowed for the benefit of a party who thinks himself aggrieved. While the right of appeal may be limited by time and by other considerations, when taken, the appeal is a further proceeding every step of which arises after judgment. The losing party may decide to appeal at any time within the limit provided. How the appeal may then be taken and the manner of considering the same are entirely matters of procedure relating to acts occurring after the date of judgment. Any rules with respect thereto became applicable, not by reason of the judgment but by the taking of the appeal. It seems reasonable that this subsequent step, which may not have been even contemplated when the judgment was entered, should be governed by the rules of law in effect when it is taken rather than by those which prevailed at a former time when an act occurred which has been completed and which, in itself, calls for no further rules of procedure.

It is not questioned that the appellant had a right to appeal at the time the appeal in question was taken. The law in effect at the time he appealed provided that the appeal might be taken in the manner followed, and at that time there was no law in effect permitting an appeal to be taken in any other way. The intervening change in the law related merely to the manner of taking and considering an appeal, and not to the right thereto. Had the appeal been taken in accordance with the former method, the following language used by the court in Hastain & Purman, Inc., v. Superior Court, 212 Cal. 783, 300 P. 966, 967, would have been appropriate: "We, therefore, have a plain case of an attempt to appeal without following the law applicable to the situation. Applying said new statute to the present case is not to give a retroactive, but a prospective, operation to it."

In Woodruff v. Colyear, 172 Cal. 440, 156 P. 475, it was held that the amendment abolishing the right of appeal from an order denying a new trial applied where such an order was made subsequent to the effective date of the amendment, "regardless of whether the proceeding for a new trial was initiated prior to or subsequent to such date." It was thus held that neither the entry of judgment nor the initiation of steps to obtain a new trial gave a vested right to an appeal in a certain manner. If such a change in the manner of taking an appeal as was made by the amendment referred to in that case can be made after the entry of judgment, it would seem to follow that the time of entering judgment does not in itself determine the manner of taking an appeal. While the appeal in the case before us was taken from the judgment entered and not from a subsequent order, to give effect to the changed procedure which had come before the appeal was taken would be somewhat similar in principle to the holding in the case referred to.

In Estate of Patterson, 155 Cal. 626, 102 P. 941, 945, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, the court said: "It is a mistake to characterize the amendment of section 1339 as a retrospective law. It relates wholly to what shall be done upon the trial of the application for probate, the proof that must be furnished, and the facts which must be established. It applies only to trials which take place after its enactment."

The change in procedure here in question relates entirely to something that occurred and to a hearing that was to occur after the effective date of the amendment. We entertain the opinion that this was merely a change in procedure affecting matters subsequent to its adoption; that its application in this instance was prospective rather than retroactive; and that the petitioner had no vested right to have the appeal taken in the manner formerly provided.

The petitioner argues that the repealing statute here in question might, in some cases, have the effect of depriving a losing party of a right of appeal; that the former law permitted an appeal within fifteen days after a motion for a new trial was denied; that the new law provides that an appeal must be taken within thirty days from date of judgment; and that, in the event of a delayed ruling on a motion for a new trial, thirty days from the date of judgment might have elapsed. It is argued that such a possibility demonstrates that this change in the manner of taking an appeal could not be applied in any case where the judgment was entered prior to the change, since it was held in Melde v. Reynolds, 120 Cal. 234, 52 P. 491, that the time within which an appeal may be taken is governed by the statute in force at the entry of the judgment. The rule referred to in that case relates to the right of appeal which is fixed at the time judgment is entered, and not to a procedural matter in connection with the appeal when later taken. If it be conceded that the rule referred to might be invoked in a proper case to save a right of appeal that would otherwise be lost, it does not follow that the statute now under consideration is not to be applied in a case where no right of appeal is affected and where its only operation is prospective and procedural in nature. The facts of this case do not bring it within the rule relied on, and disclose nothing to indicate that this change in procedure should not be applied to an action taken after it became effective and within the time and in the manner then provided.

We conclude therefore, that the appeal under consideration was governed by the law in effect at the time it was taken and not by the law in force at the time the judgment was entered.

For the reasons given, the alternative writ of mandate is discharged and the petition is denied.

We concur: MARKS, J.; JENNINGS, J.

137 Cal.App. 502

PEOPLE v. LEWIS.

Cr. 2447.

District Court of Appeal, Second District, Division 2, California.

March 23, 1934.

1. Criminal law ⚷560.

To uphold conviction there must be proof justifying findings that crime charged has been established and that crime has been brought home to one charged with offense.

2. Homicide ⚷236(1).

Evidence in murder prosecution supported finding that deceased was murdered.

3. Homicide ⚷268.

Guilt of defendant, prosecuted for murder, *held* for jury.

4. Criminal law ⚷1159(2).

Jury in first instance, and trial court after verdict, must determine what facts are established by evidence; and verdict approved by trial court cannot be set aside on appeal for insufficiency of evidence unless it clearly appears there is no substantial evidence to support conclusion reached.

5. Criminal law ⚷1160.

Fact that trial judge, having opportunity to observe witnesses, and defendant, prosecuted for murder, denied motion to set aside conviction, is supporting factor to verdict and one entitled to weight by reviewing court on reviewing evidence.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Logan Lewis was convicted for murder and for the willful and malicious burning of property, and he appeals.

Affirmed.

Tyler & Jefferson, Willis O. Tyler, and Edwin L. Jefferson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Appellant was charged by information filed by the district attorney of Los Angeles county with the crime of murder in count 1, and in count 2 with the crime of willful and malicious burning of property. The jury returned verdicts of guilty on each count, fixing punishment by life imprisonment on the murder charge.

While the notice of appeal does not specify the judgment from which the appeal is taken, appellant's brief is confined altogether to a discussion of the murder charge. The only ground urged for a reversal of the judgment is the broad general assertion that the evidence does not warrant the verdict of conviction of murder found against him.

On Wednesday night, December 7, 1932, a fire which was first observed about 11:30 p. m. destroyed a small frame building located in the rear of a church for persons of African descent on 112th street in the city of Los Angeles. The building was used as a recreation hall for the church people and particularly by a group of the women, known as "Willing Workers," whose main purpose was to make over old clothing to be distributed to the needy. At the time of the fire there was a quantity of such clothing in a closet in the building. After the fire was extinguished the badly charred body of Winnie Lewis, wife of defendant, was found in the ruins. Her forearms were half consumed by the fire, as were her legs below the knees. Both arms were dislocated at the elbows and both legs dislocated at the knees. The frontal bone on her skull was crushed in and both anterior fossæ of her skull were fractured. That the deceased was the victim of a violent assault which caused her death and that her body was deposited or left in the building, which was set on fire to cover up the foul deed, may well have been inferred by the jury from the evidence in the case.

The record discloses a marked conflict on certain material points between the story of events as related by the defendant and the evidence produced by the prosecution. Hence, in constructing the story of the events bearing upon the homicide for the purpose of considering the question before us, it is proper and indeed necessary that the evidence and inferences that tend to support the verdict be adopted rather than the story told by defendant. In this connection it may be observed that the defendant was so thoroughly impeached on a number of vital matters that the jury was justified in not only disregarding his story but in believing that he had something to cover up.

The defendant lived with his wife and her sister at 1256 East Thirty-Third street, Los Angeles. He was employed as night operator of an elevator at the Hall of Records and also as janitor at two offices near Twelfth and Maple streets. He usually went on duty at the Hall of Records at 12 o'clock midnight and was relieved about 7:30 in the morning. It was his custom to go at once to attend to his janitor work at Twelfth and Maple, which work he completed about 9 o'clock, after which he usually returned to his home.

On Monday morning, December 5, 1932, defendant left his home for work about 4 o'clock a. m., he being required to report for duty on Monday morning at 5 o'clock instead of the earlier hour of midnight, as on other days. After working about an hour, giving sickness as an excuse for quitting earlier than his usual time, he left the Hall of Records and went to Twelfth and Maple streets, where he was accustomed to do some janitor work each morning. While there he was observed by one of the clerks, a Mrs. Grantham. Lewis was next seen with his wife in his automobile on Compton avenue near Eighty-Third street, driving in the direction of the church where the fire occurred the following Wednesday night. About 10 o'clock he and his wife called to see a friend, one Mrs. Cole, who had been ill for some time. Her home was situate not far from the church in question, of which Lewis had formerly been the pastor and of which at this time both he and his wife were active members. Winnie Lewis was last seen alive when, with her husband, she left Mrs. Cole's home Monday morning between 10 and 11 o'clock.

About 11 o'clock defendant called his home by telephone and stated to his sister-in-law that he would be home soon. He arrived home some time between 1 and 2 o'clock and ate his lunch. His sister-in-law stated to him that his wife had left home about 9 o'clock that morning and had not returned. Defendant then left the house, went to the home of a friend, one Harry Miles, and reported his wife missing. He and Miles went to the police station, where they arrived shortly before 2 o'clock, defendant saying to the officer in charge, "I want to report my wife as a missing person." When the officer suggested that her absence from home for such a short period would not justify the conclusion that she was missing, defendant replied, "Well, I believe my wife has met with foul play." He later repeated this statement to the officer, and when asked for his reason for so believing told the latter that on the previous Saturday morning his wife had found a threatening letter in their mail box.

The story of the letter, as told by the sister-in-law, is briefly as follows: On Saturday morning previous to the disappearance of Mrs. Lewis, while she and Mrs. Lewis were in the house, defendant came in. "He was very excited. His voice was very excited. He said, 'Come here Babe [he called his wife Babe], see what this letter is. See this letter.'" The letter was sealed, addressed to L. Lewis, and had a three-cent stamp attached which had no cancellation marks on it. On a sheet of cheap ruled tablet paper found inside the envelope was written the following: "You put the police on me and I will get you and your husband too. 1339—39th Street, Logan Lewis." The sheet of paper found in the envelope was lined with dark blue lines and evidently taken from a tablet of cheap writing paper. On Wednesday evening, the night of the fire, when Lewis left home to go to work, he wrote the telephone number of the janitor's room at the Hall of Records on a sheet of paper and gave it to his sister-in-law, with the injunction to call him at that number if anything should happen. This sheet of paper on which the telephone number was written was similar to the sheet found in the envelope with the threatening message. There was subsequently found in the janitors' quarters at the Hall of Records a tablet of paper similar to the two sheets referred to and from which tablet the two sheets of paper in question had probably been taken.

About 3:30 o'clock on Monday afternoon the defendant met one Bell Hard, to whom he stated that he was on his way to purchase a new shirt and collar.

On Tuesday morning Lewis went to the place where he was accustomed to do janitor work each morning and asked Mrs. Grantham, a clerk in the office, if she had seen him at work there the previous morning and if so if she thought it was the usual time. He explained to her that his wife disappeared the day before and he wanted to make sure that she had seen him there that morning.

On the following Wednesday morning Lewis visited the place of business of Bell Hard and inquired if he had any coal oil for sale. Hard replied that he did not, but that Lewis could secure some from the oil station across the street, which Lewis did and later advised Hard that he had secured the coal oil.

On Wednesday evening before leaving for work at the Hall of Records defendant secured new batteries for a flash-light which he took with him when he left his home at about 10:30 o'clock. It was not his custom to carry a flash-light when he went to work. On this occasion he was late in reporting for work. On this same night, at about 11 o'clock, a man was seen entering the building later destroyed by fire. About twenty minutes later the building was first observed on fire. The key to the front door of this building was kept on the pulpit in the church property, where it could be secured by those who had occasion to use the building.

Thursday morning, after the body had been found, Lewis remarked to his sister-in-law, "I hope they won't put this on me." On the same day Lewis sent his nephew to the cleaners with a suit of clothes to be cleaned for him. Some days later defendant approached one Max Hunter, who was an employee of the cleaners, and requested him to find out, if he could, if Mrs. Randolph, who received the clothes to be cleaned, had noticed any blood stains on his clothes when they were brought in. After receiving no word from Hunter after several days Lewis called him and found fault with him for not reporting to him as to what Mrs. Randolph may have observed with regard to the clothes.

About two weeks after the fire Lewis called on Hard, the man from whom he had sought to purchase coal oil on the day of the fire, and said to him: "By the way, if anyone says anything to you about my buying coal oil, don't say anything, because they say the building was set on fire with coal oil."

Fire experts, who were at the fire and who examined the floor of the building which had not been entirely consumed, gave it as their opinion that at the point where the body was found there were indications that some inflammable liquid had been used in connection with the burning.

Several weeks after the fire a fair-sized pipe wrench was found in the ashes at a point not far from where the body was found. Attached to the head of the wrench was some carbonized fabric, interwoven with fine wire such as is used in the manufacture of women's hats. This wrench was positively identified by Mr. and Mrs. Blanchard, relatives of Lewis, as one they formerly owned and which they had loaned to defendant but was never returned by him.

Reverend C. E. Caldwell, pastor of the church where the fire occurred, said he was very familiar with the tools that were about the premises and that he had never before seen the wrench in question in or about the building. He said that all of the tools belonging to the premises were accounted for after the fire.

Mrs. Lewis had taken out two life insurance policies, on one of which she was accustomed to pay the monthly premiums to a collector who called at the house. On the Saturday previous to the Monday his wife disappeared, Lewis went to the office of the insurance company and there paid the monthly premium. After her death he collected about $800 on one of the policies.

[1] In order that the verdict of guilty in any criminal case may be upheld there must be proof in the record that will justify two general findings of fact; first, that the crime charged, the corpus delicti, has been established; and, second, that the crime has been brought home to the one charged with the offense.

[2] The evidence so clearly supports the jury's finding that Winnie Lewis was foully murdered that it would seem unnecessary for the purposes of this opinion to further elaborate upon the evidence bearing upon this phase of the case.

[3] As to the second proposition, the defendant's guilt of the crime, the evidence is not so conclusive. However, after a careful review and analysis of the evidence we have come to the conclusion that there is ample evidence to support the conclusion that the crime charged was committed by the defendant.

[4] The rule that controls this review is stated by our Supreme Court in the case of People v. Tom Woo, 181 Cal. 315, 184 P. 389. 393, as follows: "It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." Added weight is given to the incriminating circumstances and the inferences justified by the evidence, in the fact that defendant was so thoroughly impeached on several vital matters.

[5] The fact that the trial judge, who had the opportunity to observe the witnesses and particularly the defendant when on the stand. denied defendant's motion to set aside the jury's verdict and to grant him a new trial is a supporting factor to the verdict and one entitled to weight by this court in reviewing the evidence. People v. Ellis, 188 Cal. 682, 206 P. 753.

After a careful reading and examination of the entire record in the case and a thorough consideration of the points urged by appellant for a reversal of the judgment, we are satisfied that measured by the rule above quoted the judgment of the trial court should be sustained.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

137 Cal.App. 567

SMITH v. SABIN.

Civ. 7828.

District Court of Appeal, Second District,
Division 1, California.
March 28, 1934.

1. Appeal and error 🔑1045(1).

In action for injuries from automobile accident, asking jurors on voir dire whether they were stockholders in bonding company, or whether they or any of their immediate relatives were employed in bonding company, *held* not prejudicial error.

2. Trial 🔑133(6).

Statement by plaintiff in action for injuries resulting from automobile accident that he had spoken with defendant about insurance *held* not prejudicial, where court immediately ordered jury to disregard reference to insurance and finally instructed jury not to consider for any purpose evidence which had been rejected, and no bad faith was shown on part of plaintiff or his attorneys (Const. art. 6, § 4½).

3. Appeal and error 🔑930(2).

Jury is presumed to follow instructions to disregard evidence which had been ordered stricken.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Floyd B. Smith against Hudson B. Sabin. Judgment for plaintiff, and defendant appeals.

Affirmed.

Paul Nourse, of Los Angeles (Harold Jones and Forrest A. Betts, both of Los Angeles, of counsel), for appellant.

L. A. West, of Santa Ana, and G. P. Adams, of Los Angeles, for respondent.

HOUSER, Justice.

Defendant appeals from a judgment that was rendered against him pursuant to a verdict which was returned by a jury in an action for damages that arose from personal injuries sustained by plaintiff at a time when he was struck by an automobile owned and operated by defendant.

[1] In his opening brief appellant makes the statement that the only issue presented on the appeal is whether "the court erred in refusing to declare a mistrial and to discharge the jury after plaintiff on direct examination was asked to testify, and did testify, about an alleged conversation with defendant regarding insurance." In that regard two asserted separate references to the assumed fact that defendant was protected by a contract or policy of insurance from the payment of any damages for which he might become liable in the matter form the basis for the contention by appellant that, in the absence of such references, a verdict of the jury might have been returned in favor of defendant. The first of such alleged acts of so-called misconduct on the part of plaintiff occurred in the course of the "voir dire" examination by plaintiff's attorney of the prospective jurors called into the jury box, preparatory to a conclusion as to whether they would be acceptable to him to act as jurors on the trial of the action. In the course of such examination, the following question was asked: "Are any of you stockholders in any bonding company? Or are any of you employed, or any of your immediate relatives employed, in any bonding company?"

It is not contended by appellant that, standing alone, the asking of either or both of such questions constituted prejudicial error. To the contrary, it is admitted that in the circumstances, especially under the decision announced in the case of Arnold v. California P. C. Co., 41 Cal. App. 420, 183 P. 171, the questions asked were not properly subject to adverse criticism. To the same effect see: Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739; Dougherty v. Ellingson, 97 Cal. App. 87, 275 P. 456; Hasty v. Trevillian, 102 Cal. App. 405, 283 P. 148; Dermer v. Pistoresi, 109 Cal. App. 310, 293 P. 78.

The second alleged violation of the rights of defendant in the premises occurred in the following circumstances: Prior to the date of the trial of the action, at a time when the deposition of plaintiff was being taken, in response to a question asked him regarding a conversation which theretofore had taken place between him and defendant, plaintiff replied: "* * * He said he was sorry, of course, that he had done it and he said he had insurance to take care of it. I said, 'How much insurance do you have?' And he told me Ten Thousand Dollars. I told him that I was glad he had insurance, and outside of that we was talking more in a general way about business." Whereupon counsel there representing defendant made a statement to the effect that any reference to insurance was "incompetent, irrelevant and immaterial," and that he would "ask the court to have it stricken out." To which the attorney who then and there represented plaintiff remarked: "Of course, that is a matter to be determined by the court at that time if you make any objection to it." On the trial of the action no part of said deposition was introduced in evidence. By each of three separate affidavits which were introduced on the hearing of a motion for a new trial herein, it appears that, between the time when the deposition was taken and the time when plaintiff was placed on the witness stand on the trial of the action, he was instructed by each of his attorneys in substance "that any conversation between him and the defendant with respect to insurance would not be competent evidence, and that when he was asked as to how the accident occurred and the other matters to be touched upon by him in his testimony, he must omit saying anything about the insurance, and the plaintiff promised his counsel that he would heed said advice. * * *" However, on the trial of the action, in the course of the testimony given by plaintiff, particularly with reference to the conversation regarding which theretofore he had testified in his deposition, the following occurred:

"Q. Well, did you have any talk about this accident? A. I had a little talk about the accident.

"Q. Just tell us what was said now with respect to the accident—not anything else but the accident? * * * A. He said he didn't see me.

"Q. Anything else? A. That was about all, except the insurance. We talked about that.

"Q. Never mind about that.

"Mr. Read (attorney for defendant): If the Court please, I am going to assign that as error, and I ask the court to instruct the jury to disregard it.

"The Court: Oh, yes.

"Mr. West (attorney for plaintiff): We consent to it and join in the request.

"The Court: Yes; the jury is instructed to disregard that matter."

In addition to the timely instruction thus given by the court to the jury to "disregard that matter," the jury was later instructed that: "You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you had never heard it."

[2] Notwithstanding the several decisions to which attention has been directed regarding the right of counsel in proper circumstances to inquire of prospective jurors as to their possible connection with liability insurance companies, in effect it is contended by appellant that in the examination of such jurors in the instant action the inquiry as to whether any of them were "stockholders in any bonding company," or whether they or any of their "immediate relatives" were employed by a bonding company, together with the facts relative to the incident hereinbefore set forth wherein, as an outcome of such circumstances, in answer to a question as to whether "anything else" had been said, plaintiff replied that that was about all, except that they talked about "the insurance"—constituted error which injuriously affected the substantial rights of defendant. In that connection, appellant has cited several authorities, in each of which it is held that prejudicial error results where it appears that a question has been asked in "bad faith," and for the purpose of informing the jury that the liability of the defendant in the premises is protected by a contract or policy of insurance. Squires v. Riffe, 211 Cal. 370, 295 P. 517; Citti v. Bava, 204 Cal. 136, 266 P. 954, and authorities therein respectively cited. But since in the premises it is evident that the real source of the injury (if any) to defendant arose from the knowledge on the part of the jury of the assumed ultimate fact that the insurance company, and not the defendant, might be compelled to bear the burden that might result from any judgment that might be rendered in favor of plaintiff, the assumed additional element of "bad faith" on the part of either the plaintiff or his attorney in introducing evidence on the trial of the action relative to the liability of an insurance company in the matter is of a negligible character, and necessarily is of secondary importance in arriving at a determination of the probable effect of the questioned evidence. However, without reviewing the material facts in the instant action connected with the final statement made by the witness to the effect that he had talked about "the insurance," this court is of the opinion that no "bad faith" was shown by

plaintiff, or either of his attorneys. To the contrary, with the exception of the single remark made by one of such attorneys at the time when the deposition of plaintiff was taken, their acts and general conduct point to the conclusion that they were conscientious in their endeavor to prevent their client from making any statement in his testimony with reference to the fact that defendant had said anything that would indicate that his liability, if any, for damages caused by his assumed negligence was covered by a policy or contract of insurance. We are then remitted to the remaining and primary question of whether, in the particular circumstances of this case, defendant may be said to have been so prejudicially affected by the statement of plaintiff that he and defendant talked about "the insurance" that because thereof the judgment should be reversed and a new trial ordered. On consideration of the significance which might attach to the statement that they talked about "the insurance," the impression is practically instantaneous that the effect was harmless. The words are so indefinite that, in the absence of some explanation to the jurors of the meaning that was intended to be conveyed, and without knowledge on their part of the testimony that was given by plaintiff at the time his deposition was taken, however gifted with intelligence a juror might be, his conclusion as to what meaning should be ascribed to the statement would necessarily depend upon the extent to which an imagination might carry. In other words, it would be nothing other than surmise; mere guesswork. For example, the testimony given by plaintiff on the trial of the action very readily might indicate that either the plaintiff, or the defendant, or that both of them, either carried, or that he or they did not carry, insurance of some kind, for either some definite or some indefinite purpose. It may or might have been that life insurance, fire insurance, accident insurance, or liability insurance was the subject of their conversation. It may or might have been that such conversation developed the fact that plaintiff carried some sort of insurance and that defendant did not do so. It may or might have been that the conversation disclosed the fact that neither of them carried insurance of any kind, and that, in view of the happening of the accident in question, the parties were simply considering the advisability of providing against the possibility of financial loss that might ensue to one of them in the future from accident, fire, or personal injury. As far as the jury was concerned, up to the time when the criticized words were spoken, the only fact or circumstance that had any tendency to connect the word "insurance" with a contract of that nature by which defendant was assumed to be protected against his civil liability for damages occasioned by his negligent operation of the automobile were the two questions asked of the jury as a whole on their "voir dire" examination relative to whether any one of them was, or "any of his immediate relatives" were employed "in any bonding company." Of course, it is possible, but most unlikely, that some very alert quick-thinking juror may have observed the connection between the two incidents. It would seem much more probable that, had counsel for defendant remained silent and made no objection to the statements by the witness, any possible connection of the criticized testimony with the incidents that occurred on the "voir dire" examination of the jurors would not have been noted.

[3] It also will be remembered that, in addition to instructing the jury at a time immediately following the making of the statement by the witness, the court later instructed the jury more fully in regard to its duty in the premises. The presumption is that the jury followed the instructions that were given in that regard.

Counsel for appellant is the more insistent upon the soundness of his contention because of his expressed opinion that the evidence offered by plaintiff was evenly balanced by that introduced in behalf of defendant; and consequently that error, considered however slight or insignificant in ordinary circumstances, in the instant situation would have been sufficient to turn the scale against his client. Without herein setting forth a résumé of the evidence, suffice it to say that, as disclosed by the "cold record," this court is unable to agree with appellant that the evidence produced by the respective parties is evenly balanced one side with the other. To our collective mind, the evidence as a whole, including the inferences deducible therefrom, preponderated in favor of plaintiff. From the fact that the trial court denied defendant's motion for a new trial, it becomes evident that the trial judge was not favorable to appellant's contention in that regard.

In the case of McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23, 25, the pertinent facts were similar to those in the instant case. It was there said: "The errors of law assigned upon admission of testimony over defendant's objections and motions to strike, so far as in any way suggestive of prejudice, arise upon the admission in evidence, as part of a conversation had with defendant, of defendant's declaration to plaintiff, immediately after the collision that he carried accident insurance that would provide for plaintiff if he had suffered injury. As this was admitted as tending to show an acknowledgment of responsibility by defendant for the accident, we think it was proper evidence."

But, in any event, considering the premises, the alleged error was of such slight importance that it did not result in a miscarriage of justice. Section 4½, art. 6, Const.

It is ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

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137 Cal.App. 538

ROGERS v. EVANS et al.

Civ. 1494.

District Court of Appeal, Fourth District, California.

March 23, 1934.

Hearing Denied by Supreme Court May 21, 1934.

1. **Mortgages 🔑369(7).**
In suit to set aside sale under trust deed in which question was whether trust deed was void for improper description of note secured, notes and trust deeds *held* properly admitted.

2. **Mortgages 🔑369(7).**
In suit to set aside sale under trust deed, evidence supported finding that recital in trust deed as to payees of note secured was error, and that note intended to be secured was payable to one of named payees, and that trust deed secured such note.

3. **Mortgages 🔑50.**
Where note secured by trust deed can be identified by other description thereof in trust deed and parol evidence, variance between note described in trust deed and note actually evidencing indebtedness is not fatal.

4. **Mortgages 🔑335.**
Recital in notice of default under trust deed, not required by statute or terms of trust, such as statement of name of payee of note secured, is surplusage, and does not invalidate notice of default (Civ. Code, § 2924, as amended by St. 1933, p. 1669, § 1).

5. **Mortgages 🔑378.**
Notice of sale having been given under trust deed, as required by statute and terms of trust, and premises having been sold pursuant thereto, trustee's deed conveyed trust estate to purchaser, and any subsequent sale of premises under subsequent trust deed could not affect such purchaser's interest in property.

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Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to set aside sale under trust deed brought by Ellis Hill Rogers against Lillian E. Evans and another, in which Lillian E. Evans and another filed a cross-complaint against plaintiff and Grace Ina Gibson and others. From an adverse judgment and from an order denying a motion to vacate the judgment and enter a different judgment, defendants appeal.

Affirmed.

J. K. Wilson, of Beverly Hills, for appellants.

J. W. McKinley, of Los Angeles, for respondent.

WARMER, Justice pro tem.

The evidence in this case consists of the notes, trust deeds, certain notices, deeds of trust, the deposition of one Frederick M. Kincaid, and a stipulation of facts which may be stated, so far as here material, as follows:

One John W. Gibson owned certain real property situate in Riverside county. However, the record title to said real property was in the name of one Frederick M. Kincaid. Kincaid conveyed said real property to one James L. O'Donahue on December 5, 1927. Thereafter, on the same day and as a part of the same transaction, the said O'Donahue made, executed, and delivered his promissory note for $45,000, due on or before three years, to the said Frederick M. Kincaid, and at the same time O'Donahue made, executed, and delivered to Kincaid a trust deed purporting to secure a promissory note in the sum of $45,000, payable to Kincaid and his wife, Blanche D. Kincaid, according to the description of the note in the said trust deed. However, no such note was ever made. The trust deed was duly recorded December 6, 1927, in the office of the county recorder of Riverside county. Thereafter, on the same day and as a part of the same transaction, the said O'Donahue made, executed, and delivered to Kincaid his two promissory notes in the aggregate sum of $32,000, each dated December 5, 1927, and each for the sum of $16,000. One was due in one year and the other in two years from date. At the same time, and as part of the same transaction, O'Donahue made, executed, and delivered to Kincaid a second trust deed on said real property as security for the payment of said $32,000, which trust deed was duly recorded on December 6, 1927, in the office of the county recorder of Riverside county. The trust deed securing the payment of the $32,000 recited, among other things, that it was subject to a trust deed for $45,000 due on or before three years from December 5, 1927. On December 6, 1927, O'Donahue executed and delivered to John W. Gibson a deed conveying said real property, incumbered as aforesaid, to one Thelma M. Gibson, a daughter of John W. Gibson, who paid nothing for said deed. During all of said times Frederick M. Kincaid, James L. O'Donahue, and Thelma M. Gibson, were each and all agents and dummies for John W. Gibson. Neither Kincaid, O'Donahue, nor Thelma M. Gibson had any interest whatsoever in said property. During all said times the real property had no value in excess of $20,000. The plaintiff Ellis Hill Rogers acquired the aforesaid $45,000 note and trust deed in exchange for certain real property owned by her. The transfer of the note and trust deed to her was by indorsement on the back of the note as follows:

"Pasadena, California, Dec. 23, 1927.

"For value received, I do hereby transfer and assign to Ellis Hill Rogers, a married woman, the within note, together with all rights accrued or to accrue under the Deed of Trust securing the same so far as the same relate to this note and without recourse on me.

"Signed Frederick M. Kincaid."

The defendant Lillian E. Evans purchased one of said $16,000 notes secured as hereinbefore stated, and the same was duly transferred to her.

For convenience we shall hereinafter refer to the former trust deed as the Rogers trust deed and the other as the Evans trust deed.

The Rogers trust deed was foreclosed, and at the sale Ellis Hill Rogers was the purchaser, and the trustee executed and delivered its trustee's deed to Ellis Hill Rogers. Some time thereafter, the Evans trust deed was foreclosed, and F. N. Evans was the purchaser. The trustee therefore made, executed, and delivered its trustee's deed to F. N. Evans.

[1-3] The question presented is: Is the Rogers trust deed and the sale thereunder void? Admittedly, the principal and only necessary question, although presented by many specifications of error, is: Does the note described in the trust deed as payable to Frederick M. Kincaid and Blanche D. Kincaid, although no such note was ever executed, create such a variance in the description of the note secured as to cause the trust deed to be declared void? Stating it in another way, under such circumstances, does the trust deed create a valid lien or is it void, creating no lien on the premises therein described? If it is void, the purchaser of the trust deed and note had no right of foreclosure, and the whole proceeding is void. If it is a valid lien, then the proceedings, if in conformity with statute and the terms of the trust, are valid, and the trustee's deed conveyed the real property to the purchaser at such sale.

It is apparent from the written instruments received in evidence, and we think properly admitted, and the testimony of Frederick M. Kincaid, that he prepared the note and trust deed in question at the same time and as a part of the same transaction; that in drafting the trust deed through mistake he included the name of Blanche D. Kincaid, his wife, in the copy of the note described in the trust deed, instead of a true copy of the note actually executed showing himself alone as the payee. It is also apparent that the trust deed, as executed and recorded was given to secure the payment of the $45,000 evidenced by the promissory note actually executed and delivered to him, and not to secure a purported note payable to him and Blanche D. Kincaid, his wife, for in fact no such note ever existed.

The case of Moore v. Russell, 133 Cal. 297, 65 P. 624, 625, 85 Am. St. Rep. 166, is one involving a somewhat similar point. However, in that case a mortgage was involved. A note for $800 was executed by William Russell and his wife, Ruth M. Russell, payable upon certain terms and at specified times to H. P. Moore. A mortgage covering certain property was made and executed at the same time. It was declared on the face of the mortgage that it was given, "as security for the payment to said mortgagee of the sum of eight hundred dollars," at the same time and under the precise terms of the note, except the word "administrator" is inserted after the name of the payee "Moore," and at the end of the copy of the note in the mortgage the name of Ruth M. Russell is omitted. Appellant contended that these two mistakes in the copy of the note were fatal to the validity of the mortgage as security for the note sued on. The court said: "* * * But the point is not maintainable. He (appellant) speaks in his briefs of the 'first' and the 'second' note, but there is nothing in the record to warrant a pretense that there were two notes. The question here is as to the identity of the debt and note secured, and it is quite apparent, notwithstanding the two slight mistakes in the copy, that the debt of $800 and the note sued on are the debt and the note referred to in the mortgage."

The case of Snow v. Holmes, 71 Cal. 142, 11 P. 856, involved a note dated March 1, 1878, payable on demand. A chattel mortgage dated June 1, 1878, was claimed to have been executed as security for the payment of said debt. The note is correctly described in the mortgage, except the date is given as February 8, 1878. The court there said, at page 147 of 71 Cal., 11 P. 856, 858: "The note was correctly described in the mortgage, except as to its date, and no question was made that the note produced was the one referred to and intended to be secured. If the date had been entirely omitted from the description, the mortgage would still have been good, and might have been foreclosed."

In W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, at page 193, 191 P. 1027, 1031, the court says: "It is not necessary to the validity of a mortgage that it should truly set forth the nature and character of the debt that it is intended to secure. Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. Ed. 260." See, also, Rose's U. S. Notes. See, also, 41 C. J. 409, § 256.

In the case at bar the court found, in part, "that James L. O'Donahue executed the note and trust deed described in paragraph II of the answer to the second cause of action (being the Rogers note and trust deed); that said James L. O'Donahue in executing and recording said trust deed intended to secure the promissory note in the sum of $45,000, made payable to Frederick M. Kincaid, and that the recital in said deed of trust that said promissory note was made to Frederick M. Kincaid and Blanche D. Kincaid was an error and that the note intended to be secured by said James L. O'Donahue was the $45,000 note made payable to Frederick M. Kincaid, and that said deed of trust secured said note." The evidence amply supports such finding.

Counsel have not cited any cases in this state, and we have not found any, holding that the rules applicable to a mortgage containing an erroneous description of a note it secured, are applicable to a deed of trust. However, the question has been considered by other courts. The Supreme Court of Missouri says, in Graham v. Finnerty, 232 S. W. 129, at page 130:

"Appellant contends that because the deed of trust recited that 'whereas first parties (Finnerty and wife) have been jointly indebted to the third party for borrowed money in the sum of $6,000,' to secure which with interest they have executed a note payable to said third party for $6,000, etc., and there having been no such joint indebtedness, and no such joint note, the deed of trust did not describe, and was not intended to secure, the $6,000 note, shown in evidence, executed by Thomas Finnerty alone, and consequently said deed of trust was void as to both Thomas Finnerty and his wife.

"But we hold that such a variance in the description of the note secured was not fatal, and did not avoid the deed of trust as to Thomas Finnerty; that parol and extrinsic evidence of the circumstances and what was actually done by the parties was admissible to show the note actually intended to be secured. The evidence showed, and it was admitted, that the only $6,000 note and $150, interest notes corresponding in date, maturity, and payee, * * * to the notes described in the deed of trust, were the said notes executed by said Thomas Finnerty alone, and by him transferred, as secured by said deed of trust, as collateral. * * * The conclusion is irresistible, therefore, that such individual notes of Thomas Finnerty were the notes intended to be secured by said deed of trust and described therein. * * * It is well settled that such a variance between the notes intended to be secured and their description in the deed of trust or mortgage is not fatal and does not impair the validity of such deed or mortgage"—citing cases.

The Texas Supreme Court in Thompson v. Cobb, 95 Tex. 140, 65 S. W. 1090, 1092, 93 Am. St. Rep. 820, had before it a trust deed having an erroneous description of the note which it secured. Quoting with approval from Paine v. Benton, 32 Wis. 491, the court stated the rule applicable as follows: " 'It is well settled, where the note agrees in some respects with that described in the mortgage, though it differs in others, that it may be proved by parol to be the note intended to be described in the mortgage.' " The court then says: "That this is the true rule, when the mortgage correctly gives sufficient particulars to enable the court, by the application of them, to identify the instrument produced, after rejecting the false particulars, is recognized without conflict in a great number of authorities, in which almost every variety of mistake in description is found. (Citing cases.) * * * These errors are to be rejected and the note identified by the remainder of the description, there being enough for the purpose; and parol evidence is admissible, if indeed it be necessary, for the purpose of identification."

It is urged that, while the above rule may be proper in mortgage foreclosure proceedings, it cannot be applied to trust deeds. In that regard the court, in Thompson v. Cobb, supra, says: "His (the trustee's) power comes from the deed of trust, properly construed with the aid of facts legally admissible in explanation of it. When the deed, considered with these facts, is found to secure a particular note, by the same process the power to sell is established, because it is given to enforce the payment of such note. The power to sell existing, and being duly followed, the sale could not be void."

We think the rules of law declared in the above decisions are applicable to the issues presented in the case at bar. Applying these rules of law, it is apparent that the payment of the debt, as evidenced by the promissory note, is the obligation that is secured. Hence, if the note can be identified by the other description thereof in the trust deed and parol evidence, after rejecting all erroneous portions, the variance between the note described in the trust deed and the note actually evidencing the indebtedness is not fatal. The appellant's contention that, as the note described in the trust deed was never executed, no trust ever came into being, is therefore not maintainable. The transfer by Kincaid to Mrs. Rogers of the trust deed securing the payment of the debt, and the note actually executed evidencing the debt, placed her in position to cause the same to be foreclosed as provided under the terms of the trust.

[4, 5] Appellant further contends that the notice of default recorded by the trustee was insufficient, that is, that, even though the trust constituted a valid lien on the premises, the sale was premature because of failure to give the required notice under the provisions of section 2924 of the Civil Code, as amended by St. 1933, p. 1669, § 1. The notice was recorded in ample time to comply with the requirements of the statute. Hence, if sufficient in substance, it was sufficient in law. Civil Code, § 2924, as amended, states the requirements of the notice of default as follows:

"* * * The trustee * * * shall first file for record, in the office of the recorder of each county wherein the * * * trust property or some part or parcel thereof is situated, a notice of default, identifying the * * * deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the * * * trust property and containing a statement that a breach of the obligation for which such * * * transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation. * * *"

A reading of the notice of default reveals that it contains all the facts required to be contained therein by the provisions of the statute, and in addition thereto certain other statements of fact not required by statute or the terms of the trust, including the erroneous statement as to the names of the payee of the note, as shown by the error in the purported copy of the note set up in the trust deed. There is no provision of the statute requiring the notice of default to show any fact relative to the original payee, unless such fact is necessary to make a description of the trust deed, and we do not think it is necessary here. Such a recital or any recital not required by statute or the terms of the trust is surplusage, and does not have the effect of invalidating the notice of default. In other words, the requirements of the statute and the terms of the trust having been complied with, as to the notice of default, the notice of default was both proper and legal. The notice of sale having been given as required by statute and the terms of the trust, and the premises having been sold to Ellis Hill Rogers at the sale, the trustee's deed conveyed the trust estate to her, and any subsequent sale of the premises under and by virtue of any subsequent trust deed could not in any wise affect her interest in the property thus conveyed to her.

The conclusion we have reached herein makes it unnecessary to discuss other points raised on appeal. We are satisfied the evidence was sufficient to sustain the findings and that there is no error disclosed by the record on appeal.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

137 Cal.App. 701

JOHNSON v. JOHNSON et al.

Civ. 1202.

District Court of Appeal, Fourth Appellate District, California.

April 3, 1934.

1. Automobiles 🔑245(24).

In action for injuries sustained by automobile guest in highway intersectional collision, gross negligence of host *held* for jury.

2. Automobiles 🔑244(20).

Evidence that automobile host approached intersection at 50 miles an hour and that colliding motorist had right of way and that there was nothing to prevent host from seeing other automobile and making turn sustained jury's finding that host was guilty of gross negligence.

3. Automobiles 🔑246(9).

Instruction that motorist colliding at intersection could not assume that road was clear but was required to anticipate presence of others *held* not erroneous where question of right of way was for jury.

4. Automobiles 🔑245(24).

In action by automobile guest against host and other motorist colliding at highway intersection, question of right of way *held* for jury.

5. Trial 🔑260(8).

In action by guest against host and other motorist colliding at highway intersection, refusal of defendants' instructions on right of way *held* not error where court gave instruction covering matter in words of statute (St. 1929, p. 541, § 131).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. W. Johnson against George I. Johnson and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

M. F. McCormick, of Fresno, for appellant Johnson.

Wakefield & Hansen, of Fresno, for appellant Eastlund.

James W. Campbell, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to recover damages for injuries sustained by the plaintiff while riding in an automobile as the guest of his father, the defendant George I. Johnson, which injuries occurred as the result of a collision between that automobile and one driven by the defendant Eastlund. The collision occurred in the daytime of June 1, 1930, at the intersection of Mendocino avenue and Dinuba avenue, two country roads in Fresno county. Mendocino avenue is a paved road running north and south and Dinuba avenue, an oiled road, intersects it at right angles. On the occasion in question the Johnson car was proceeding north on Mendocino avenue and the Eastlund car came from the west on Dinuba avenue and turned north on Mendocino. The collision occurred somewhere within this intersection and while the Eastlund car was making the turn or just as it was completing the same. There were no eyewitnesses other than the occupants of the two cars and their testimony is hopelessly conflicting.

Testimony was given by the defendant Johnson and his witnesses to the effect that he was traveling through the intersection at about 30 miles an hour; that about 50 feet south of the intersection his son called his attention to the Eastlund car; that he then saw this car some 100 or 200 feet west of the intersection; that that car was then traveling between 25 and 30 miles an hour; that he entered the intersection first; that the collision occurred when the rear of his car was about the center of Dinuba avenue; that the Eastlund car hit his car over the left rear wheel; that after the collision his car struck an electric power pole standing at the northeast corner of the intersection; that his right rear fender struck the pole and the car bounced north and to the west of the pole; and that the Eastlund car stopped about the middle of the paved portion of Mendocino avenue, near the north line of the intersection and just to the west of where his car stopped. He also testified that he did not slacken his speed and that he had no occasion to do so as he had the right of way.

The defendant Eastlund's version, sustained by other occupants of his car, was that as he approached the intersection he was traveling not more than 15 miles an hour; that he reduced his speed and entered the intersection at not more than 8 miles an hour; that he intended to turn north on Mendocino avenue and signaled for a left-hand turn by holding his left hand straight out; that he saw the Johnson car when he was about 20 feet from the intersection; that at that time the Johnson car was about 200 or 300 feet south of the intersection and coming pretty fast, probably 50 miles an hour; that he did not cut the corner, but made a square turn, keeping on the pavement, however; that the collision occurred when he had about completed the turn and when his car was not quite straightened out parallel with the east edge of the pavement; that the Johnson car struck his car on the right-hand front fender just ahead of the right front door; that the left front wheel or bumper on the Johnson car struck his car; that the cars then bounced together, throwing the rear end of the cars together; that neither the front of his car nor any portion thereof near the front struck the left rear fender of the Johnson car; that the front right wheel of his car was broken and the front fender and back fender on the right side of his car were damaged; and that at the time of the collision his automobile was on the east edge of the pavement and the Johnson car was either entirely or partly off the pavement.

A disinterested witness who arrived on the scene shortly after the accident testified that the Johnson car was entirely on the dirt with its rear about 2 feet from the power pole; that the Eastlund car was standing on the pavement just to the west of the other car; that the right front wheel on the Eastlund car was broken and the right front fender damaged; that the right side of the Johnson car was damaged; and that the right rear wheel hub on the Johnson car had plowed a hole in the power pole an inch deep and about 3 inches wide.

At the time this accident occurred the law permitted a guest to recover on proof of gross negligence and this case was tried upon that theory. The jury rendered a verdict against both defendants and each defendant has appealed, the appeals being separately presented.

[1, 2] The appellant Johnson first contends that the evidence, as a matter of law, is not sufficient to support the implied finding of gross negligence on his part. It is first contended that while the evidence given by the occupants of the Eastlund car was to the contrary, the physical facts conclusively prove that the Johnson car entered the intersection first and that the other car struck it on the fender just over the left rear wheel. As demonstrating this, this appellant relies upon a photograph of his car appearing in the record which shows its left rear fender dented or caved in just above that wheel. It is argued that this physical fact cannot be explained under the theory maintained by the occupants of the Eastlund car and conclusively shows that this appellant's theory as to how the accident occurred is correct. The danger of relying exclusively upon the condition and position in which cars are left for an explanation as to how a collision occurred, and the many elements of uncertainty affecting such a situation, has been frequently pointed out. Fishman v. Silva, 116 Cal. App. 1, 2 P.(2d) 473; Johnston v. Peairs, 117 Cal. App. 208, 3 P.(2d) 617; Holt v. Yellow Cab Co., 124 Cal. App. 385, 12 P.(2d) 472. It may be also observed that this appellant's theory of how the accident happened leaves unexplained a number of other physical facts. For instance, the front end of the Eastlund car was not damaged, the left front fender and light on the Johnson car were badly damaged, as shown by the photographs appearing in the record, and the bumper of the Johnson car was knocked off, although the evidence shows that neither the front nor the left side of that car struck the power pole. It would appear that the existing physical facts, that is the condition in which the cars were left, could be better explained under the theory advanced by Eastlund as to how the accident occurred than under this appellant's version. It is easy to account for the damage appearing on the right front side of the Eastlund car and for the damage to the bumper and left front side of the Johnson car, if the Eastlund car, as it was about to complete the turn, was struck just behind its right front wheel by the bumper and left front side of the Johnson car. And the force of the blow, with the fact that the Eastlund car was being steered to its left in making the turn, might then naturally result in the rear portion of the Eastlund car sliding to its right and making the dent which appears in the left rear fender of the Johnson car. The force of the collision and the natural impulse of the driver to turn to the right would then account for the Johnson car swerving to the right and colliding with the power pole after the front end of the car had passed that object. Under the record here, it is not possible to hold that the physical facts relied upon by this appellant are sufficient to overcome the physical facts and the testimony which tend to have a contrary effect.

This appellant next contends that the evidence is not sufficient to show gross negligence upon his part for the reason that the respondent's testimony as to how the accident occurred corresponds with and sustains this appellant's theory in that regard and that any evidence supporting the theory advanced by Eastlund cannot change the result, so far as this appellant is concerned, because the respondent is bound by his own testimony and cannot avail himself of any contrary testimony appearing in the record. In effect, it is argued that the respondent is bound by his own testimony, that this testimony is essentially the same as that given in support of this appellant's theory, and that the respondent may not recover against this appellant regardless of any other evidence which appears.

It may first be observed that while it has usually, if not always, been held that the rule contended for applies where a party to an action testifies to some fact peculiarly within his own knowledge or where he makes an admission, there is very good authority for refusing to apply the rule in a case where a party, instead of making an admission or testifying as to a fact peculiarly within his knowledge, is merely giving a narration of how something occurred as the same appeared to him. Hill v. West End St. Ry. Co., 158 Mass. 458, 33 N. E. 582; Whiteacre v. Boston Elevated Ry. Co., 241 Mass. 163, 134 N. E. 640; Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 A. L. R. 619. The exception referred to might well be applied to accident cases, where it is well known that honest witnesses do not always see the same thing or get a correct impression of the happening and relation of a series of events which take place almost simultaneously. In any event, whether or not this exception be adopted in this state, there is nothing in the respondent's testimony which necessarily conflicts with the essentials of the theory of the accident advanced by Eastlund. While the respondent did not testify strongly against his father, certain omissions in his testimony are significant. He does not state who came into the intersection first and he does not definitely state which car first struck the other. He testified that he was riding in the rear seat of his father's car and that he saw the collision; that at that time the rear of his father's car was about the center point of the intersection; and that his father's car was on the right half of the pavement and at no time left the pavement. While he states that the right front wheel of the Eastlund car came in contact with and struck the left rear wheel of his father's car, he does not say when this occurred. He then states that the right-hand side of his father's car hit the power pole and that there was no contact or hitting of one car against the other after his father's car hit the power pole. He states that the Eastlund car was about 300 feet from the intersection when he first saw it; that it was traveling about 25 miles an hour; and that it increased its speed as it neared the intersection. He also testified that his father's car was about 300 feet from the intersection when he first saw the other car; that it was going about 35 miles an hour; and that his father slackened his speed to about 25 miles an hour as he approached the intersection. Under this testimony, with the other evidence, the jury could have believed that the Eastlund car was in the intersection first; that it had practically completed the turn; that the left front of the Johnson car struck the right front of the Eastlund car; and that as the Johnson car went on, the right front of the Eastlund car rebounded and struck the left rear of the Johnson car. Or the jury might have believed that when the front end of the cars came together the force of the blow swung the rear end of the two cars together. Or, if the respondent's testimony be taken to mean that the first contact of the two cars was between the right front wheel of the Eastlund car and the left rear wheel of the Johnson car, the jury could have believed that while the Eastlund car was completing the turn and the Johnson car was attempting to pass it, the left rear fender of the Johnson car came into contact with the right front side of the Eastlund car, and thereafter the force of the blow and the action of the drivers caused the rear of the Johnson car to swerve to the right, and brought the front of the two cars together, causing the damage shown by the record. Under any theory of the case, the question was one of fact for the jury.

This appellant does not raise the point that the facts supporting Eastlund's theory of the happening of the accident are, in themselves, not sufficient to show gross negligence as distinguished from ordinary negligence. Under the law as established during the time gross negligence prevailed as a basis for recovery in such cases, the question whether such negligence existed was one for the jury. And, under the decisions, we think the evidence to the effect that this appellant approached this intersection at a speed of 50 miles an hour and entered the same at approximately that speed, and that Eastlund had the right of way, together with the fact that there was nothing to prevent this appellant from seeing the other car in the intersection and making a turn, was sufficient to sustain the jury's finding.

[3, 4] The appellant Johnson next complains of the giving of the following instruction:

"You are instructed that it is a part of the duty of the operator of a motor vehicle to keep his machine always under control, so as to avoid collisions with other cars and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that any one was on the highway, is no excuse for the conduct, which would have amounted to recklessness, if he had known that another vehicle or person was on the highway."

It is argued that this instruction was erroneous and prejudicial for the reason that this appellant had the right of way and that the instruction fails to take account of that fact. It does not certainly appear that this appellant had the right of way and there was ample evidence to permit the jury to find that the other car had the right of way. Instructions were given as to the right of way rule and the entire matter was left to the jury and, we think, properly so. As the court said in Lindenbaum v. Barbour, 213 Cal. 277, 2 P. (2d) 161, 164:

"We are also unable to agree with appellant's contention that the judgment should be reversed by reason of the fact that the court erroneously instructed the jury to the prejudice of the defendant. Appellant objects to an instruction which states that the defendant was 'bound to anticipate that he might meet persons at any point on the highway and he must, in order to avoid a charge of negligence, keep a proper lookout for them. * * *' He argues that the obligation to keep a proper lookout placed a burden upon the defendant which under the facts he was not required to bear, inasmuch as this obligation was inconsistent with the rights flowing from the right of way rule. It is apparent that in complaining of this instruction appellant is presuming that he was entitled to the right of way at the intersection. As we have before indicated, he was not entitled to the right of way, and this is not, therefore, a valid objection to this particular instruction nor to the other instructions complained of, which complaints involve the same assumption."

[5] The only other point raised by this appellant and the only point raised by the appellant Eastlund is that the court erred in refusing an instruction offered by each. Each of these instructions was to the effect that if the jury found from the evidence that that defendant entered the intersection before the other defendant entered the same, the one thus first entering had the right of way. It may be conceded that an instruction along this line was called for under the circumstances shown by the evidence, but the court gave one reading as follows:

"Section 131 of the California Vehicle Act provides that 'The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time the driver of the vehicle on the left shall yield to the driver on the right.'" (St. 1923, p. 560, § 131, as amended by St. 1929, p. 541.)

This instruction covered the matter in question in the words of the statute and we see no prejudicial error in refusing to repeat the same thing in three different ways.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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137 Cal.App. 630

In re HARTLEY'S ESTATE.

BACON et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 9416.

District Court of Appeal, First District,
Division 1, California.
March 31, 1934.

Rehearing Denied April 30, 1934.

1. Wills 🔑55(1).

Marked change in testatrix' habits of thought about time will was executed constitutes strong evidence of mental unsoundness.

2. Wills 🔑52(3).

Proof of testatrix' sanity and of facts upon which her state of mind depends *held* not necessarily confined to time of execution of will.

3. Wills 🔑52(3).

Evidence showing testatrix' mental status, together with her appearance, conduct, acts, habits, and conversation, both before and after execution of will, are admissible, if having reasonable tendency to indicate mental condition at time of execution of will.

4. Wills 🔑55(7).

In will contest, evidence *held* to support verdict finding that testatrix, 80 years of age and formerly a school teacher, was of unsound mind and incompetent to execute will.

5. Wills 🔑166(4).

Preparation of will by lawyer who obtained all information regarding will from beneficiary, and who was neither requested, nor given opportunity, to consult testatrix, *held* evidence against good faith of beneficiary who allegedly exercised undue influence.

6. Wills 🔑166(8).

In will contest, evidence *held* to support verdict finding that will of testatrix, who was 80 years old at time, was procured by undue influence of beneficiary.

7. Witnesses 🔑276.

In will contest, permitting cross-examination of beneficiary as adverse party, where beneficiary was employee of proponent-bank at time will was executed, but not at time of trial, *held* not abuse of discretion, where facts would have been brought out later (Code Civ. Proc. § 2055).

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceedings in the matter of the estate of Jennie E. Hartley, deceased, wherein Dollie Bacon and others filed a will contest, opposed by the Bank of America National Trust & Savings Association. From a judgment in favor of the contestants, the proponent appeals.

Judgment affirmed.

Keyes & Erskine, of San Francisco, and Edmund Scott, of Redwood City (William A. White, of San Francisco, of counsel), for appellant.

Treat & Ogden and Barrett & Barrett, all of San Francisco, for respondents.

PER CURIAM.

Respondents filed a contest to the will of Jennie E. Hartley. The contest was based upon three grounds: (1) Incompetency of Jennie E. Hartley; (2) lack of due execution; and (3) undue influence of Carl E. Wagner. The trial was had before a jury. After respondents had rested their case, appellant moved for a nonsuit on all of said grounds, and same was denied. Thereupon the trial continued, and the jury returned a verdict that the testatrix was of unsound mind at the time she executed the will, that the said will was not executed in the manner and form required by law, and that it was procured under the undue influence of Carl E. Wagner. Upon this verdict judgment was rendered in favor of respondents, and thereupon appellant moved for a new trial, and, same being denied, it prosecutes this appeal.

Appellant contends that the evidence is not sufficient to support the verdict. The evidence produced by respondents was substantially as follows: They were the next of kin and heirs at law of decedent; they were her first cousins; two of them, Dollie and Birdie Bacon, had lived with her since 1907; that the alleged will was executed on July 3, 1928; that the testatrix at that date was eighty years of age; that she had been a resident of Redwood City for many years; that she had been a school teacher, had taught in that city, and for a time was assistant superintendent of schools in San Mateo county; that during all of this time she was a dignified, refined, and intelligent woman, very decorous in her conduct. Beginning in 1919, and continuing thereafter until her death on August 30, 1932, her friends and acquaintances began to notice a change in her mental condition, and this change became more marked in 1926 following the death of a sister. Numerous intimate friends and neighbors of decedent testified to her unsoundness of mind and mental incompetency during 1927 and 1928, and that this condition continued to exist until her death. Two physicians, Dr. Joseph Butler and Dr. Bernard Kaufman, gave as their opinions that the testatrix was mentally incompetent in 1928. Dr. Butler, who was her physician since 1918, testified that in his opinion the decedent was incompetent since 1919. Dr. Kaufman, who was called in consultation with Dr. Butler, testified that in his opinion she was incompetent in 1928. Richard Barrett, who had been her attorney and legal advisor for a number of years, testified that he had known her and had been intimately acquainted with her since 1907, that he noticed her mind became unbalanced in the early twenties, and that after her sister's death in 1926 she grew worse mentally, and from that time on was mentally incompetent. She could not carry on a coherent, connected conversation, and on a number of occasions when she came to his office she would dance around. She offered to deed him some of her real estate, but he declined to accept it. Mrs. Miramontes, city tax collector of Redwood City, testified that she had known the testatrix for thirty years; that in her opinion from 1926 on said testatrix was an incompetent person. Mrs. Agnes Coleman

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

testified that she had been a neighbor of testatrix for many years, and frequently met and talked with her; that decedent had been a very bright woman until 1925 or 1926; that then there was a marked change in her mentality, and in 1928 she was wholly incompetent. Mrs. Emma Lalande said that she had been intimately acquainted with decedent for many years; that prior to 1924 she was a very bright woman; in 1924 she noticed that her mind was failing and she gradually grew worse, her memory failed her, she could not collect her thoughts, and after 1926 she was incompetent. Many other witnesses, friends and neighbors of decedent, testified that she was an incompetent person in 1928; that her memory had failed; that she would repeatedly ask questions over and over again after they had been answered; that she frequently tried to pay bills that she had already paid; that she danced and recited little poems in the presence of strangers; that she was not able to dress herself; that she could not count money, and often did not recognize people she had known for years; that she could not maintain a conversation, but would abruptly switch from one subject to another without finishing the subject about which she had been conversing.

[1-4] When we take into consideration the mental condition of the testatrix as it existed prior to 1925 or 1926, and compare it with the condition that prevailed after that time and until her death, we can but see that there was a very marked change in her mentality. "A marked change in a man's habits of thought is strong evidence of his mental unsoundness." In re Carpenter's Estate, 79 Cal. 382, 387, 21 P. 835, 837. Proof of the sanity of the testator and of the facts upon which his state of mind depends are not necessarily confined to the exact time of the execution of the will. Evidence of the testator's mental status, together with his appearance, conduct, acts, habits, and conversation, both before and after the execution of the will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time of the execution of the will. Its weight was for the jury to determine. Estate of Baker, 176 Cal. 430–438, 168 P. 881; Alexander on Wills, p. 487, § 358). This is particularly true when the characteristics of the malady indicate a permanent and progressing mental disease. This is the nature of senile dementia. Estate of Alexander, 111 Cal. App. 1, 295 P. 53; Estate of Ivey, 94 Cal. App. 576, 271 P. 559. There was substantial evidence to support the verdict of the jury that the testatrix was of unsound mind and incompetent at the time she executed the will. We are also of the opinion that there is sufficient evidence to support the verdict that undue influence was exerted over the mind of the testatrix by Carl E. Wagner.

[5, 6] Wagner became manager of the Redwood City branch of the appellant bank on June 1, 1927. Prior to that time he had not known the testatrix. He first became acquainted with her at the bank in Redwood City in June, 1927. He immediately began a course of conduct toward her to gain her confidence. Her visits to the said bank became almost of daily occurrence. Wagner would meet her as she entered the bank building and conduct her to his office in the bank, would pat her hand and evince toward her a feeling of exceeding friendship and regard. He would write out her checks and procure for her the money she desired to withdraw. Some six months prior to the date of the execution of the will he suggested to her that she place her property in a trust and execute a will, and from time to time thereafter he renewed these suggestions. He induced her to loan him $8,500, of which sum he obtained $4,500 from her without security, although he was a man of limited means. He induced her to loan or give to his two children $600 each, and he finally induced her to place her property in a trust. This trust and the will were executed at the same time. By this trust the sum of $40,000 was set apart in a separate fund, the income from which was to be paid to Wagner to be used by him at his discretion, until October, 1951, for the education of his children. The will and trust agreement were prepared at the San Francisco office; Wagner furnishing the information upon which they were drawn. They were then brought to Redwood City and signed by the testatrix. Wagner testified that before she signed the said instruments he read them to the decedent and then called in two of the employees of the bank and told them that the testatrix had made her will and wished them to sign it as witnesses; that decedent signed the will, and then the witnesses signed it, but that the testatrix did not say that it was her will, nor did she ask them to sign it as witnesses. In fact, during the execution of the will, she said nothing. The preparation of the will by a lawyer who obtained all his knowledge from Wagner and was neither requested to consult nor given opportunity of adequate conference with the testatrix speaks volumes against the good faith of Wagner. Estate of Nutt, 181 Cal. 522, 527, 185 P. 393.

[7] Appellant next contends that the trial court erred in permitting the cross-examination of Wagner, an adverse party, called as a witness under section 2055 of the Code of Civil Procedure. He had been the general manager of appellant when the will was executed, and had remained such after this action was commenced, but was not in appellant's employment at the date of the trial. In Estate of McDonald, 191 Cal. 161, 170, 215 P. 545, 549, the court said: "This witness was perfectly competent to testify in the case regardless of the provisions of section 2055 of the Code of Civil Procedure, and it is not shown by appellant that any evidence elicited by way of cross-examination under section 2055 would not have been admissible under the general rules of evidence, nor is it shown in what manner appellants were prejudiced, if at all, by this manner of examining the witness. The method of examining witnesses is largely in the control and discretion of the trial court, and, the evidence in question being relevant, it is not important how the examination was characterized." We see no error in this action of the trial court. It brought out facts which would have been brought out later, for the reason that appellant when offering testimony in its own behalf placed this witness on the stand and after his direct examination he was again cross-examined by respondents.

Appellant also complains of certain instructions given and refused, but an examination of the instructions as a whole shows that the law applying to this case was fully and fairly given to the jury and covered those refused by the court.

The judgment is affirmed.

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137 Cal.App. 668

MONTGOMERY v. BOARD OF EDUCATION OF LOS ANGELES CITY et al.

Civ. 9348.

District Court of Appeal, Second District, Division 2, California.
April 3, 1934.

1. Schools and school districts 🔑141(1).

High school teacher did not acquire any rights as permanent teacher by reason of her service prior to adoption of Teacher Tenure Law (Pol. Code, § 1609, repealed by St. 1929, p. 303 [School Code, § 10.3]).

2. Schools and school districts 🔑141(1).

High school teacher, having acquired classification of permanent teacher by serving two consecutive years and thereafter resigning on account of ill health and leaving school system, *held* not entitled to be classified thereafter as permanent by reason of such prior service (School Code, § 5.500, as amended by St. 1931, p. 1394, § 4; § 5.503, as added by St. 1931, p. 1394, § 4; § 10.3; Pol. Code, § 1609, as amended by St. 1921, p. 1663).

3. Schools and school districts 🔑141(5).

High school teacher, serving two years as probationary teacher and accepting contract as substitute teacher for third year, did not acquire permanent status so as to require preferment of charges and hearing for her dismissal though she signed letter that she did substitute work with understanding that she would complete probationary period by serving extra year if she should secure regular position (School Code, § 5.500, as amended by St. 1931, p. 1394, § 4; § 5.503, as added by St. 1931, p. 1394, § 4; § 10.3; Pol. Code, § 1609, as amended by St. 1921, p. 1663).

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Etta L. Montgomery against the Board of Education of Los Angeles City and others. From an adverse judgment, plaintiff appeals.

Affirmed.

George J. Shaffer, of Los Angeles, for appellant.

Everett W. Mattoon and E. R. Purdum, both of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Appeal by plaintiff from a judgment quashing an alternative writ of mandate issued upon her petition and denying her prayer for a permanent writ.

The case was presented to the trial court on stipulated facts, which show that plaintiff held certificates entitling her to teach in the Los Angeles City High School District, that she was elected by the defendant Board of Education to teaching service in said district and was so assigned February 7, 1916, continuing to teach therein until January 22, 1921, when a temporary leave of absence was given, evidently at her request. September 21, 1921, she was again elected and assigned as a teacher in said district and continued so to act until October 15, 1923, at which time she resigned on account of ill health. February 6, 1924, appellant was once more elected and assigned to teaching service in said district, this time as a substitute teacher, and served as such until the end of that school year, June 30, 1924. April 12, 1924, appellant took and passed an examination to requalify for teaching service after her resignation. September 8, 1924, she was elected and assigned as a probationary teacher and served the full year, or until June 30, 1925. September 9, 1925, she was again elected and assigned to serve as a probationary teacher and served as such until her "illness in quarantine," from October to December, 1925, which was followed by a leave of absence until March 13, 1926, when she was assigned as *substitute* teacher, serving in such capacity until the end of the school year, June 30, 1926, a total of 112 days for such school year. July 1, 1926, she was again elected and assigned as a *substitute* teacher and served as such a total of 119 days for such school year. July 7, 1927, she was again elected and assigned as a *substitute* teacher and served a total of 164½ days in that school year. May 28, 1928, she was given a probationary contract and served in such capacity for the school year following, or until June 30, 1929. May 16, 1929, appellant was again elected and assigned as a *substitute* teacher, but on September 12, 1929, her contract was changed by said board to that of a *probationary* teacher and she was assigned to serve as such in the Gardena high school, serving for the full year or until June 30, 1930. July 1, 1930, she was given a *probationary* contract, but when she refused a transfer to some school in the metropolitan district as a probationary teacher she took a *substitute* contract so as to be able to teach in such area, serving there for 174⅗ days in the year ending June 30, 1931. Appellant signed a letter prepared in the office of defendant board and dated September 2, 1930, stating that she knew that she "was offered the opportunity of teaching a third year on probation at Gardena high school during the school year 1930–1931," but that she preferred to do substitute work beginning September 2, 1930, "with the understanding that, should I later secure a regular position, I will expect to complete my probationary work by serving at least one additional year as a probationary teacher." May 5, 1932, appellant was discharged by respondents, effective June 30, 1932. No charges against her were made nor was there a hearing of any kind. August 27, 1932, she was placed "on the High School Reinstatement List, eligible for reinstatement as a teacher in the Los Angeles City High Schools until August 1, 1933." Formal demand was made on respondent board for assignment to duty as a permanent teacher in said district high schools, which demand was refused. Said Board of Education and the positions held by appellant were subject to the provisions of section 1609 of the Political Code, commonly known as the Teacher Tenure Law, enacted in 1917 (St. 1917, p. 737, § 8) and amended in 1921 (St. 1921, p. 1663) and repealed March 28, 1929 (St. 1929, p. 303 [School Code, § 10.3]), when the present School Code went into effect. It also appears that a complete school year consists of approximately 200 teaching days.

The sole question involved on this appeal is: Was plaintiff, at the time of her dismissal, a *probationary* teacher, or had she acquired a *permanent* status? If she had, her dismissal without the preferment of charges and a hearing was ineffectual and the lower court's judgment denying her relief was erroneous.

[1] Appellant did not acquire any rights as permanent teacher by reason of her service prior to the adoption of the Teacher Tenure Law in 1921. Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881. Section 1609 of the Political Code as then amended gave boards of education the power and made it their duty to employ substitute, probationary, and permanent teachers, and to classify as substitute teachers those persons employed from day to day, to classify as permanent teachers "all persons who shall have been successfully employed as teachers by the district for *two consecutive school years*" at the time of classification, and to classify as probationary teachers those persons employed as teachers for the school year who have not been classified as permanent. In 1927 such section was amended (St. 1927, p. 1913) so as to make the period of service "*for two or three complete consecutive school years*" requisite for permanent classification. The School Code, as adopted in 1929 (section 5.500), had a similar requirement. In 1931 said Code section was amended (St. 1931, p. 1394, § 4) to make the time required "*three complete consecutive school years,*" and section 5.503 was added (St. 1931, p. 1394, § 4), providing that a probationary employee serving for at least 75 per cent. of the number of school days of the district in which

he is employed "shall be deemed to have served a complete school year."

[2, 3] It is to be observed that under the law and the stipulated facts appellant had acquired the classification of a permanent teacher by serving two consecutive years, viz., the school years of 1921–1922 and 1922–1923, and had started to serve her third year when she resigned on account of ill health. We must assume, under the facts stipulated, that such resignation was accepted by the respondent board as it was authorized to do under section 1609 of the Political Code as it then existed. Having resigned her position and left the system, there would seem to be no question but that appellant was no longer an employee of the district and was not entitled to be classified thereafter as permanent by reason of such prior service, nor until she again entered into contract with the district as a teacher, in which case her future classification would be determined by the nature of the contract or contracts given her and the law applicable thereto. The first contract given her after such resignation as a probationary teacher was that of September 8, 1924. She served the full year thereunder and approximately one month on the second year, when she became ill and was given a leave of absence; and on her return March 15, 1926, she accepted service as a substitute teacher. It will be noted that appellant had not then served two consecutive years as a probationary teacher and had not acquired a permanent status. Then followed a year of service as a substitute teacher, in 1927–1928. The next two school years, 1928–1929 and 1929–1930, were served as a probationary teacher, the last of the two being in the Gardena High School. Respondent board under the law then existing had the discretion, but did not use it, to classify appellant as a permanent teacher. She was offered a probationary contract for the third year in Gardena High School but refused it and accepted instead a contract as a substitute teacher, under which she could and did work in the metropolitan area of the district during such school year. So, notwithstanding the fact that appellant did serve as a probationary teacher during the school year 1931–1932, she had not served three complete consecutive years as such at the time she was discharged, and in our opinion the letter signed by her did not make the year 1931–1932 complete her permanent status, the law then requiring "three complete *consecutive* years" to acquire such status.

Under the facts of this case there was no error, in our opinion, in the implied finding that appellant was a probationary teacher at the time she was discharged, and that in consequence she was legally discharged without a hearing after charges filed.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

137 Cal.App. 719

NEW AMSTERDAM CASUALTY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1323.

District Court of Appeal, Fourth District, California.

April 5, 1934.

Hearing Denied by Supreme Court June 4, 1934.

1. Insurance ⚷129.

Insurance company *held* not bound by knowledge, intention, or representations of persons who were not its agents, and of which it had no notice.

2. Master and servant ⚷405(2).

Evidence in compensation proceeding sustained finding that experienced practical nurse, in attending aged disabled man, was acting as personal servant.

3. Master and servant ⚷405(4).

Evidence sustained finding of Industrial Accident Commission that claimant sustained disability resulting from fracture of femur.

4. Master and servant ⚷417(4).

Question of insufficiency of evidence in compensation case to support finding of disability was waived, where point was not argued in any of hearings before commission or in petition for rehearing (St. 1917, p. 873, § 64(c).

◆

Proceedings under the Workmen's Compensation Act by Katherine Stacy, opposed by the New Amsterdam Casualty Company, insurer, and D. B. Moore, employer. To review an award of the Industrial Accident Commission in claimant's favor, insurer and employer bring certiorari.

Affirmed.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

W. N. Mullen, of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

MARKS, Justice.

D. B. Moore, an elderly gentleman of the age of about eighty-four years, suffered a fracture of his hip and was confined to a hospital in the city of Tulare for a considerable time. During the early part of his confinement there he was cared for by graduate and registered trained nurses. For the latter part of his stay he was attended by Miss Katherine Stacy, who was not a graduate and registered nurse, but came within the classification of practical nurse. It was not questioned that her long experience had qualified her to perform all of the duties of a graduate and registered nurse. While at the hospital she performed these duties and received the compensation of a graduate and registered nurse.

On December 8, 1930, Mr. Moore was discharged from the hospital and returned to his home. He was not sick, but was totally disabled as a result of his injury and the physical weaknesses of age so that he required the constant care of an attendant. He took Miss Stacy with him. She was on duty twenty hours a day, having four hours off. She lived, and took her meals, at the Moore home, and received about the same compensation as would have been paid to a graduate and registered nurse. During the four hours of each day when Miss Stacy was off duty, Mr. Foss took care of Mr. Moore. Mr. Foss was not shown to have possessed any of the qualifications of even a practical nurse. His services were entirely satisfactory, and it was not even suggested that he was not competent to perform all the functions of his employment and to attend to all the wants and needs of Mr. Moore. During his hours on duty he performed about the same services for Mr. Moore as did Miss Stacy during the twenty hours when she was attending him.

On August 25, 1932, while performing the duties of her employment at the home of Mr. Moore, Miss Stacy fell and fractured the neck of her left femur. She was confined to a hospital for a number of weeks, and was not able to work between the time of her injury and August 30, 1933. She applied for compensation and the Industrial Accident Commission awarded her $1,242.85, total temporary disability from August 25, 1932, to August 15, 1933, and the further sum of $25 per week commencing August 16, 1933, to continue until the termination of her disability, or until further order of the commission. This proceeding is brought to review this award.

The petitioners urge three grounds for the annulment of the award. (1) Conceding that Mr. Moore and the insurance agents intended to cover Miss Stacy as an employee under the policy written by the New Amsterdam Casualty Company, and accepted and paid for by Mr. Moore, and that all of them believed she was so covered; such agents were not agents of the casualty company, and therefore the New Amsterdam Casualty Company was not bound or obligated beyond the terms of its express contract; (2) that Miss Stacy was an independent contractor and not an employee of Mr. Moore, and therefore was not covered by the terms of the policy; (3) that there is no evidence in the record showing that Miss Stacy was disabled.

[1] The insurance policy written by the New Amsterdam Casualty Company covered the "employees" of Mr. Moore, who were defined as follows: "Two Inservants * * * one occasional in and outservant." Those employed by and attending Mr. Moore were a housekeeper, Miss Stacy, and Mr. Foss. The policy of insurance was procured by Mr. Moore through J. J. Mitchell, an insurance agent residing in the city of Tulare. Mitchell was assisted in the preparation of the application for the policy by F. R. Thompson. Mitchell was the authorized agent and Thompson the special agent of Seely & Co., insurance brokers of San Francisco. Seely & Co. secured the insurance policy from agents of the New Amsterdam Casualty Company without disclosing the fact that Mr. Moore, Mitchell and Thompson all intended to include Miss Stacy within the definition of an inservant, and believed that she was so included, or that the Moore household consisted of the housekeeper, Miss Stacy, and Mr. Foss. Neither Mitchell, Thompson, nor Seely & Co. were agents of the New Amsterdam Casualty Company. Under such circumstances, the New Amsterdam Casualty Company could not be bound by the knowledge, intention, or representations of those who were not its agents, and of which it had no notice. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 P. 859.

[2] The petitioners maintain that Miss Stacy was acting in the capacity of a professional nurse in her care of Mr. Moore, and that as such she performed "her usual duties with the skill which is the result of training in that profession (and), does not come within the definition of a servant, but rather is one

who renders personal services to an employer in pursuit of an independent calling." Moody v. Ind. Acc. Com., 204 Cal. 668, 269 P. 542, 543, 60 A. L. R. 299.

Respondents maintain that, while Miss Stacy possessed knowledge and experience sufficient to qualify her to act in the capacity of a professional nurse, the evidence shows that in fact she was a companion and personal servant of Mr. Moore, and as such subject to his complete direction and control. It is admitted by counsel that, if she were an independent contractor, the award must be annulled, but that, if she were working as a servant, a contrary conclusion must be reached.

Petitioners group the following facts which they maintain demonstrate that she was acting in the capacity of a graduate registered, professional nurse and was therefore an independent contractor within the ruling in the case of Moody v. Industrial Accident Commission, supra: A training and experience equaling that possessed by a registered graduate nurse; compensation equaling that received by such a nurse; her testimony that, had Mr. Moore instructed her to do something which she knew would be injurious to him and which the attending physician prohibited, she would have followed the directions of the physician instead of the demands of the patient.

We can see no reason why the qualifications of Miss Stacy should be controlling in determining her status in the home of Mr. Moore. There is no reason why a professional woman could not step out of her profession and accept menial employment if she desire to do so. During the past several years men and women possessing high professional training have been compelled by the extremities of the times to leave their professions and accept any employment that would supply the necessities of life. Nor should the rate of pay be controlling. It was a matter of private contract between the two, and, if Mr. Moore was willing to pay Miss Stacy more than the usual wage for similar services rendered, by a less highly trained servant, it was within his province to do so without changing the nature of the employment. Miss Stacy's testimony that she would not have followed the directions of Mr. Moore should he have required her to do something which would have been detrimental to him was in answer to a question by counsel which assumed that such an occasion might have arisen. The evidence shows that Mr. Moore made no request of Miss Stacy with which she did not comply. Miss Stacy never disobeyed the directions of Mr. Moore nor did she disregard his requests. We must determine her status from what the record shows actually occurred between the two rather than what might have happened had a different state of facts presented themselves.

One of the attending physicians testified that Mr. Moore was disabled but was not sick; that any one with ordinary intelligence, without special training as a nurse who had been shown and told what to do, could have taken care of Mr. Moore; that the services rendered by Miss Stacy were not those required of a graduate, registered nurse, but such as "any ordinary person can do * * * any ordinary housekeeper, mother, anyone in the family can do what she did at home." The evidence describing the various services performed by Miss Stacy amply supports the opinion of the doctor and the conclusion of the Industrial Accident Commission that Miss Stacy was acting in the capacity of companion and personal servant of Mr. Moore and not as a trained professional nurse.

[3] There is ample evidence in the record supporting the finding that Miss Stacy was disabled. The first hearing was held on October 26, 1932, when her testimony was taken at her bedside. She testified then concerning her fall and that her left femur had been fractured. A second hearing was held February 9, 1933, and a third on August 15, 1933. She was present and testified, and the referee had an opportunity to observe her physical appearance and actions on each of these occasions. On August 31, 1933, the attending physician of Miss Stacy filed the following report with the commission:

"Miss Katherine Stacy of Tulare, California, who was injured Aug. 25-1932 has been under my care since that time, and has been unable to do any work since her accident.

"Henry W. Fox, M.D."

[4] Another reason exists why this last contention of petitioners cannot be sustained. It is made here for the first time, and was not specifically urged at any of the hearings before the commission nor in the petition for rehearing. This being true, we must regard it as waived. Section 64 (c), Workmen's Compensation Act (St. 1917, pp. 831, 873); Great Western Power Co. v. Industrial Accident Commission, 196 Cal. 593, at page 600, 238 P. 662.

Petitioners reply that in their petition for rehearing, and as a ground thereof, they specified "that the evidence does not justify the findings of fact," and that this should be sufficient to raise the question of the insufficiency of the evidence to support the finding of disability. An argument on the evidence was incorporated in the petition, and this question was not mentioned. It was not argued in any of the hearings nor in the written arguments of counsel filed with the commission before the award was made. That sufficient proof of the disability of Miss Stacy had been offered seems to have been assumed by all parties in all proceedings had prior to filing the petition in this court to review the award of the commission. Under such circumstances, the question cannot be raised here for the first time.

Award affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 617

PEOPLE v. COSTA.

Cr. 1311.

District Court of Appeal, Third District, California.
March 30, 1934.

1. Criminal law 🔑1159(3).

On conflicting evidence on issue of identity of accused, jury's conclusion is conclusive unless testimony of identity is so weak as to constitute no evidence thereof.

2. Criminal law 🔑566.

Evidence *held* sufficient to establish identity of accused as individual who had forged check cashed by complaining witness.

3. Criminal law 🔑808½.

Instruction on reasonable doubt in language of statute, without further instruction thereon, *held* sufficient (Pen. Code, §§ 1096, 1096a).

4. Criminal law 🔑1170½(5).

In forgery prosecution of accused who gave assumed name to arresting officer, cross-examination of accused thereon *held* not prejudicial to accused.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Louis Costa was convicted of forgery with a prior conviction of a felony, and he appeals. Affirmed.

Sam Duker, of Tracy, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An information was filed against defendant, charging him with the crime of forgery and with having been previously convicted of a felony and having served a term of imprisonment therefor in the state prison at San Quentin, to which the defendant entered a plea of not guilty to the charge of forgery and admitted the prior conviction.

After a trial by a jury, defendant was found guilty as charged and now prosecutes this appeal from the judgment based thereon, claiming insufficiency of the evidence, failure of the court to properly instruct as to reasonable doubt, and prejudicial misconduct on the part of the district attorney.

It appears that a stranger called at the place of business of Mr. Vlahos and presented a check in the sum of $10, purported to have been made by one John Pedro and payable to J. Borges. The stranger said he was J. Borges and was employed by John Pedro who was a responsible business man in the community. The check was indorsed "J. Borges" in the presence of Vlahos, who delivered to the stranger a small amount of merchandise and the balance in cash. Upon presentation to the bank, the check was found to be a forgery. The defendant was arrested and identified by Vlahos as the man who had presented to him the check in question.

[1, 2] The first ground for appeal is as to the sufficiency of the evidence in that the identity of the defendant as the individual who presented the forged check is not established. It has been frequently held that a conflict of evidence as to the identity of the one on trial accused of having committed an offense presents a question solely within the province of the jury and their conclusion may not be disturbed on appeal. People v. Seawright, 72 Cal. App. 414, 237 P. 796. The proffered testimony as to the identity must be so weak before an appellate court can disturb the finding of the trial court on such an action, as to constitute no evidence to sup-

port the identification. People v. Farrington, 213 Cal. 459, 2 P.(2d) 814.

While the complaining witness Vlahos was unable to tell the color of appellant's hair or describe the clothing worn, he was positive in his identification of appellant as the man who cashed the check. He testified: "Well, that is him, that is all I got to say. * * * It looks like him, that is what I know, it is him, that is all. * * * Well, I had never seen him before. He came to the store, he is the man. Looking at him I know that he is the man, that is all I know." The witness was entitled to full credit and apparently from the verdict of the jury they believed his testimony.

[3] The second point urged for reversal by appellant is that the court failed to properly instruct on the question of reasonable doubt. The answer to that objection is that the court gave as its instruction on that question section 1096 of the Penal Code, and by virtue of section 1096a of the Penal Code the court need give no further instruction on the subject of the presumption of innocence or defining reasonable doubt than to read to the jury section 1096 of the Penal Code. People v. O'Shaughnessy (Cal. App.) 26 P.(2d) 847.

[4] As a third point urged for reversal, appellant complains that defendant's rights were prejudiced by permitting the assistant district attorney to examine defendant as to his use of another name or alias. Here the defendant gave the arresting officer at the time of his arrest an alias or an assumed name and was asked concerning this circumstance upon his cross-examination. In the case of People v. Meile, 97 Cal. App. 56, 274 P. 1003, 1005, the defendant, shortly after the robbery, rented a safe deposit box under an assumed name. Evidence to this effect was admitted and the court said: "Both the time and the manner of the rental were circumstances admissible on the same theory as flight or concealment of the person."

In People v. Frank, 75 Cal. App. 74, 241 P. 924, 926, the defendant attempted to sell a diamond pin which he was charged with stealing. Accosted by officers defendant fled, was pursued and captured and then gave an assumed name. "Under these circumstances there was no error in admitting the evidence complained of, as his statement giving a false name was made after the offense had been committed and evidently with knowledge on appellant's part of its commission. It must be considered, in connection with, and as a part of his attempted flight, after he, with a stolen pin in his possession, found himself in the presence of the officers of the law."

As was said in the case of People v. Cox, 29 Cal. App. 419, 155 P. 1010, 1011: "When a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt. * * *"

We find no error in the actions of the trial court nor were defendant's rights jeopardized by the question propounded by the district attorney, and for that reason the judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

220 Cal. 470

LANDIS et al. v. RAILROAD COMMISSION.

L. A. 14079.

Supreme Court of California.
March 30, 1934.

1. Automobiles 🔑107(2).

Railroad Commission's finding that petitioners were transportation companies within statute imported finding that each was common carrier of property over highways, and that each operated between fixed termini or over regular route (St. 1929, p. 1895, § 1(c).

2. Automobiles 🔑76.

Motortruck owner who, within limits of his equipment, held himself out to haul what he offered to carry for those choosing to employ him and pay charges satisfactory to him, *held* "common carrier" and not entitled to operate without certificate of public convenience and necessity (Civ. Code, § 2168; St. 1917, p. 330, as amended by St. 1929, p. 1894).

Truck owner was common carrier within definition of "common carrier" as one who, by virtue of his calling and his regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges, since, although his customers were limited to particular class of those who desired transportation of furniture and similar personal effects, those were the commodities which he offered to carry, and his public were those desiring transportation of such products, since, as applied to certain types of common carriers, "public" does not mean everybody all the time.

[Ed. Note.—For other definitions of "Common Carrier" and "Public," see Words & Phrases.]

3. Automobiles 🔑63.

That motortruck owner might have more than one-half of his business not subject to regulation by Railroad Commission could not render portion of his business which was subject to regulation immune from control of commission's regulating supervision (St. 1917, p. 330, as amended by St. 1929, p. 1894).

4. Automobiles 🔑107(2).

Evidence *held* insufficient to support Railroad Commission's finding that motortruck owner conducting radial on call trucking business was operating between fixed termini or over regular route so as to be required to obtain certificate of public convenience and necessity (St. 1917, p. 330, as amended by St. 1929, p. 1894).

Evidence disclosed that truck owner had place of business in Los Angeles where it conducted radial on call trucking business and also transported furniture and personal effects, that it had no similar business or business connection in San Francisco Bay region, and did not advertise to haul goods between such two points, that during seven months and a half period it hauled six loads from Los Angeles to San Francisco, and that on some occasion, it left some of goods with another transportation company, and on some trips received goods for return trip from some other transportation company.

5. Automobiles 🔑107(2).

Truck owner's occasional trips from Los Angeles to San Francisco were insufficient on which to base finding that described route was route over which it "usually or ordinarily operated" trucking business so as to be required to obtain certificate of public convenience and necessity (St. 1917, p. 330, as amended by St. 1929, p. 1894).

6. Automobiles 🔑107(2).

In absence of sufficient jurisdictional facts, order of Railroad Commission requiring truck owners to cease operations as carriers without certificate of convenience and necessity must be annulled (St. 1917, p. 330, as amended by St. 1929, p. 1894).

7. Automobiles 🔑107(2).

Decree requiring motortruck owners to cease operations as carriers of freight without obtaining certificate of convenience and necessity was not ambiguous because of recital that individual defendants, with but few exceptions, were common carriers, where finding as to each defendant was definite and specific (St. 1917, p. 330, as amended by St. 1929, p. 1894).

◆

In Bank.

Petition by C. W. Landis, doing business as the Highway Transportation Company, and others against the Railroad Commission to review an order of respondent.

Order as to petitioner named affirmed, and order as to petitioner the Safeway Transfer Van & Storage Company annulled.

Dixon & Howell, of West Los Angeles, J. J. Laton and C. P. Von Herzen, both of Los Angeles, and Thos. J. Dixon, of West Los Angeles, for petitioners.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review an order of the Railroad Commission requiring the petitioners to cease their operations as carriers of freight by motortruck between Los Angeles and the San Francisco Bay region and intermediate points unless and until they have received a certificate of public convenience and necessity as provided in the Auto Stage and Truck Transportation Act of 1917 (St. 1917, p. 330, as amended by St. 1929, p. 1894).

In July, 1932, complaints were filed with the commission charging the petitioners and others with owning and operating automotive trucks for the transportation of property as common carriers over the highways of the state between fixed termini or over regular routes, to wit, between Los Angeles and the San Francisco Bay region and intermediate points. Answers were filed by the several carriers and after extended hearings the commission made the findings and order complained of. A petition for a rehearing was denied.

The present petition was filed on behalf of three of the fourteen carriers affected by the order. After the petition herein was filed, the petitioner, Merle C. Turner, doing business as the Turner Van & Storage Company, sold his business and left the state. From this showing by the petitioners in their closing brief, the petition, so far as Turner is concerned, will be deemed abandoned, and the present proceeding will be considered as affecting the other two, who will be referred to as the petitioners.

The commission found the petitioners, as to the routes and termini set opposite their respective names, each to be a "transportation company," as defined in section 1, subsection (c) of the Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended by St. 1929, p. 1895), transporting for hire over the public highways new and secondhand household goods, office furniture, and personal effects without having a certificate of public convenience and necessity for such services. The routes and termini specified in the order are the same for each of the petitioners, and, as set opposite their names, are Los Angeles and San Francisco Bay points of San Francisco, Oakland, Berkeley, Alameda, Emeryville, Piedmont, Albany, and intermediate points. No other business of the petitioners is affected by the order of the commission.

[1] The finding of the commission that the petitioners are "transportation companies" as defined by the statute is a finding of ultimate fact. It imports a finding that each is a common carrier of property over the highways of the state, and that each operates between fixed termini or over a regular route. This finding is attacked as having no substantial evidence to support it.

[2] The petitioner Landis claims to be a private or "radial on call carrier," operating under contract in each case. The evidence in support of the finding of the commission shows that he maintains a regular place of business in Los Angeles in conjunction with the De Luxe Transfer & Storage Company, which does no long-distance hauling; that in San Francisco he has a business arrangement with the Owl Transfer Company which does no long-distance hauling, but takes orders for that class of business and refers the same to this petitioner; that this petitioner advertises and otherwise holds himself out to go anywhere if the price is agreeable; that about 25 per cent. of his business is interstate; about 25 per cent. is local to Los Angeles; about 25 per cent. is intrastate outside of the Los Angeles-San Francisco route, and about 25 per cent. is between Los Angeles and the San Francisco Bay region and intermediate points. The order of the commission relates only to the business representing the 25 per cent. last above noted.

As to the petitioner Landis, we think the evidence brings him within the definition of a common carrier, as defined by the Code (Civ. Code, § 2168), and generally by the courts in this and other jurisdictions. See People v. Duntley, 217 Cal. 150, 17 P.(2d) 715; Terminal Taxicab v. Kutz, 241 U. S. 252, 36 S. Ct. 583, 584, 60 L. Ed. 984; Sanger v. Lukens (D. C.) 24 F.(2d) 226, 228. The last case cited contains the following satisfactory definition of a common carrier applicable generally, to wit: "One who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." This definition is particularly applicable to the petitioner Landis under the evidence. Within the limits of his equipment he holds himself out to haul what he offers to carry to those who may choose to employ him and pay charges satisfactory to him. His offer to the public was such that he could not with reason be classed as a private or contract carrier. True, his customers were limited to the particular class of those who desired the transportation of furniture and like personal effects. But those were the commodities which he offered to carry and his "public" were they who desired the transportation of those commodities. As applied to certain types of common carriers, "the public does not mean everybody all the time." Terminal Taxicab Co. v. Kutz, supra.

[3] The commission was faced with another problem in determining whether the petitioner Landis was operating between fixed termini or over a regular route. As to his local business, his interstate business, and his long-distance hauling within the state from Los Angeles to points other than in the San Francisco Bay region, the commission apparently concluded that it could not reasonably be found that he was operating either between fixed termini or over a regular route. As to the remaining substantial part of his business, the commission found, and the evidence pointed reasonably to the conclusion, that, because of his business connections in Los Angeles and at San Francisco Bay points, and his methods of conducting business between those points, those places might be considered the termini between which he was conducting that portion of his business or that, as to such business, he traveled over a regular route. From either standpoint, we are not prepared to say that the finding of the commission is without support in the evidence. The fact that this petitioner may have more than one-half of his business not subject to regulation by the commission under present law obviously could not render the portion of his business which is subject to such regulation immune from the control of the commission's proper regulating supervision.

[4-6] The petitioner Safeway Van & Storage Company is a corporation which has its place of business in Los Angeles. It conducts a "radial on call" trucking business, also transporting furniture and personal effects for whomsoever may employ it at the price agreed upon. It has no similar business or business connection in the San Francisco Bay region and does not advertise to haul goods between the two points involved. Between February 1 and August 15, 1932, it hauled six loads from Los Angeles to San Francisco. On occasion it left some of the goods transported at the Busk Van & Storage Company of Oakland, with which firm J. J. Busk, the president of this petitioner, was formerly connected, and on some of the trips it received goods for the return trip from the Checker Van & Storage Company of San Francisco, with which other members of the Busk family were connected. The foregoing is all of the evidence cited to us as constituting facts sufficient to vest the commission with jurisdiction to subject this petitioner to the regulatory order. We are unable to conclude that this evidence was sufficient as matter of law to support the finding and order of the commission. Assuming that the evidence was ample to support a finding that this petitioner was a common carrier, it is deficient as a showing of the jurisdictional facts either that it was operating between fixed termini or over a regular route. There was no substantial showing that it operated between fixed termini, and in connection with its other business its occasional trips to San Francisco with its two trucks were insufficient upon which to base a finding that the prescribed route was the route over which it "usually or ordinarily operated" its trucking business. Under these circumstances, it must be held that there is no substantial evidence to support the finding. In the absence of sufficient jurisdictional facts, the order as to this petitioner must be annulled. See Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; Traber v. Railroad Commission, 183 Cal. 304, 191 P. 366.

[7] Complaint is made of alleged ambiguity in the decree wherein the commission states: "That these individual defendants, with but few exceptions, are, in fact, common carriers is clear." This statement was continued in the opinion preceding the findings and order, and related to a consideration of the status of all of the defendants. The finding as to each defendant is not subject to the same criticism, for the finding as to each of the petitioners is definite and specific.

The order as to the Safeway Van & Storage Company, a corporation, is annulled. The order as to C. W. Landis, doing business as the Highway Transportation Company, is affirmed.

220 Cal. 458

HENSHAW v. BELYEA.

L. A. 14406.

Supreme Court of California.

March 30, 1934.

Rehearing Denied April 26, 1934.

1. **Automobiles** ⚷245(6).

In action for injuries to one attempting to stop truck hauling excavating shovel, which started backing down incline after motor was not able to pull load to top of grade, whether truck with trailer was properly equipped with brakes, whether vehicles were out of control, and whether there was negligence in operation thereof presented jury questions.

2. **Automobiles** ⚷245(89).

In action for injuries to one attempting to stop truck backing down incline after motor was not able to pull load to top of grade, submission of issue of contributory negligence based on theory that human beings were in imminent peril, or in danger of injury *held* error under evidence.

> There were no appearances which would justify plaintiff in concluding that persons in vicinity might be endangered, since street was not a busy one, and there was no evidence that persons in vicinity would be unable to utilize their own faculties in keeping clear of vehicle which at best could move back but short distance on its own momentum.

3. **Automobiles** ⚷245(72).

Contributory negligence of one injured while attempting to stop truck and trailer which started backing down incline after motor was not able to pull load to top of grade *held* for jury.

4. **Negligence** ⚷75.

It is not contributory negligence per se for one owing duty to protect property to take manifest risk to save it unless risk is wanton or unreasonable, and exposure by person so situated is not presumed wanton or unreasonable exposure to unnecessary danger, test being whether reasonably prudent man would have assumed peril.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by William U. Henshaw against B. W. Belyea, doing business under the fictitious name and style of the Belyea Truck Company, to recover damages for personal injuries. From an adverse judgment, defendant appeals.

Reversed, with directions.

Prior opinion, 23 P.(2d) 434.

George H. Moore, Gerald O'C. Egan, Harry D. Parker, and White McGee, Jr., all of Los Angeles, for appellant.

Leslie S. Bowden and Gaines Hon, both of Los Angeles, for respondent.

PER CURIAM.

Appeal from a judgment entered on a jury's verdict for the plaintiff in an action to recover damages for personal injuries.

On August 28, 1933, the plaintiff was employed by Grunewald & Tudor, who were under contract to do excavating work at 114th street and Budlong avenue in the city of Los Angeles. The defendant, B. W. Belyea, who conducted a trucking business, was engaged by Grunewald & Tudor to haul an excavating shovel to that intersection on that day. Budlong avenue, which runs north and south, intersects 114th street with a jog. That is, Budlong avenue north from 114th street intersects the latter street a distance of from 60 to 90 feet easterly from the point where Budlong avenue intersects the southerly side of 114th street. The latter was a paved street. It was graded downward from the east to the north extension of Budlong avenue. Upward from the west curb of the north extension of Budlong avenue to the south extension of Budlong avenue there was about a 10 per cent. grade. The district was apparently a sparsely settled community. The plaintiff, who was employed to operate the shovel and whose duties also included the rendering of assistance in getting the shovel to the job and in loading and unloading it, arrived at the intersection in advance of the truck.

The plaintiff was standing on the south side of 114th street near the east curb of the south extension of Budlong avenue talking to Mr. Coon, the contractor on the job, when the truck advanced down 114th street from the east toward the north extension of Budlong. The excavating shovel was loaded on the truck and a trailer, the length of which over all was about 61 feet. The combined weight of the truck, trailer, and shovel was 81,000 pounds, or over 40 tons. The driver of the truck, Norman Kresge, was alone. He passed the north extension and commenced the climb upward toward the south extension. It was his intention to unload at the south extension, where the excavating was to be commenced. Near the east curb line of the south extension the truck stopped. The driver testified that he was unable to get the truck and trailer with its load over the grade and that he therefore started backing down on compression. There was testimony that the drive wheels, which also were the only wheels connected with the foot and hand brakes, started to slide. The plaintiff ran from his position on the curb, took a "4 x 4" 4-foot block from the truck bed, carried and used for such purpose, and placed it under the left drive wheel in an attempt to stop the truck and trailer. As he reached for another block, the wheel, passing over the inner end of the block, raised its outer end, which caught and crushed under it the plaintiff's right foot and ankle as the wheel went over the block. At the same time that the plaintiff was putting a block under the wheel of the truck, another witness, Mr. Glancy, placed a block under the rear wheel of the trailer, which ran over the block, whereupon he placed another block under the same wheel and at the same time heard the plaintiff cry out. The truck then stopped almost instantly. Mr. Glancy and the plaintiff both testified that the drive wheels seemed to be sliding at the time they ran out to place the blocks. Instructions were given to the jury on the issues of the defendant's negligence and the plaintiff's contributory negligence. The jury returned a verdict for the plaintiff in the sum of $15,349.70. From a judgment entered thereon, the defendant has appealed.

The jury was instructed that if the defendant was negligent in the operation and management of the truck and such negligence imperiled human life, the plaintiff, if his acts were reasonably necessary for the safety of human life, was not contributorily negligent in voluntarily leaving a place of safety and incurring danger so long as he did not act with a recklessness which would not be warranted under the circumstances in the judgment of a prudent man.

Two contentions are made on this appeal. First, that there was no evidence sufficient to warrant the jury in finding that the defendant was negligent; second, that there was not sufficient evidence to sustain the jury's implied finding that human life was imperiled so as to justify the plaintiff's conduct or to warrant the issue of contributory negligence being submitted to the jury on that theory. Error is also assigned on the court's refusal to grant the defendant's motion for a nonsuit.

[1, 2] We are not able to say on the facts presented that the question of the defendant's negligence was not for the jury. Whether the truck with the trailer was properly equipped with brakes, whether these vehicles were out of control, and whether there was negligence in the operation thereof, presented close questions of fact which might, on this record, be resolved either way. The principal question presented is whether the court applied the correct doctrine under the circumstances of the present case by the instruction above noted. It is the defendant's contention that the evidence on the question whether human life was imperiled is insufficient to justify the submission of the issue of the plaintiff's contributory negligence to the jury under that instruction and that no other theory is applicable; hence that the court should have granted the defendant's motion for a nonsuit.

The doctrine in question grew out of such cases as Eckert v. Long Island Railroad Co., 43 N. Y. 502, 3 Am. Rep. 721, said to be the leading case allowing a recovery by the rescuer against a defendant by whose negligence the person rescued was placed in a position of danger. There the rescuer attempted to rescue a child on a railroad track from in front of a rapidly approaching train. He succeeded in his object but was himself killed. The court stated the general rule which has since been followed in similar cases, as follows: "Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."

In Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700, it was indicated that the general rule was applicable in this state, although a verdict and judgment in that case was reversed on the ground, among others, that the issue of the defendant's negligence toward the person being rescued was not properly submitted to the jury. Whether the rescuer acted with a recklessness unwarranted by the judgment of a prudent man in attempting to rescue one placed in peril by the defendant's negligence was, in McClure v. Southern Pacific Co., 41 Cal. App. 652, 656, 183 P. 248, stated to be the test in arriving at a conclusion whether he was guilty of contributory negligence. 19 Cal. Jur. 602.

No difficulty in the application of the principle arises when the facts are similar to those involved in the Eckert Case and clearly show that some particular person is found in such imminent peril as that the rescuer instinctively and spontaneously responds to the call for immediate action to avert impending injury or death. In cases involving such circumstances the principle is recognized without conflict and applied wherever the question of the defendant's negligence is properly one for the jury. Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692; Norris v. Atlantic C. L. R. Co., 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069, and note; Corbin v. Philadelphia, 195 Pa. 461, 45 A. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715, and note; Wagner v. International R. Co., 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1, and note; 20 R. C. L. 131 et seq.; see Donahoe v. Wabash, St. L. & P. R. Co., 83 Mo. 560, 53 Am. Rep. 594; Bracey v. Northwestern Imp. Co., 41 Mont. 338, 109 P. 706, 137 Am. St. Rep. 738; Taylor Coal Co. v. Porter's Adm'r, 164 Ky. 523, 175 S. W. 1014, 1017. The foregoing authorities also establish that in such cases it is for the jury to say whether the plaintiff has acted with prudence under the circumstances or has conducted himself in so reckless a manner as to defeat the right of recovery.

The conflict in the application of the doctrine to the facts in particular cases has arisen when it was sought to apply the principle where the peril was not imminent or did not threaten a particular person, or where there was no threat of danger to human life but the motive and purpose of the plaintiff was to prevent damage to property. In the present case there was a conflict in the evidence as to whether there were other people in the street. It was, however, not a busy thoroughfare. There was evidence from which the jury could believe that there was a boy on a bicycle a distance of 50 or 60 feet behind the truck and that there were some other children on the sidewalk on the south side of 114th street, a distance of about 100 feet. There is no conflict as to the fact that there was no one in a position of such imminent and immediate danger as is described in the foregoing cases, and the plaintiff himself testified that he attempted to stop the truck because he thought it was his duty to his employer.

It has been stated that the threatened danger must be imminent and real, and not merely imaginary or speculative. Note 19 A. L. R. supra, at page 10, and cases cited. The defendant contends that cases holding to that effect are applicable to the present situation The case principally relied upon is Eversole v. Wabash R. Co., 249 Mo. 523, 155 S. W. 419, 424. In that case the defendant's engineer was backing a string of freight cars on a down grade and the cars became uncoupled from the engine when the engineer slackened the speed. The plaintiff, a bystander, who was an experienced switchman, jumped on the engine and signaled to the engineer that he would make the coupling if the engineer would speed up and overtake the string, to which the engineer assented. Before, however, he had gathered the requisite speed the runaway string collided with another train, and the plaintiff was caught between the freight cars and the engine. The court in that case, referring to a previous decision (McManamee v. Railway Co., 135 Mo. 440, 37 S. W. 119), stated that it had never extended the doctrine of the Eckert Case to mere property. It concluded that the question had therefore been improperly submitted to the jury because no one was shown actually to have been in peril, inasmuch as the track was not one used for passenger service and the hour was mid-afternoon, when passenger trains were not arriving. Furthermore, unknown to the plaintiff, the crew had been signaled to leave and had left the train. The court said: "But, further, one who attempts to assert the original negligence of a defendant toward one who is in peril must show that there was some one in peril and that he acted from humanity's sake to rescue such person from peril. It is only under such circumstances that the usual rash acts of the rescuer is excusable, and he is permitted to impute the negligence committed as against the person in peril to himself. Under the evidence in this case, plaintiff saw no person in peril. * * * Some one must be actually in peril before the rescuer is authorized to act. At the broadest, the situation must be such as to clearly convince the rescuer that human life or limb is in peril." By similar reasoning a conclusion was reached in the case of Wilson v. New York, N. H. & H. R. R. Co., 29 R. I. 146, 69 A. 364, that a brakeman, who met his death when he was looking backward trying to scare children from running alongside the train by being hit by a post negligently maintained on the right of way, was contributorily negligent because no imminent danger to human life was shown. The court expressly refused to extend the principle of the Eckert Case to the circumstances there presented. The case of Wright v. Atlantic Coast Line R. Co.,110 Va. 670, 66 S. E. 848, 849, 25 L. R. A. (N. S.) 972, 19 Ann. Cas. 439, is also relied upon by the defendant. There the plaintiff stood in the track of an approaching freight train frantically signaling it to stop in order to avert injury to her mother, who was walking alongside in a place of safety, but whom the plaintiff knew would step in the path of the freight in the belief that it was the passenger train which customarily stopped on signal and which they expected to board. It was held that the defendant was not negligent inasmuch as no duty rested upon it either to stop or to slacken its speed, nor was it negligent in interpreting the plaintiff's signal, not as a warning, but as a stop signal for a passenger train. The court furthermore refused to apply the imminent peril doctrine inasmuch as the mother was not in a position of peril but in fact was in a place of safety at the time the plaintiff signaled and "that the mother's peril arose when she deliberately stepped from her place of safety in the public road upon the track in front of a rapidly moving train, when it was too late to save her or to save the plaintiff. According to the authorities, as already seen, the mother must have been at the time of the attempted rescue in a place of imminent danger caused by the negligence of the defendant in order to excuse the contributory negligence of the plaintiff." The fact, however, that in that case negligence of the defendant was not proved disposes of it and renders it a case not in point on the present discussion. Likewise the case of Tyler v. Barrick & Son, 178 Iowa, 985, 160 N. W. 273, also relied upon, is not of any particular assistance. A ground of the decision in that case was that the danger to the person supposedly being rescued was in part due to the plaintiff's own acts, which on the facts did not free him from the charge of negligence which either contributed to or was the sole proximate cause of his injury.

On the other hand courts have extended the principle underlying the decision in the Eckert Case to facts where, although no person is shown to be directly in the path of a moving instrumentality and in no imminent danger from which an immediate rescue is imperative in order to save him from certain injury or death, nevertheless it is shown that injury might result to persons in the vicinity unless steps be taken to stop the moving agency. Cases involving runaway horses illustrate this extension of the Eckert Case. See note, 19 A. L. R., supra, at page 28 et seq. Such a case is Hollaran v. City of New York, 168 App. Div. 469, 153 N. Y. S. 447, wherein it was decided that it was not necessary that the danger should have reached or menaced a particular person and that under the particular facts it was a fair question for the jury whether the venture of the decedent was justified by the circumstances. The court cited Manthey v. Rauenbuehler, 71 App. Div. 173, 75 N. Y. S. 714, 716, where the principle of the Eckert Case was applied under similar facts. There the test was stated to be that "the action of the deceased is clearly to be measured by what was reasonably likely to happen if the horse continued upon his course." The Supreme Court of Illinois, in the case of Devine v. Pfaelzer, 277 Ill. 255, 115 N. E. 126, L. R. A. 1917C, 1080, recognized the extension of the doctrine in the two foregoing cases, but concluded that the trial court erred in not directing a verdict for the defendant where the evidence was that there were no people in the roadway and there was no evidence that it was a busy street and where the plaintiff had no occasion to believe that any one was in danger. Also, in the case of McDonald v. Burr, 12 Sask. L. R. 482, recovery was not allowed in the absence of evidence that children were in the street or other evidence to support the plaintiff's stated apprehension that lives were in danger. In American Express Co. v. Terry, 126 Md. 254, 94 A. 1026, Ann. Cas. 1917C, 650, the plaintiff was injured while attempting to stop an electric truck which was running without a driver in control. There were persons and other cars in the street, although not in the immediate path of the truck. It was held that the court properly submitted to the jury the questions of the defendant's negligence and the plaintiff's contributory negligence, and the further question whether the moving truck endangered the lives and property of persons on the street. In Thoresen v. St. Paul & Tac. L. Co., 73 Wash. 99, 131 P. 645, 647, 132 P. 860, the plaintiff, a stevedore, was engaged in unloading lumber from small flat top cars onto the dock. These cars were ordinarily pushed around by hand. There was no buffer or block to prevent the cars running off the end of the dock. The plaintiff observed an unattended loaded car coming down an incline at a considerable speed, which had been negligently started down by the defendant's employee. He endeavored to stop it by twice placing a board in front of the hind wheel. On the third attempt the front wheel ran over the shorter rail at the end of the dock and some lumber falling off crushed the plaintiff's legs. The plaintiff recovered a judgment. It was said: "Attention is called * * * to the further fact that no harm could have come, as the sequel proved, had the car been allowed to run to the end of the rails. But notwithstanding the respondent's acts may not have been essential either to preserve the property from loss or protect other individuals from harm, we think nevertheless that the question whether his act constituted contributory negligence was a question for the jury. He was entitled to act upon appearances, and, if his conduct was that of a reasonably prudent person under the circumstances, he is not to be charged with contributory negligence even though he may have been deceived thereby." It was also held that the plaintiff's testimony as to his motive in attempting to stop the car, viz., to prevent destruction to property and possible injury to persons, was admissible inasmuch as the plaintiff's motive was material on the issue of his contributory negligence.

On the present record the only motive which the plaintiff had and the only motive which is supported by the evidence was that to save property and principally the property of his employer. This is not a case involving a runaway or fast-moving instrumentality with no one in control. The only deduction which the plaintiff was reasonably justified in making from the driver's actions and the movements of the truck was that the motor was not equal to pulling the load to the top of the grade, that the truck started back by its own weight and that the brakes were insufficient to prevent the truck's gathering momentum; that if additional aid in checking the momentum of the truck was not immediately furnished, serious injury to the shovel might conceivably follow. There were no appearances which would justify the plaintiff in concluding that persons in the vicinity might be endangered. The street was not a busy one, and there was no evidence that the few persons who were about were or would be in such a position as to be unable to utilize their own faculties in more than sufficient time to keep clear of such a large and slow-moving vehicle and load, which at best, on account of the topography of the roadway, could move back but a short distance on its own momentum. We conclude that the court committed error in submitting to the jury the issue of contributory negligence based on the theory that human beings might be shown to have been in imminent peril, or in any danger of injury, and that the giving of the instruction on that theory was prejudicial to the rights of the defendant.

[3, 4] It does not follow, however, that the issue is not properly one for the jury on any theory and that the motion for a nonsuit should have been granted. Some of the decisions have followed the dictum in the Eckert Case (Eckert v. Long Island R. Co., supra, at page 506, of 43 N. Y.), and have denied a recovery on the ground of the plaintiff's contributory negligence where he has assumed the role of rescuer "in the mere protection of property." See note to Corbin v. Philadelphia, supra, 49 L. R. A., at page 719. There is, however, a well-defined diversity of opinion and decision on the question when it relates to an attempt to save property from destruction; but where the attempt is by the owner to save his own property or by the employee to save the property of his employer, the recovery has generally been allowed. Authorities holding divergent views are collected in a note following the case of Pegram v. Seaboard Air Line Railway (139 N. C. 303, 51 S. E. 975, 976), 4 Ann. Cas. at pages 216 and 217, and in a note following the case of McKay v. Atlantic Coast Line Railroad Co. (160 N. C. 260, 75 S. E. 1081), Ann. Cas. 1914C, at pages 413 and 414. In Pegram v. Seaboard Air Line Ry., supra, in its discussion of the question whether the doctrine is applicable when the person injured or killed has attempted to save property from destruction the court stated: "Some jurisdictions deny the right to recover at all, while others have extended the rule so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances. No one, however, should be permitted to recover for injury sustained in attempting to recover mere property in the face of obvious danger such as no reasonably prudent man would under the circumstances incur. (Citing authorities.) * * * We are willing to hold with many able jurisdictions that, when the employer's property is set on fire by the negligence of another, the employee may attempt to rescue it, but not in the presence of obvious danger." Following that pronouncement, the court in the case of McKay v. Atlantic Coast Line R. Co., supra, reversed a judgment for the defendant. Other cases cited as in accord in the note following that case in Ann. Cas. 1914C, at page 414, are: Davis v. Savannah L. Co., 11 Ga. App. 610, 75 S. E. 986; Leavenworth Coal Co. v. Ratchford, 5 Kan. App. 150, 48 P. 927; Finnigan v. Biehl (City Ct.) 61 N. Y. S. 1116; Ivy v. Wilson, Cheves (S. C.) 74; Thompson v. Seaboard Air Line Ry., 81 S. C. 333, 62 S. E. 396, 398, 20 L. R. A. (N. S.)

426; Temple Electric Light Co. v. Halliburton (Tex. Civ. App.) 136 S. W. 584; Thorn v. James, 14 Manitoba, 373. See, also, Henry v. Cleveland, etc., R. Co. (C. C.) 67 F. 426; Liming v. Illinois Cent. R. Co., 81 Iowa, 246, 47 N. W. 66. In Thompson v. Seaboard Air Line Ry., supra, the rule supported by the foregoing cases is stated to be: "The rule was established in this state in 1840 by the case of Ivy v. Wilson, Cheves [S. C.] 74, that it is not contributory negligence per se for one who owes the duty to protect property to take a manifest risk to save it, unless the risk was wanton or unreasonable, and that the exposure by a person so situated is not to be presumed to be wanton or unreasonable exposure to unnecessary danger. The test is whether a reasonably prudent man in the same exigency would have assumed the peril." We conclude that the authorities support the application of that rule to the facts in the present case.

One of the principal cases cited as illustrating the contrary conclusion is that relied upon by the defendant here, viz., Eversole v. Wabash R. Co., supra, 249 Mo. 523, 155 S. W. 419. In 20 R. C. L. at page 133, § 110, the foregoing divergence of opinion is noted and the statement is made that the weight of modern authority favors the extension of the doctrine so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under the circumstances. In this jurisdiction the case of Deville v. S. P. R. Co., 50 Cal. 383, appears to be the only decision which bears upon the question. In that case the plaintiff attempted to rescue his vegetable wagon and team of horses from in front of the defendant's approaching train. One of the grounds of denial of the plaintiff's right to recover was his contributory negligence in leaving his team unhitched in close proximity to the railroad track at a time when the train usually came so that they became frightened and ran upon the track. The result in that case is not inconsistent with the trend of modern authority.

Under the decisions hereinabove cited as illustrating the weight of authority on the subject, we conclude that there was no error in denying the motion for a nonsuit. In view of the condition of the record the issue of the alleged negligence of the defendants should be retried, if a retrial is had, and the issue of the alleged contributory negligence of the plaintiff should be retried in accordance with the views herein expressed.

The judgment is reversed.

220 Cal. 429

MONIZ et al. v. PETERMAN.

Sac. 4618.

Supreme Court of California.
March 30, 1934.

1. Boundaries 🔑37(3).

In action to quiet title, evidence *held* to support trial court's finding that common corner section which was initial starting point used in respective deeds was 44 feet, not 26.2 feet, west of center line of railroad right of way.

2. Boundaries 🔑37(3).

In quiet title action, that there was iron pipe at point claimed by defendant to be common section corner used as starting point for description *held* not conclusive as to location of point; there being no direct evidence establishing when pipe was so located or that it was government location of the section corner (Code Civ. Proc. § 2077, subd. 2).

3. Appeal and error 🔑1011(1).

In quiet title action, weighing of testimony *held* within province of trial court, whose conclusion on conflicting evidence will not be disturbed on appeal.

4. Boundaries 🔑37(3).

Evidence that survey was made to subdivide tract properly and that adjoining owners jointly constructed fence starting at stakes located by the survey, with understanding that fence was and would be boundary line of respective tracts, *held* to support finding that the fence constituted agreed and established boundary.

5. Boundaries 🔑46(1).

To show establishment of agreed boundary by joint construction of fence, there need be no dispute as to location of true boundary in sense of quarrel or ill feeling between parties.

6. Boundaries 🔑46(1).

Where boundary is uncertain, tacit agreement to regard fence constructed jointly as true boundary line is sufficient, and such agreement may be inferred from conduct of parties.

7. Boundaries 🔑48(2).

Acquiescence in fence, to show boundary agreement, must consist in acquiescence in the fence as a boundary line, not mere acquiescence in existence of fence as barrier.

8. Boundaries 🔑32.

In quiet title action, issue of agreed boundary could be proved under general allegations of ownership and possession of property contained in complaint.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by M. Moniz and J. M. Alvarez against Alva Peterman. Judgment for plaintiffs, and defendant appeals.

Affirmed.

W. T. Belieu, of Willows, for appellant.

H. W. McGowan, of Willows, for respondents.

CURTIS, Justice.

Action to quiet title to a 40-acre tract of land in Glenn county, upon which a pumping plant and well are situated. In 1908, the plaintiff Moniz and one Pimental, predecessor in interest of defendant, Peterman, and one Fulton, as partners in a dairy business in Glenn county, purchased a tract of land consisting of 130 acres from David Hughes, situated in the north half of section 3, township 19 north, range 3 west, M. D. B. & M. It was agreed between the parties that Fulton should take the east 50 acres, Moniz, the plaintiff, should take 40 acres adjoining Fulton's on the west, and Pimental the 40 acres adjoining Moniz' tract on the west. A survey was made for Hughes by one T. L. Knock, a licensed surveyor, which survey was known as the "Map of the Hughes Tract," and a fence which connected the stakes put in by Knock to mark the northwest and southwest corners of Moniz' land and the northeast and southeast corners of Pimental's land was jointly constructed between Moniz' land and Pimental's land by them. Moniz and Pimental shared the expense of constructing said fence. In the northwest corner of Moniz' land, the three partners dug a well and installed a pump and engine to be used in common by them. Subsequently Pimental and Fulton sold their lands, and it is the claim of plaintiffs that, at the time of the sale of their property, plaintiff Moniz paid them for their part or interest in the well. No question ever arose until the present controversy as to the ownership of this well and the land upon which it was located from the time the well was dug and the pump installed in 1908, but the respective owners on each side of the fence during all the intervening years used the property up to the fence line. In August, 1921, Alvarez acquired his interest in the Moniz tract. In 1927, by mesne conveyances, the defendant, Peterman, became the owner of the 40-acre tract formerly owned by Pimental. In 1930, defendant, Peterman, had a survey made of his property by one Thomas. According to this survey, the boundary line between his land and the land of the adjoining owners, Moniz and Alvarez, lay some 18 feet to the east of the fence between the two tracts of land, and the pumping plant and well, instead of being on the northwest corner of plaintiffs' property, was situated on the northeast corner of defendant's. Defendant thereupon erected a fence upon the line located by the recent survey to the east of the well and pumping plant, thereby inclosing it and preventing the plaintiff Alvarez from using any water from the well. This action was then commenced by the plaintiffs to quiet title to their 40-acre tract which, according to their contention, is bounded on the west by the line marked by the fence erected by Moniz and Pimental at the time of the purchase of the 130-acre tract of land in 1908. The original deeds from Hughes to Moniz and Pimental set forth the description of their respective tracts by metes and bounds and described the 40-acre tract deeded to Moniz as beginning at a point in the section line between section 3, township 19 north, and section 34, township 20 north, range 3 west, M. D. B. & M., 2,820 feet east of the common corner for sections 3 and 4, township 19 north, and sections 33 and 34, township 20 north, range 3 west, M. D. B. & M., and described the 40-acre tract deeded to Pimental as beginning at a point in the section line between section 3, township 19 north, and section 34, township 20 north, range 3 west, M. D. B. & M., 2,150 feet east of the common corner for sections 3 and 4, township 19 north, and sections 33 and 34, township 20 north, range 3 west, M. D. B. & M. The dispute between the adjoining owners arises from the lack of knowledge as to the true location of the initial starting point for the two descriptions; the plaintiffs claiming that the common section corner from which the description in the deeds starts is from 41 to 44 feet west of the center line of the Southern Pacific right of way, and the defendant claiming it to be 26.2 feet west of said right of way. If defendant be correct, the eastern boundary of his tract of land would be some 18 feet east of the boundary marked by the fence built by Moniz and Pimental in 1908. The trial court upheld plaintiffs' contention that the location of the initial starting point was 44 feet west of the center line of the Southern Pacific right of way; thereby including the disputed strip of some 18 feet within the boundary and description of plaintiffs' deed, and made a further finding to the effect that the line as marked by the fence built in 1908 was the agreed and established boundary line. Judgment for the plaintiffs quieting their title to the 40-acre tract, and for the sum of $272.50 as damages for the deprivation of the use of the well was made and entered. From said judgment, defendant appeals.

[1] There is no merit in the appeal. The finding of the trial court with reference to the initial starting point is supported by the evidence. The question of the location of the common corner section which was the initial starting point for the description of plaintiffs' and defendant's deeds was gone into thoroughly by both sides. Mr. Russell, a surveyor called by the plaintiffs, testified that by measuring 2,820 feet west from the northwest corner of plaintiffs' property he arrived at a point 45 feet from the center of the Southern Pacific right of way, that he was unable to find any monument there, but by prolonging a straight line north through the southwest corner of said section 3 and through another known section corner one mile to the south of the latter section corner, he arrived at the exact intersection marked by his measurements from the northwest corner of plaintiffs' property, thus indicating that the point 45 feet west of the railroad right of way was the true section corner. Bayard Knock, who had been county surveyor of Glenn county for some fifteen years and had made numerous surveys all through that particular township, and who was a son of T. L. Knock who had made the original survey of the property here for David Hughes, testified from his general knowledge of the section corners north and south of said corner, that said corner was 44 or 45 feet west of the center line of the Southern Pacific right of way. He further testified with reference to known section corners both directly north and south of the corner in dispute, giving the exact location in each instance, and stated that all of them were from 41 feet to 46 feet west of the center line of the railroad right of way. He testified that he believed the section corner was approximately 45 feet west of the center line of the railroad right of way because "it bears out a general alignment with all the others there, and I cannot see why with the whole alignment running 40 odd feet that that should only be twenty-six." Ryan, a licensed surveyor, testified from the field notes of T. L. Knock, deceased, of his survey of the Hughes tract, being the original and identical survey made by him for Hughes at the time of the sale of the 130-acre tract to Moniz, Pimental, and Fulton in 1908, that T. L. Knock had established the section corner here in dispute about 41 feet west of the center line of the railroad right of way. Bayard Knock likewise so interpreted these field notes of his father. The map of the Hughes subdivision was also received in evidence. It cannot be said, as claimed by appellant, that a finding based upon the above testimony, locating the disputed point at 44 feet west of the center line of the railroad right of way, was "contrary to all the evidence and wholly unsupported."

[2, 3] Appellant at the trial attempted to prove his contention by showing that there was an iron pipe in the ground located at the point claimed by him to be the common section corner; that is to say, 26.2 feet west of the center line of the railroad right of way. It is admitted that there was an iron pipe there, but there is no direct evidence establishing when the pipe was so located, or that it was a government location of the section corner. Appellant cites section 2077, subd. 2, of the Code of Civil Procedure, which provides that, "when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount," as requiring that such monument be held to be the common section corner. It will be noted, however, that the original government field notes were not available and appellant in his own brief states that, "it stands as an admitted fact in the case that there was no established or known government corner common to the four sections." The testimony of Thomas, the licensed surveyor, who made the survey upon which appellant bases his claim to the 18 feet of land and the well situated thereon, that in several maps of adjoining tracts of lands the iron pipe had been accepted as the section corner by the surveyors making the respective surveys, while persuasive, is not conclusive. As was said in Golden v. City of Vallejo, 41 Cal. App. 113, 182 P. 347, 349, in answer to a similar argument that by virtue of Code section 2077, subd. 2, Code of Civil Procedure, the known monument must control, "the application of this rule, however, presupposes that the monument * * * was placed there by the government surveyor to mark the corner. But that was not established, and the court, in view of all the evidence, was justified in rejecting that theory." Inasmuch as neither side could with certainty establish the disputed section corner, the decision of the trial court necessarily rested upon a weighing of probabilities. We have set forth generally the evidence offered by each side. It will serve no purpose

for us to balance the facts adduced one against the other and weigh the testimony of the various witnesses upon this phase of the case. That was the province of the trial court. It has done so and decided in favor of the respondents. Under the familiar rule relative to a conflict in evidence, the conclusion of the trial court will not be disturbed on appeal.

[4-6] But in no event, even if it be conceded for the sake of argument that the evidence relative to the location of the initial starting point of the Hughes survey preponderated in favor of the appellant, would appellant be entitled to a reversal of the judgment. The finding of the trial court that the fence jointly constructed by Moniz and Pimental in 1908 constituted an agreed and established boundary is amply supported by the evidence. Both Moniz and Pimental testified that a survey had been made by T. L. Knock in order to properly subdivide the 130-acre tract, and that they jointly constructed the fence, starting at the stakes located by the survey, with the understanding that such fence was and would be the boundary line of their respective tracts. And there is not the slightest doubt that from the time of the construction of the fence in 1908, until appellant moved the fence over in 1930, the respective owners on each side of the fence acquiesced in the fence as the true boundary line of their properties. This is expressly admitted by appellant in his brief. Appellant, however, insists that "mere acquiescence" is not sufficient to sustain the finding, and that in the absence of proof of a dispute or uncertainty with reference to the boundary line and an agreement between the parties, the finding must fall. But it is settled that no dispute in the sense of a quarrel or ill feeling between the parties is necessary. Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893. And there is no doubt that the boundary was uncertain, for this is demonstrated by the fact that it was necessary to employ a surveyor to divide the entire tract and fix and definitely establish the boundary line. Neither is an express agreement in writing or parol necessary. A tacit agreement to regard the fence as the true boundary line is sufficient and this may be inferred or implied from the conduct of the parties. Raney v. Merritt, 73 Cal. App. 244, 238 P. 767; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260, 18 P.(2d) 58.

[7] It is, of course, true that the acquiescence must consist in acquiescence in the fence as a boundary line and not mere acquiescence in the existence of the fence as a barrier. Thus in Staniford v. Trombly, 181 Cal. 373, 186 P. 599, 600, the court reversed the judgment, holding that the evidence therein showed that the builders of the fence fixed the line "for occupancy, and not for title." It was also so held in Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 143 P. 754, where it was shown, as in Staniford v. Trombly, supra, that the fence had been built to turn cattle and not to establish a boundary line. And it is, of course, well settled by a long line of authorities that, if the true location of the boundary line is known by both the parties, or one of them, but nevertheless another and different line is agreed upon or acquiesced in as the boundary line, acquiescence in such line even for a long period of time will not suffice to establish such line as the true boundary line. Clapp v. Churchill, 164 Cal. 741, 130 P. 1061; Lewis v. Ogram, 149 Cal. 505, 87 P. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; Mann v. Mann, 152 Cal. 23, 91 P. 994; Nathan v. Dierssen, 134 Cal. 282, 66 P. 485; Cosgrave v. Donovan, 52 Cal. App. 625, 199 P. 808, 810. But neither would an express agreement. This is so because, if the true location of the line be certain, an agreement placing it somewhere else could not be enforced, for the agreement, if oral, would be void as constituting an attempt to transfer land without writing (section 1091, Civ. Code), and the agreement, if written, would be ineffectual to pass title, as it would lack the apt words of conveyance necessary to accomplish a transfer of real property. Lewis v. Ogram, supra. Most of the cases cited and relied upon by appellant belong to this category, and obviously the language in such cases setting forth the rules and requirements applicable to the situation where the boundary is in fact known but the parties agree upon another and different line as the boundary have no application to the situation pictured here, where the boundary line (as is contended by appellant) was not the true boundary line, but was in good faith through a mistaken belief in the correctness of the original survey accepted as such by both parties. No good reason exists why the same rules should not apply where the coterminous owners honestly believe that a certain line marks the true boundary line and build a fence thereon with the understanding that it shall mark and measure their properties as are applied where the owners do not know where the boundary line is and, being uncertain, by agreement establish a line as the boundary. It has been so held. Dundas v. Lankershim School District, 155 Cal. 692, 102 P. 925; Silva v. Azevedo, 178 Cal. 495, 173 P. 929, 930; Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 200 P. 651;

Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.(2d) 58.

In the case of Silva v. Azevedo, supra, Azevedo deeded to Silva part of a tract of land purchased by him; the land granted being described in the deed by metes and bounds. Before the execution of the deed, the entire tract had not been divided, nor had the boundary line between the east and west halves been marked upon the ground. Azevedo and Silva, acting jointly, employed a surveyor to survey the tract, to divide the same into halves, and to furnish a particular description by metes and bounds. The surveyor made the survey and established a line of stakes upon the ground, but by mistake located these stakes too far to the east. The two joined in building a substantial fence on the line marked by the stakes, believing such line to be the true line called for by the deed. The court said: "On this state of facts, we think there was no room for any other inference than that the line indicated by the surveyor as the dividing line between the two holdings, and followed by the erection of a fence by the two parties, was agreed on by them as the true boundary. * * * That Silva and Azevedo were, in fact, in doubt as to the place where the dividing line should run is apparent from the circumstances, and from their conduct. * * * That the parties thought they needed the assistance of some one possessing the requisite ability is conclusively shown by their employment of a surveyor to locate and mark the division line between the two halves of the larger tract. The only purpose they could have had in so doing was to fix definitely, by proper measurement and marking, the boundary, which, until it was so ascertained and marked, must have remained uncertain in their minds. When, then, acting upon the information so given them, they joined in the construction of a substantial fence on the line, and proceeded, respectively, to improve and cultivate up to the fence, the only theory upon which their acts can reasonably be explained is that they had agreed upon the fence line as the true location of the west boundary of the land conveyed to Silva. It is true that both were mistaken in believing that the line so fixed was the true line. But this does not prevent the application of the rule." It is true that doubt is thrown upon this conclusion by the case of Huddart v. McGirk, 186 Cal. 386, 199 P. 494, but, since the decision of that case, both the case of Nusbickel v. Stevens Ranch Co., supra, and Vowinckel v. N. Clark & Sons, supra, have been decided by this court. In the Nusbickel Case, the case of Silva v. Azevedo is cited as an authority, and in the Vowinckel Case, it is quoted from with approval. The facts in the Nusbickel Case and the Vowinckel Case are similar to the facts in the instant case, and are decisive of the question here involved.

[8] Appellant complains that the finding relative to the agreed boundary line is not within the issues of the amended complaint to quiet title. The first count contained the usual averments of ownership and possession of the property in controversy. We are of the opinion that under these general allegations, the issue of an agreed boundary line may be proved. "One averring himself to be the owner in fee, may prove title by adverse possession, or indeed any title, however acquired." 22 Cal. Jur. p. 165.

We are satisfied that not only are the findings of the lower court supported by the evidence, but that the equities in the case are with respondents.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

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220 Cal. 510

PEOPLE v. LEWIS.

Cr. 3724.

Supreme Court of California.
April 9, 1934.

Homicide 🔑253(3).

Evidence *held* to support conviction of murder in first degree as against contention that homicide was committed while defendant was drunk, and without required deliberation (Pen. Code, § 189).

In Bank.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Walter Lewis was convicted of murder in the first degree, and he appeals.

Judgment, and order denying new trial, affirmed.

Byrl R. Salsman and O. R. Gauthier, both of Palo Alto, for appellant.

U. S. Webb, Atty. Gen., and Fred L. Thomas, Dist. Atty., J. P. Fitzgerald, Deputy Dist. Atty., and H. S. Bridges, Asst. Dist. Atty., all of San Jose, and Siebert L. Sefton, Deputy Atty. Gen., for the People.

PRESTON, Justice.

Appellant was convicted of murder in the first degree and sentenced to suffer the death penalty. He appeals from the judgment of conviction and order denying his motion for new trial.

The record is singularly free from error and the appeal presents no ground for reversal of the judgment. Evidence was offered by the prosecution to prove that the murder was deliberate, premeditated, and accomplished in an attempt to perpetrate a rape, at a time when appellant was sober and in possession of his faculties. Appellant claims that he made no attempt to commit rape but struck the fatal blow without the deliberation necessary to first degree murder (section 189, Pen. Code), his act being "that of a drunken man—unreasoning and without cause." Appellant also, in effect, asks us to overrule, or hold here inapplicable, the doctrine long established in this jurisdiction, that to constitute murder of the first degree, there need be no appreciable space of time between the intention to kill and the act of killing. People v. Donnelly, 190 Cal. 57, 210 P. 523; 13 Cal. Jur., p. 598, § 15, and many cases cited.

This argument requires no discussion in view of the fact that there is in the record ample evidence to support the verdict, either on the ground that the killing was willful, deliberate, and premeditated, or that it was committed in an attempt to perpetrate rape. There is also persuasive evidence of appellant's sobriety at the times in question. A brief statement of fact will serve as a basis for this conclusion:

Appellant, a colored man, 51 years of age, and a colored woman living with him and passing as his wife, resided at Mayfield, Palo Alto, Cal., in a shack at the rear of premises occupied by Mrs. Wright, also colored and a sister of the deceased. The crime was committed on February 4, 1933, in the evening. On that day appellant spent the time from about 9 o'clock in the morning until between 4 and 5 in the afternoon, in making a trip by automobile from Palo Alto to Oakland, and return, in the company of a colored friend and his son. These parties performed respective errands in and around Oakland and there purchased a pint or more of whisky, which was partially consumed by appellant and his friend prior to reaching home. At one place where he called during the day appellant was given a drink of whisky and of beer; in addition he took three or four drinks from the bottle of whisky above mentioned. However, his companions testified that he was sober at all times and their testimony was corroborated by various witnesses who saw and talked with appellant after he returned home. Indeed, the evidence in support of the defense of intoxication is unsatisfactory and at most it only raised a conflict which the jury was thoroughly warranted in resolving adversely to appellant.

When appellant arrived home, his "wife" was not there. He feared that she might have left him for good and immediately went about the neighborhood making inquiry as to her whereabouts. As a result, his suspicion that she had gone ripened into conviction. He returned to the shack, where he lay down on the bed. The deceased was a colored girl about 30 years of age, small of stature, partially crippled, of good moral repute, and unmarried. She had known appellant casually since 1919, had seen him frequently during the several months her sister let him live in the shack, and they were friendly, "just like home people" to each other. About 9 o'clock of the night in question the deceased called at her sister's to attend a party but found that she was too early as her sister had not yet come home. She then went to the shack in back, knocked at the door, and when appellant answered, started to converse with him about his "wife." At his invitation she entered the room to continue her visit with him. The murder was committed soon thereafter.

Appellant contends that at said time he was so intoxicated as not to be accountable for his acts. He further claims that this is true although the effect which the day's drinking had upon him might not have been apparent to those who observed and talked with him. He testified that the killing occurred in the following manner: "I just threw a fit; I jumped up and struck her, that is all. I had no cause, or I cannot give no account. * * * Only being drunk, that is all." He further testified that he made no effort to have sexual intercourse with the deceased; that he had the "first thought" of striking her at the time he struck her; that afterwards he left the shack, walked up past the Mayfield depot and on up the railroad track some distance and then lay down and stayed until it was light, whereupon he continued to move on. This version of the crime differed materially from that given by appellant on various occasions subsequent to his apprehension and prior to trial, as will be hereinafter shown.

About 9:30 p. m. the sister of the deceased arrived home and soon became concerned over the latter's nonappearance. Later she reported the unaccountable absence of the deceased to the police. About 10:30 she and the police searched the premises. They tried the door of the shack, found it locked, forced their way in, and discovered the body of the girl. She had been hit with a blunt instrument (an axe wielded by appellant) on the head so severely as to break the left side of her skull into fifteen different pieces in the circular area near the bruise. The blow had evidently caused immediate death. There was no indication of a struggle. The body lay across the bed, with legs hanging over the edge, the head sunk in the bedclothes and surrounded by a pool of blood. The dress and underskirt of the deceased had been thrown back over her so that the lower portion of her body was exposed. Medical examination showed her organs to be in normal condition, without physical evidence of any forced attack upon her. The physician testified, however, that owing to her age, sexual intercourse would not necessarily be revealed by an autopsy. On the floor nearby was found an axe, the head thereof covered with fresh blood. Also on the floor, and under the left foot of the deceased, was found a knife with a spot of blood thereon, but there was no proof that the deceased had tried to use this knife in self-defense.

Appellant was arrested in March at a hobo camp near El Centro, Cal. During the days following his apprehension he talked freely and voluntarily with the officers about his commission of the crime and his mental state prior thereto. He twice affixed his name to statements purporting to give a full report of the occurrence. The following is taken from the first of these statements: "I came home from Oakland and I found my wife gone and I went out to look for her and I came back home and I came in contact with Eatha Holliday. She came out to the house and sat down and talked. I told her that my wife had quit me and she said she would be my girl. And she said that she would come to see me twice or three times a week. She told me how much she cared for me. There was no argument nor fight nor nothing and I was just drunk and knocked her in the head with an axe. I remember hitting her but I didn't know she was dead. After I struck her I just walked out and shut the door. * * * I kept the axe setting in the closet. I just walked over and got it and struck her with it. She was laying down on the bed and I left her laying down on the bed. I was standing up when I struck her. * * *"

The following is taken from a later account given by appellant to police officials and subscribed by him: "Ernestine Halliday came out to see him in the shack; she asked for his wife and said that she had been out there previously when he was not there. He admitted trying to 'make' (have intercourse with) her but she was not willing. He stated that he was terribly worked up over his wife having left him. His wife was not really his wife but a woman who was living with him. All his life he has had trouble with women and he resented keenly anyone who would try to take any of his women away from him, and he was crazy because the woman he had been living with had left. * * *"

It is clear from the above recital, which sets forth but part of the testimony in behalf of the prosecution, that the record in this cause contains abundant evidence to support the verdict and judgment.

The judgment is affirmed. The order denying motion for new trial is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; IRA F. THOMPSON, J.; SHENK, J.; SEAWELL, J.

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220 Cal. 402

HANSEN v. FRESNO JERSEY FARM DAIRY CO.

L. A. 14459.

Supreme Court of California.

March 28, 1934.

Rehearing Denied April 26, 1934.

1. Sales 🔑382.

Evidence of buyer's oral notice of termination of contract *held* inadmissible in seller's action for damages, where contract provided for written notice of termination and there was no proof of waiver.

2. Sales 🔑179(4).

Trial court, in seller's action on contract for purchase of milk giving buyer option to reject milk below standard, could find seller's breach, if any, in this respect, was waived, where buyer had not exercised applicable contract rights.

3. Account stated 🔑7.

"Account stated" becomes unperformed contract for payment of amount stated to be due, without proof of specific items included therein.

4. Account stated 🔑5.

Assent of parties is essential element of "account stated," and is not present when party makes proper objections to account.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

5. Account stated 🔑4.

Acceptance of payment under account rendered will not render it "account stated" unless payment is accepted without objection.

6. Account stated 🔑19(3).

Finding that buyer's rendition of monthly accounts and payments for milk did not constitute account stated so as to prevent seller from recovering balance of price due under contract *held* justified under evidence showing that seller protested against price reduction.

7. Contracts 🔑238(2).

Executed oral agreement may serve as modification of written agreement.

8. Appeal and error 🔑173(12).

Sufficiency of evidence to sustain finding of accord and satisfaction *held* not presented on appeal, where defendant failed to interpose specific plea of accord and satisfaction.

9. Accord and satisfaction 🔑25(1).

Generally, accord and satisfaction must be specifically pleaded.

10. Appeal and error 🔑1008(1).

Whether there is accord and satisfaction is question primarily for trial court in case tried without jury.

11. Accord and satisfaction 🔑26(3).
Compromise and settlement 🔑23(3).

Implied finding that acceptance by seller of milk, of buyer's monthly checks for amounts less than contract price, was not accord and satisfaction, *held* justified under evidence.

12. Sales 🔑77(1).

Provision of contract for sale of milk for reduction of basic price if buyer reduced price to "customers" included wholesale as well as retail customers, though at time of agreement most of buyer's trade was with retail customers.

[Ed. Note.—For other definitions of "Customer," see Words & Phrases.]

In Bank.

Appeals from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Jacob Hansen against the Fresno Jersey Farm Dairy Company. From the judgment, defendant appeals, and plaintiff cross-appeals.

Affirmed.

Prior opinion, 24 P.(2d) 232.

Everts, Ewing, Wild & Everts, of Fresno, and Pillsbury, Madison & Sutro, of San Francisco (Dan F. Conway, of Fresno, and Eugene D. Bennett, of San Francisco, of counsel), for appellant.

Irvine P. Aten, of Fresno, for respondent.

SHENK, Justice.

Cross-appeals from a judgment for the plaintiff in an action for damages for breach of contract.

On April 1, 1930, the parties entered into a written agreement for the sale and delivery by the plaintiff to the defendant of approximately eighty gallons of milk daily f. o. b. Fresno. The defendant agreed to pay for butter fat content of the milk at 85 cents per pound for all milk less 2 cents to cover costs of hauling for each gallon of milk shipped. That price was referred to in the contract as the basic price. Payments for milk delivered were to be made monthly on the 15th of each month for milk received during the preceding calendar month on statements to be made up and rendered by the defendant to the plaintiff. The contract was to continue for one year and be renewed automatically from year to year unless written notice was given by either party at least thirty days prior to the first or any subsequent expiration date. The contract contained the following provision: "It is furthermore agreed that whenever and whilst buyer reduces its price to customers in order to meet competition or on account of a milk price war in Fresno, said basic price for milk hereinabove fixed shall stand reduced for the time of continuance of buyer's said reduced price, in an amount equal to one-half of said reduction."

The plaintiff delivered milk which was received and paid for by the defendant at the basic price stated in the contract. On May 28, 1930, the defendant reduced the price to the plaintiff 2 cents per gallon. Effective August 1, 1930, the defendant made a further reduction of 4 cents per gallon in the price to the plaintiff. The defendant continued to receive the plaintiff's shipments.

The defendant each month sent to the plaintiff a statement of milk delivered during the preceding month, accompanied by a check covering the amount thereby shown to be due on the basis of the reductions made by the defendant. The plaintiff retained the proceeds from those checks.

On March 5, 1931, the plaintiff received from the defendant a letter dated March 1, 1931, and postmarked March 4, 1931, purporting to give notice of cancellation of the contract effective April 1, 1931. On and after April 1, 1931, the defendant refused to receive further deliveries of milk from the plaintiff.

The plaintiff in the present action sought to recover the difference between the amounts paid by the defendant and the amount computed upon the basic price stated in the contract without reduction except the reduction of May 28, 1930, for all milk delivered during the period between August 1, 1930, and April 1, 1931. The plaintiff also sought to recover damages for the defendant's refusal to accept deliveries of milk during the second year of the contract period. As to the latter item of damages, the defendant pleaded the giving of the aforesaid notice, and, as to the first item, the defendant alleged that the plaintiff and defendant had stated their accounts under said contract and that upon each of such accounts the defendant had paid to the plaintiff the sum so computed to be due thereon.

The trial court found that at the time the contract was entered into and on May 28, 1930, when the defendant made its first reduction in the price to be paid to the plaintiff under the contract, it was selling and disposing of almost all of its milk to retail customers, and but 20 per cent. thereof to wholesale customers; but that, at the time it made its second reduction effective, viz. August 1, 1930, because of existing conditions in the market, the defendant was disposing of but 15 per cent. of its milk at retail and 85 per cent. to the wholesale trade.

The court further found that on May 28, 1930, the defendant cut the price to its retail customers 4 cents per gallon and 12 cents per gallon to its wholesale trade, and at the same time cut the price to be paid to the plaintiff 2 cents per gallon; that it paid to the plaintiff the basic price mentioned in the contract less 2 cents per gallon from May 28 to August 1, 1930; that the defendant made no additional or further reduction in the price of milk to its customers, but on August 1, 1930, when the bulk of its trade had become wholesale, the defendant cut the price to the plaintiff an additional 4 cents per gallon. The court further found that there was due to the plaintiff an additional 4 cents per gallon on 15 per cent. of the milk delivered by the plaintiff between August 1, 1930, and April 1, 1931, amounting to the sum of $109.92.

The court also found that the defendant had not given notice of termination pursuant to the terms of the contract. Based on the same percentages of retail and wholesale trade, damages in the sum of $1,378.02 were found to be due by reason of the defendant's refusal to receive deliveries from the plaintiff during the second year of the contract. The court found further that no account was ever stated between the plaintiff and the defendant concerning any portion of the milk delivered between the 1st day of August, 1930, and the 1st day of April, 1931. Judgment for the plaintiff was entered for the sums found to be due. Both parties appealed from the judgment.

[1] On its appeal the defendant contends that the evidence establishes as a matter of law that an account was stated between the parties and that the trial court erred in refusing to admit evidence offered of oral notice of termination of the contract and evidence in support of certain breaches of contract by the plaintiff alleged in the defendant's answer.

The defendant alleged and offered to prove oral notice to the plaintiff prior to the sending of written notice and within the time specified. Under the terms of the contract, the plaintiff was entitled to the written notice as provided. There was no evidence tendered or received to prove that the plaintiff expressly or by his conduct waived the required notice, nor, under the facts offered, was he, as in the case of Mason v. United Press of Illinois, 94 App. Div. 617, 88 N. Y. S. 99, relied upon, legally chargeable with notice within the time specified.

[2] The trial court further found that the plaintiff had fully kept and performed all of the terms and conditions of the contract up to and including the 1st day of April, 1931, when further deliveries of milk were refused by the defendant. The defendant claims error in the rejection of evidence offered to prove that the plaintiff had breached the conditions of the contract and was not entitled to recover, and specifically that the plaintiff had not complied with the requirements for certain standards of cleanliness, flavor, and condition of the milk, as well as

certain standards of sanitation in the maintenance of the plaintiff's dairy. On the documentary evidence in the record the trial court was justified in concluding that any such breach on the part of the plaintiff was waived by the defendant. The purported written notice contained the following statement: "Our business relations have been most agreeable and we look forward to being in a position to do business with you again at some future date." Furthermore, the contract provided the disposition to be made by the defendant of milk delivered by the plaintiff which did not comply with the required standards. The parties agreed that "no milk shall be delivered, nor shall any milk be required to be paid for that does not in all respects meet the requirements. * * * Any milk shipped with a foreign odor, caused from feeding, barn or any other conditions, the buyer will have the right not to pay for, or in its discretion allow only market price at Fresno of butter fat for said milk. * * *" The defendant did not offer to prove that it had refused to pay for any milk which it accepted from the plaintiff and which was included in its statements of account; nor do its accounts show that it had exercised the discretion vested in it by those provisions, or that any reduction in the contract price was based thereon. On the contrary, its statements of milk received, so far as the record shows, were based on a compliance by the plaintiff with the terms of the contract. The plaintiff is not endeavoring to recover for any milk except such as the defendant's accounts show was received by it.

[3-7] On the defendant's appeal there remains for consideration the contention that the evidence does not support the finding that no account was stated between the parties. Although generally accounts are rendered by the creditor to the debtor, it is conceivable that pursuant to a relationship such as existed between these parties, accounts are expected to be rendered by the party by whom the goods are received and from whom payment is due. Moreover, the contract provides for accounts to be rendered by the defendant. The theory of an account stated is that it becomes a contract between the parties for payment of the amount computed to be due without proof of the specific items included therein. Auzerais v. Naglee, 74 Cal. 60, 64, 15 P. 371. Therefore an element essential to render the account stated is that it receive the assent of both parties, but the assent of the party sought to be charged may be implied from his conduct. Crane v. Stansbury, 173 Cal. 631, 636, 637, 161 P. 7; Hendy v. March, 75 Cal. 567, 17 P. 702; Auzerais v. Naglee, supra; 1 Cor. Jur. p. 685 et seq. Accordingly an account fails to become stated when the essential element of assent is lacking; and assent is not present when proper objections are made by the party sought to be charged. Klein-Simpson Co. v. Hunt, Hatch & Co., 65 Cal. App. 625, 633, 225 P. 14. Ordinarily an account stated is an unperformed promise or agreement to pay the amount shown to be due. However, acceptance of payment of the amount shown to be due on an account rendered may render it an account stated, but it is essential to constitute the transaction an account stated that such payment be accepted without objection. 1 Cor. Jur. 689. There is evidence in the record that, at the time the reduction of August 1, 1930, was announced and subsequently during at least a portion of the time the defendant's statements of account and checks were received, the plaintiff personally and through the Dairymen's League, of which he was a member, protested the reduction made by the defendant as arbitrary and not in accordance with the terms of the contract. On this record and in view of the contractual relationship between the parties and the requirement for monthly accounts and payments, we cannot say that the court was not justified in concluding that there was no assent on the part of the plaintiff to the accuracy of the account. The plaintiff makes the contention that the accounts sent to him may not constitute accounts stated for the additional reason that to allow them as such is to do violence to the rule that parol evidence may not be permitted to vary or contradict the terms of a written agreement. An exception to the rule is that an executed oral agreement may serve as a modification of a written agreement. Julian v. Gold, 214 Cal. 74, 76, 3 P.(2d) 1009. In the present case the point is immaterial, inasmuch as the record, as noted, supports the finding that no oral agreement was proved.

[8-11] The defendant relies upon the case of Blue Ribbon Creamery v. Monk (Miss.) 147 So. 329, asserted to be similar on its facts to the case at bar. That case in part turned on the question whether the trial court properly decreed that no balance was due to the dairymen because there had been accord and satisfaction by the acceptance of the amounts tendered in semimonthly settlements for milk delivered. It was determined

that the acceptance of the semimonthly settlements constituted an accord and satisfaction. The question whether the evidence in the present case sustains any finding that the acceptance of the monthly checks by the plaintiff was an accord and satisfaction is not presented, inasmuch as the specific plea of accord and satisfaction was not interposed by the defendant, the issue was not raised, and consequently there was no finding based thereon. It is a general rule that accord and satisfaction must be specially pleaded. Berger v. Lane, 190 Cal. 443, 447, 213 P. 45; Simmons v. Oullahan, 75 Cal. 508, 17 P. 543; see California, etc., Assn. v. Rindge L. & N. Co., 199 Cal. 168, 180, 248 P. 658, 47 A. L. R. 904; Sierra, etc., P. Co. v. Universal Elec., etc., Co., 197 Cal. 376, 241 P. 76; and B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 P. 624. However if we assume that the pleading of an account stated and payment thereunder calls for the application of the principles involved in the doctrine of accord and satisfaction, nevertheless the question whether there is an accord and satisfaction is one primarily for the trial court; and the question here, since payment is not disputed, is whether the evidence supports the implied finding of the court that there was no accord between the parties. On the evidence hereinabove noted we do not feel justified in disturbing that conclusion.

[12] The plaintiff's appeal is prosecuted on the theory that the damages are inadequate as to both items. It is his contention that the trial court misconstrued the provisions of the contract relating to the basic price and the method by which it might be reduced. It is claimed that, inasmuch as most of the defendant's trade was with retail customers at the time of the agreement, the basic price computed thereon must always remain based on the price of the defendant's retail trade and could not be reduced below the plaintiff's proportionate share of the reduction made to retail customers even though the trade with retail customers fell to a negligible proportion due to the cheaper prices to the consumer available at the stores. There is no such limitation in the terms of the contract. The provision purports to include any reduction of the defendant's "price to customers in order to meet competition or on account of a milk price war in Fresno." This purports to include both classes of customers, retail and wholesale. We conclude that the trial court properly construed the contract between the parties, and that no error was committed in the trial of the cause.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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220 Cal. 498

WILDMAN v. MOE-BRIDGES CO.

S. F. 14766.

Supreme Court of California.

April 9, 1934.

Master and servant ⚷80(10).

Evidence supported finding that hardware company paying its branch manager percentage of net profits of branch office agreed that profits of branch were to be based on prime factory cost of merchandise sold by branch, excluding administrative expenses of central office.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Banks J. Wildman against the Moe-Bridges Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Wright & Wright & Larson, of San Francisco, for appellant.

C. H. Sooy and Sooy & Heywood, all of San Francisco, for respondent.

PRESTON, Justice.

Defendant, during the years 1923, 1924, and 1925, was engaged in the manufacture and sale of household fixtures and hardware, with home office at Milwaukee, Wis., and plaintiff was sales manager for its western division, or San Francisco branch, under contract to receive a stipulated monthly compensation, plus 10 per cent of the net profits of the branch, payable at the end of each year. In the matter of arriving at a satisfactory cost basis for merchandise sold by the branch, upon which might be computed the 10 per cent. net profit, there soon arose a controversy of long duration, which culminated in the bringing of this action by plaintiff to recover sums alleged to be due him from defendant.

The sole issue in the cause was clearly defined by a stipulation of the parties which provided that if the court found, in accordance with the contention of plaintiff, that the profits of said branch, during said period and under the agreement between the parties, should be based upon the factory cost of the merchandise sold by the branch, excluding from said factory cost specified items of indirect, general, and administrative expenses of the principal, central, main offices of defendant at Milwaukee, not incurred by the branch (hereinafter referred to as "items"), then, according to a stipulated computation, there would be due and payable to plaintiff upon said basis the sum of $6,811.50, for which he should have judgment, with interest thereon. The stipulation further provided that if the court found, in accordance with the contention of defendant and under the agreement between the parties, that the profits of said branch should be based upon the factory cost of the merchandise sold by the branch during said period and that said items should be included in or added to said factory cost, or included in the deductions from the gross profits of the branch, then, according to a stipulated computation, defendant would be entitled to judgment dismissing the action.

Upon the trial various documents and correspondence between the parties over the period involved were introduced in evidence; plaintiff testified and defendant offered depositions taken prior to trial, together with additional documentary evidence. On the above issue, the court found that in April, 1923, defendant entered into an oral agreement with plaintiff, thereafter partially reduced to writing by exchange of letters between the parties, under which the profits of said branch were to be based on the prime factory cost of merchandise sold by it, excluding therefrom said items. Judgment in accordance with this finding, and following the terms of said stipulation, was thereafter entered for plaintiff, and defendant appealed.

Appellant contends that we are required to interpret the terms of its contract with respondent to determine whether the provision for payment of said 10 per cent. net profit contemplated charging the branch, in computation thereof, with said items, as part of the cost of the goods sold by it. In this connection, appellant claims that all the terms of the contract, as orally agreed upon by the parties, were later incorporated in confirmatory letters exchanged by them, which merely stated that respondent would receive a sum equivalent to 10 per cent. of the net profits of the branch, without specifying upon what basis said profits were to be computed. In this situation, appellant urges, we must give the term "net profits" its usual definition and significance, viewed in the light of the interpretation which the parties, during their conduct of the business, placed upon it and, so doing, we must determine this appeal in accordance with appellant's claims.

Respondent asserts that no question of interpretation of the contract, or of said term, is involved on this appeal; that the sole question here is whether the evidence sufficiently supports the findings and judgment. He contends that the issue in the court below was purely one of fact, to wit: Did the parties agree that the merchandise should be charged to the branch at prime factory cost only, or did they agree that to the latter cost could be added the aforesaid items? What was the agreement between the parties? Was it partially or fully reduced to writing? Is there evidence to support the conclusion of the court below on these questions of fact?

Respondent's statement of the case seems to be correct. As above stated, the court found that appellant entered into an oral agreement with respondent, which was thereafter *partially* reduced to writing by exchange of letters between them. The evidence abundantly supports this, and all other findings and the judgment, as will now be shown.

Appellant company was organized in 1919. In 1920 respondent undertook pioneering work for it on the west coast at a minimum compensation by representing it along with other companies. Considerable business was developed, and in 1922 the San Francisco branch was established, with respondent as its manager, devoting himself exclusively to appellant's business under a five-year written contract of employment, executed January 1, 1922, which provided that he should receive, in addition to a drawing account, compensation based on a straight monthly commission of 5 per cent. on total net shipments to the territory in excess of $12,000 a month. This contract proved profitable for respondent but burdensome to appellant; hence in 1923 respondent was called to the home office and was asked to and did surrender it for the contract here involved, the terms of which were reached by oral agreement during his stay at said home office. After his return to San Francisco he received the letter of April 3, 1923, which, appellant alleges, sets forth all of the terms of the new contract of employment. We cannot concur in this view, as the letter does not purport to have any such scope. It states: "* * * This will confirm the new arrangement accepted as mutually satisfactory and the following points are enumerated here merely as a matter of record to preclude any possible misunderstanding in the future." It then enumerates certain points: That the new arrangement is effective April 1, 1923; that respondent will return the old contract for cancellation; that he will receive a flat weekly salary of $100, plus automobile allowance; and that he will also receive a "sum equivalent to ten per cent of the net profits earned by the San Francisco Branch, this being payable in a lump sum after * * * December 31st each year." Respondent did not reply to this letter until May 17, when he wrote that the new arrangement "looked all right"; that he did not like the idea of not receiving his profits until the end of the year, but supposed it was all right.

The tenor of these letters indicates clearly that no attempt was made therein to make a complete statement of the terms and working arrangements of the oral agreement of the parties. This view is confirmed by an examination of the later correspondence, which is quite voluminous. It shows that appellant tried first one method and then another of figuring the cost basis for merchandise shipped to the branch, at first excluding but later including the aforesaid items, and that the result of these frequent changes was that although respondent greatly increased the volume of branch business, his profit grew smaller instead of larger, or vanished altogether. Furthermore, as he received an accounting of the net profit due him, if any, only at the end of the year, changes in appellant's methods of computation and accounting were more or less concealed from him over long periods, and correspondence with respect thereto was intermittent and unsatisfactory because of absorption of his time by pressure of the rapidly expanding branch business. In other words, there is no doubt that appellant imposed upon respondent's trust and loyalty and left him somewhat in a state of mystification relative to accounting at the head office, until at last his suspicions that he was being mistreated were thoroughly aroused and he protested vigorously and expressed his indignation at having been induced to surrender a profitable contract for one rendered uncertain and apparently subject to control by appellant through manipulation of or changes in its accounting system.

The trial court was abundantly justified in believing respondent's testimony that one of the terms of his oral contract with appellant, agreed upon during his visit to the home office, was that the branch was to be charged only with prime factory costs (cost of labor to appellant in the manufacture of goods plus 135 per cent.), and that the said "items" were not to be added thereto.

We are satisfied that the findings and judgment have ample support in the evidence.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.

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220 Cal. 372

SECURITY TRUST & SAVINGS BANK OF SAN DIEGO v. NEW YORK INDEMNITY CO.

L. A. 14415.

Supreme Court of California.

March 27, 1934.

Rehearing Denied April 26, 1934.

1. Insurance ⇨425.

Bankers' blanket bond covering loss by theft and excepting loss through forgery or loans *held* not to cover loss resulting when bank in good faith made loan to alleged agent on basis of forged writings (Pen. Code, § 484; Civ. Code, § 2628).

Bank made loan to alleged agent on basis of letter and instructions authorizing agent to borrow moneys, which letter was forged, and which forgery was not known to bank. Loan was established in form of credit which alleged agent withdrew by several checks drawn upon his account. Alleged agent under California laws could have been prosecuted for theft.

2. Insurance ⇨425.

That general coverage clause of bankers' blanket bond insured against all thefts did not require construction that exception clauses excluding losses resulting from forgery or growing out of loans meant to exclude such losses only when there was absence of elements of theft (Civ. Code, § 2628).

3. **Insurance** ⚷146(1).

Insurance contract should be construed as an entirety.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by the Security Trust & Savings Bank of San Diego against the New York Indemnity Company. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Prior opinion, 23 P.(2d) 1079.

Mathes & Sheppard and W. C. Mathes, all of Los Angeles (Lloyd Melvin Smith, of Los Angeles, of counsel), for appellant.

Hamilton, Lindley & Higgins and F. M. Downer, Jr., all of San Diego, for respondent.

O'Melveny, Tuller & Myers, Louis W. Myers, C. P. Von Herzen, Joe Crider, Jr., and Clarence B. Runkle, all of Los Angeles, amici curiæ.

WASTE, Chief Justice.

Defendant appeals from a money judgment entered in favor of plaintiff.

The cause went to trial on an agreed statement of facts which may be summarized as follows: At all times material to this action, Gordon L. Eby and Lewis H. Homer were attorneys in fact for the Indemnity Insurance Company of North America, which for brevity we will refer to as the indemnity company, and each was authorized to execute, acknowledge, and deliver in the name of the company, indemnity and fidelity bonds and undertakings, including those similar to the one here involved. Homer had offices with, and was employed by, Eby. He acted as solicitor and salesman for the indemnity company, and inspected and supervised the work of contractors for whom the indemnity company had written indemnity or fidelity bonds and represented the indemnity company in cases where such contractors had failed or were about to fail or had abandoned the performance of their contracts. These facts were all known to the plaintiff bank and its officers.

P. C. Kelley was a vice president of the plaintiff bank, and was authorized to and did act for it in all the transactions involved in this action. R. W. Forsyth was the Pacific Coast manager of the indemnity company. Blanche P. Matson was a notary public in and for San Diego county, and was employed in the office of Eby up to about November 17, 1928, on which date her employment terminated. Plaintiff and its officers knew she was a notary public and that she was employed in the office of Eby, but had no knowledge of the termination of her employment until after March 4, 1929.

On or about December 24, 1928, Homer represented to Kelley that a contractor named R. T. Dawson had obtained two public improvement contracts, one known as the Sweetwater bridge contract and the other as the Dulzura conduit contract, with the indemnity company as surety on his labor, material, and completion bonds; that Dawson was unable to complete the contracts, and that the indemnity company would be compelled to take over and complete them at a cost to it of $15,000; that the completion would require about six months; that the indemnity company had instructed Homer to take charge of the completion work and to borrow money in his own name from the plaintiff to complete the contracts; that the indemnity company would guarantee the repayment of the loan by giving a bond in the penal sum of $16,500. Homer gave Kelley an unexecuted bond which would serve as the form of the bond to be executed to secure this loan. This application for a loan was referred to the loan committee of the plaintiff bank. Kelley reported the representations made to him by Homer, and gave the committee the blank form of bond. While the application was under consideration by the loan committee, and for the purpose of inducing it to approve the loan, Homer presented to plaintiff the following letter:

"Gordon L. Eby & Co.,

"Gentlemen: Re: Robert T. Dawson. S. A. 15148 Sweetwater Bridge. S. A. 14195 Dulzura Conduit. Your wire received. You are hereby authorized to sign Indemnity Bond $16500.00 favor of Security Trust & Savings Bank of San Diego securing note of Lewis H. Homer issued for six months.

"Very truly yours,

"R. W. Forsyth.
"R. W. Forsyth.
"RWF/AM Manager."

Homer represented to the officers of the plaintiff bank that the foregoing letter was genuine and bore the genuine signature of R. W. Forsyth. The loan committee and officers of plaintiff bank believed Homer's representations, and authorized the making of the proposed loan, which was to be evidenced by the promissory note of Homer, due in six months and secured by the written guaranty of the indemnity company.

Thereafter, and on or about December 27, 1928, Homer executed and delivered to plaintiff the required promissory note in the principal sum of $15,000 and the written guaranty purporting to have been executed by the indemnity company and having attached to it the signature of the indemnity company by Gordon L. Eby, its attorney in fact. This guaranty bore the acknowledgment of Eby before Blanche P. Matson, a notary public. Homer represented that the guaranty bore the genuine signature of Eby and was in fact duly acknowledged by him. Plaintiff and its officers did not question the truth of these representations, made the loan upon the security mentioned, and placed $15,000 to the credit of Lewis H. Homer in a checking account subject to his check. All of this money was withdrawn by checks signed by Homer prior to March 1, 1929, except the sum of $28.49. Homer disappeared on this last date, and has not been apprehended.

It is stipulated that plaintiff would not have advanced the money to Homer had it not believed all the representations made by him and that the letter and guaranty were the genuine acts of Forsyth and the indemnity company.

All the representations made by Homer were false and fraudulent, except that there was a contractor named R. T. Dawson who had two contracts for public improvements which we have mentioned, that the indemnity company had written a labor, material, and completion bond for him, and that the signature and seal of Blanche P. Matson on the certificate of acknowledgment were genuine. The signature of Forsyth on the letter was forged, as was the signature "Indemnity Company of North America by Gordon L. Eby, attorney in fact" on the guaranty. The signature of Blanche P. Matson on the certificate of acknowledgment was her genuine signature. It had been attached to the certificate in blank before it was attached to the indemnity guaranty bond. It was her custom to sign acknowledgment certificates in blank for convenience. These were left in her desk in the office of Eby. The certificate of acknowledgment was filled out by Homer or some other person without her knowledge or consent, and the notarial seal attached after she left Eby's office was attached to the guaranty bond by Homer before its delivery to the plaintiff. Security Trust & Savings Bank v. Matson, 116 Cal. App. 616, 2 P.(2d) 1001. Neither Forsyth, Eby, nor the indemnity company had any knowledge of the execution and delivery of the forged letter or of the forged guaranty bond, and neither plaintiff nor its officers had any knowledge of these forgeries or of the falseness of the representations made by Homer until after March 1, 1929.

Upon ascertaining the facts, the plaintiff bank made written demand upon the defendant New York Indemnity Company for the loss sustained as a result of the loan to Homer, and accompanied the demand with an affidavit purporting to comprise a proof of loss under the terms and provisions of a "Banker's Blanket Bond" theretofore issued by the defendant to the plaintiff upon payment of the premium therefor. The defendant denied any liability for the loss, and this action followed. As already indicated, the trial court gave judgment for the plaintiff. The sole question presented is whether the loss to the plaintiff bank, as a result of the transaction with Homer, is such a loss as the defendant indemnity company insured against by the terms of its "Banker's Blanket Bond."

The pertinent coverage provisions of the bond are:

"The losses covered by this bond are as follows: * * *

"(B) Any loss of Property through robbery, larceny (whether common-law or statutory), burglary, theft * * * while the Property is within any of the Insured's offices covered hereunder, * * *

"The foregoing agreement is subject to the following conditions and limitations: * * *

"Section 2. This bond does not cover:

"(a) Any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause (A) or (D) hereof. [It is conceded that insuring clauses "A" and "D" are without application to this case.] * * *

"(d) Any loss resulting from any loan made by the Insured. * * *"

It must be admitted that Homer's conduct in obtaining the loan from the plaintiff bank and in absconding with the money so obtained constituted theft as it is now defined in section 484 of the Penal Code. Every element of the offense is presented in the facts stipulated to by the parties.

[1] This being so, and had the bond contained only the insuring clause B, without exception or limitation, the loss suffered by

plaintiff would fall squarely within its coverage provisions, and the judgment would have to be affirmed. However, the several coverage clauses are, in the terms of the bond, "subject to the following conditions and limitations," viz., that the bond does not cover (a) any loss effected directly or indirectly by means of forgery, or (d) any loss resulting from any loan made by the insured. A mere reading of the stipulated facts, summarized above, very clearly indicates to us, and the trial court so found, that the loss suffered by the plaintiff bank was effected, indirectly at least, by means of forgery. This, of course, serves to exclude such loss from coverage under the policy because of the exception and limitation contained in section 2a, above quoted. The loss suffered in the Homer transaction would also appear to be excluded from coverage under the policy because of the provisions of section 2d, supra, which exclude any loss resulting from a "loan." For either or both of these reasons the judgment must be reversed.

[2, 3] In opposition to this conclusion, and in support of the judgment, the plaintiff contends that the court below was correct in determining an inconsistency existed in the coverage clauses of the policy which, under settled principles, should be resolved in favor of the insured. While we readily recognize and approve the principle that ambiguities and inconsistencies should be resolved against the insurer and in favor of the insured, we fail to see its application to the bond under consideration. We are unable to ascribe to the reasoning which suggests that, because the general coverage clause B insures against all thefts, the exception or limitation clauses excluding losses resulting from forgery or growing out of a loan must be so construed as to exclude such losses only when there is an absence of the elements of theft. To so interpret the bond would be novel, to say the least, and would serve to nullify the exception or limitation clauses in important particulars. The very purpose of exception or limitation clauses is to exclude risks otherwise covered by general coverage clauses. It is of their nature to conflict with general clauses, in that they constitute restrictions on the latter. An insurance contract, like any other contract, should be construed as an entirety, the intention being gathered from the whole instrument. Burr v. Western States L. Ins. Co., 211 Cal. 568, 576, 296 P. 273.

The unquestionable purport of section 2a is that the bond does not cover "any loss effected directly or indirectly by means of forgery," unless such loss falls within the purview of the general coverage clauses A or D, which latter clauses, as stated above, are not pertinent to the present inquiry. If all losses effected by means of forgery, except losses covered by clauses A and D, are excluded from coverage under the bond, it goes without saying that losses otherwise covered by the general clauses B and C are excluded when effected directly or indirectly by means of forgery. What has been said applies equally to losses resulting from loans. Section 2d, supra.

This construction of the bond comports with the provisions of section 2628 of the Civil Code wherein it is declared that: "Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

We find additional support for our conclusion in two New York decisions wherein, the identical question was presented for adjudication. Trade Bank of N. Y. v. U. S. F. & G. Co., 249 N. Y. 546, 164 N. E. 578; World Exch. Bank v. Commercial Cas. Ins. Co., 255 N. Y. 1, 173 N. E. 902, 904. In each of these cases the New York court was called upon to interpret a "Banker's Blanket Bond," such as we have here before us, and more particularly to determine the identical question here involved, viz., whether losses resulting from theft, and otherwise covered by the general insuring clause B, are excluded from coverage because of the particular provisions of section 2a excluding any loss effected directly or indirectly by means of forgery. In each of the cited cases the loss was held, as herein concluded, not to be covered by the bond. The following appears in the latter case: "Subdivision B gives indemnity for any loss 'through robbery, * * * theft, * * * while the property is actually within the offices of the insured.' This clause might apply to the loss suffered by the plaintiff if it were not for a subsequent exception. By subdivision 2 (a), the 'bond does not cover any loss effected by means of forgery, except when covered by insuring clauses A and D.' The loss in question was one effected by means of forgery * * * and, unless covered by A or D, must be held to be excluded." This construction of the provisions of the bond coincides with our interpretation thereof.

Inasmuch as this cause was submitted to the court below upon an agreed statement of fact, and there is therefore no necessity for a second trial, the judgment is reversed, with directions to the trial court to make new findings of fact and conclusions of law in accordance with the views herein expressed and to enter judgment thereon for the defendant.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; IRA F. THOMPSON, J.

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220 Cal. 492

LUCCI et ux. v. UNITED CREDIT & COLLECTION CO.

S. F. 14785.

Supreme Court of California.

April 3, 1934.

1. Pleading 🔑85(4).
Further extending time to answer after original extension expires is within judge's discretion (Code Civ. Proc. §§ 473, 1054).

2. Pleading 🔑85(4).
In action to quiet title to mortgaged premises, refusal to grant additional 20-day extension of time to answer after original 10-day extension expired *held* not abuse of discretion, where mortgagee was threatening foreclosure unless title was cleared (Code Civ. Proc. §§ 473, 1054).

3. Homestead 🔑84.
Whether debtor and wife were joint tenants or tenants in common *held* immaterial respecting their right to declare homestead.

4. Homestead 🔑95.
Attachment lien is defeated by subsequent declaration of homestead before judgment.

5. Fraudulent conveyances 🔑38.
Where debtor, wife, daughter, and son-in-law were joint tenants, deed by daughter and son-in-law, though made to enable debtor and wife to declare homestead, was not void as against attachment creditor (Civ. Code, §§ 1245–1259).

6. Fraudulent conveyances 🔑38.
Principles of fraudulent conveyances are inapplicable to homestead declarations.

7. Equity 🔑88.
Estoppel 🔑110.
In action to quiet title to homestead, questions of laches and estoppel, not pleaded, *held* not available.

8. Equity 🔑66.
Judgment quieting title to homestead as against execution creditor *held* proper as against contention that debtor should first do equity by paying judgment (Civ. Code, §§ 1245–1259).

9. Appeal and error 🔑977(5).
Denial of new trial will be sustained unless abuse of discretion is shown.

10. New trial 🔑102(1).
Denying new trial for newly discovered evidence *held* not abuse of discretion, in absence of facts showing reasonable diligence to discover evidence before trial.

11. Appeal and error 🔑714(1).
Affidavits used below only on motion for new trial cannot be considered on appeal in determining whether evidence supports findings.

In Bank.

Appeal from Superior Court, San Francisco County; George H. Cabaniss, Judge.

Action by Romualdo Lucci and wife against the United Credit & Collection Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

E. B. Cassidy, of San Francisco, for appellant.

A. Don Duncan, of San Francisco, for respondents.

IRA F. THOMPSON, Justice.

The defendant United Credit & Collection Company has appealed from a judgment quieting the title of the plaintiffs Romualdo and Caterina Lucci to the premises in dispute free and clear of all incumbrances, except a mortgage held by the San Francisco Bank as security for the payment of a note in the sum of $2,500; decreeing that the defendant has no right, title, interest, claim, or lien of any nature in or to the premises, and, further, that the execution, the sheriff's sale based thereon and the sheriff's certificate of sale made to the United Credit & Collection Company are invalid and void and that the declaration of homestead made by the plaintiffs was valid, that all the statements made therein were true, and that the declarants had fully complied with the requirements of the homestead law; and enjoining the defendant from asserting any claim, lien, or interest in or to the premises.

This action was commenced October 16, 1931, by Romualdo and Caterina Lucci to quiet title to a lot on Grove street in San Francisco and to remove a cloud from their title consisting of execution proceedings and a sheriff's sale to the United Credit & Collection Company. On December 2, 1927, the United Credit & Collection Company brought an action against the respondents on a claim for goods sold to Lucci, and an attachment was levied upon the property in dispute, which was then held in joint tenancy by Romualdo Lucci, Caterina, his wife, and Frank and Carmelina Oliva, his daughter and son-in-law. On December 14, 1927, the Olivas made a deed conveying to Romualdo and Caterina Lucci "all that certain lot, piece or parcel of land," particularly describing it. On the same day Romualdo and Caterina Lucci executed a declaration of homestead, in which they stated that the property was community. Both instruments were recorded on the following day, the deed from the Olivas at 9:34 a. m., and the declaration of homestead at 9:45 a. m. Mr. and Mrs. Lucci defaulted in the action by the United Credit & Collection Company, and on January 24, 1928, judgment was entered against them for $467.22; execution being levied on January 26, 1928. The sheriff's sale was held March 6, 1928, the United Credit & Collection Company purchasing for the sum of $511, and the sheriff's return being recorded April 27, 1928. The sheriff's deed was made on March 8, 1929, and recorded March 14, 1929. It was stipulated at the trial that these various proceedings were taken as required by law and were valid in form.

Appellant's brief is voluminous and urges a great many grounds for reversal, in so many of which there is so little merit that the appeal borders upon the frivolous. It is unnecessary to burden this opinion with a discussion of all of the points which it has attempted to make.

[1, 2] Complaint is made of the action of the trial court in refusing to allow to the defendant, upon the expiration of the original ten-day extension of time, an additional twenty days within which to plead to the complaint. Appellant insists that it was not allowed a reasonable time in which to prepare its defense and make a satisfactory investigation and that, on that account, important evidence was not discovered and important witnesses were not located until after trial, and that this action of the trial court prevented defendant from having a fair trial and amounts to such irregularity of procedure as to constitute an abuse of discretion and also was such accident and surprise as could not have been guarded against by the use of due diligence for the reason that the defendant was entitled to believe that additional time would be granted upon a proper showing. Sections 473 and 1054 of the Code of Civil Procedure are cited in support of this contention. These sections provide that an extension "may" be allowed by the trial court "in furtherance of justice" and "upon good cause shown." Obviously, the further extension of time to plead to the complaint rested in the sound discretion of the trial court. Not only has no abuse of discretion been shown, but it would appear that, under the circumstances of this case, the trial court acted correctly in denying further time. The record shows that the holder of the mortgage was threatening foreclosure unless the title could be cleared and that the statute of limitations on the mortgage expired about a month from the trial date. Plaintiffs' interest in the property was being jeopardized by the delay. The date of trial, November 13, 1931, was stipulated to by the parties, although appellant seeks to avoid the effect of this stipulation by saying that it was entered into because of the remarks of the court and the threats of counsel for the plaintiffs that the bank would foreclose and no one would get anything. The record also shows that during the trial counsel for defendant agreed that the plaintiff was "quite justified in bringing it on at an early date."

[3] The contention is made that Romualdo and Caterina Lucci had not such an interest in the premises as would entitle them to declare a homestead thereon for the reason that they held in joint tenancy with the Olivas. However, the record shows that the Olivas had conveyed their interest to the Luccis prior to the declaration of homestead. Whether the Luccis thereafter held as joint tenants or tenants in common is immaterial. Swan v. Walden, 156 Cal. 195, 103 P. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194.

[4] The argument that the lien of the attachment is not defeated by the declaration of homestead prior to judgment is answered to the contrary by Jacobson v. Pope & Talbot, 214 Cal. 758, 7 P.(2d) 1017.

[5, 6] It is also claimed that the deed from Frank and Carmelina Oliva to Romualdo and Caterina Lucci, having been made for the

sole purpose of enabling the latter to declare a homestead on the property, is void as against the attaching creditors. It has been held by this court that the principles of fraudulent conveyances do not apply to declarations of homestead. Gray v. Brunold, 140 Cal. 615, 621, 74 P. 303. It is said in Schmidt v. Denning, 117 Cal. App. 36, 39, 3 P.(2d) 322, 323: "The fact that the defendants filed a declaration of homestead to hinder and delay their creditors is not actionable. That result is to be expected from the very existence of a statute allowing the creation of homesteads. Fitzell v. Leaky, 72 Cal. 477, 483, 14 P. 198." And, in Marelli v. Keating, 208 Cal. 528, 282 P. 793, 794, this court said: "The object of the homestead law is to protect the homesteader and those dependent upon him or her in the enjoyment of a domicile not exceeding $5,000 in value, and to this end a liberal construction of the law and facts will be indulged by courts. When this object has been accomplished, courts will not suffer this salutary statute to be used as a shield behind which those who would deal unjustly with creditors may find refuge." Since the law protects and recognizes as legitimate the purpose of Lucci in making his declaration of homestead, it is difficult to see how the action of the Olivas, who merely assisted in that purpose and who owed no duty to the United Credit & Collection Company, can be characterized as fraudulent. The case does not go beyond the object of the homestead law as stated above. Any excess value over $5,000 could have been reached under the procedure authorized by sections 1245 to 1259 of the Civil Code, but concededly no such proceedings were taken by the judgment creditor.

[7, 8] The question of laches and estoppel we will dismiss as not having been pleaded. But it is asserted that the plaintiffs are not entitled to the equitable relief of a judgment quieting their title and removing the cloud of the execution sale without first doing equity by paying the amount of the appellant's judgment. It is held to the contrary in Price v. Central Savings Bank, 62 Cal. App. 583, 217 P. 800, and Graham v. Hunt, 119 Cal. App. 586, 7 P.(2d) 186. We are of the opinion that this is the proper rule to follow: A homestead exemption is allowed by law. Consistency demands that it be protected or the purpose of "this salutary statute" is not accomplished.

[9, 10] On motion for new trial made on the ground, among others, of newly discovered evidence, appellant filed affidavits of its counsel and Alec C. Stoddard, who with his wife held the property under a trust deed executed by Romualdo and Caterina Lucci and Frank and Carmelina Oliva to secure the payment of the balance of the purchase price to their grantors. By these affidavits the appellant sought to show that a "duplex" dwelling house and a single dwelling house separated by a yard and having three separate street numbers were located upon the homesteaded premises and that the declarants lived only in one portion of the "duplex" despite the fact that the declaration stated that they lived on the premises described, with all improvements thereon, the "improvements numbered 718 Grove Street," and that the premises "together with the dwelling house thereon" were selected and claimed as a homestead. It was also sought to be shown by the affidavit of Stoddard that the transfer of the interest of the Olivas was merely colorable and that as a matter of fact there was no actual change of ownership. It is alleged in the affidavit of appellant's counsel that it was necessary to search the record and locate witnesses, but no facts are stated showing that reasonable diligence was used in endeavoring to discover the evidence prior to the trial, nor is any satisfactory explanation given why it was not possible to discover that the improvements upon the property consisted of a "duplex" and a single dwelling and that the declarants occupied only a portion of the "duplex." In fact, it is attempted to place upon the trial court, because of its refusal to make additional extensions of time, the entire responsibility for the failure of appellant to present these facts at the time of trial.

The action of the trial court in denying a new trial will be sustained except where an abuse of discretion is shown (Maxwell Hardware Co. v. Foster, 207 Cal. 167, 277 P. 327; Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622; Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127), and no abuse of discretion has been made to appear.

[11] The evidence offered on the trial sustains the findings and the judgment. The affidavits used in the trial court only upon a motion for a new trial cannot be considered on appeal in determining the sufficiency of the evidence to support the findings. Gallatin v. Corning Irr. Co., 163 Cal. 405, 422, 126 P. 864, Ann. Cas. 1914A, 74.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

220 Cal. 503

In re CRONVALL'S ESTATE.

S. F. 14895.

Supreme Court of California.
April 9, 1934.

Rehearing Denied May 7, 1934.

1. Husband and wife 🔑264.

Evidence sustained finding that deceased wife's estate consisting of lot purchased in her name and house afterwards constructed thereon by husband, and furniture was community property distributable to husband and not wife's separate property distributable to her nieces.

2. Appeal and error 🔑1010(1).

Finding of trial court, supported by sufficient evidence, is conclusive on review.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding for the final distribution of the estate of Hannah Cronvall, alias, deceased. From an order and decree of final distribution, distributing the estate to Alfred Cronvall, administrator, Mary Haley and another appeal.

Affirmed.

Peter S. Sommer, Nat Schmulowitz, and Tobin & Tobin, all of San Francisco, for appellants.

Walter J. Brown, of Modesto, for respondent.

PRESTON, Justice.

Appeal from order and decree of final distribution, finding the entire estate of Hannah Cronvall, deceased, to be community property and distributing it to respondent, Alfred Cronvall, the husband of said decedent and administrator of her estate, thus overruling the objections of appellants, two surviving nieces, who seek to share in the distribution of said estate as separate property of decedent.

The estate is located at 227 Corbett avenue, San Francisco, and consists of a lot, and house thereon, valued at $3,000, and household furniture valued at $100. In 1909 the lot was purchased in decedent's name for about $900. Respondent, by trade a carpenter, constructed a dwelling thereon which was, until the passing of decedent in 1931, the family home of this husband and wife.

[1, 2] The sole question here presented is that of sufficiency of the evidence to sustain the finding that the entire estate was community property and not separate property. Appellants claim that the evidence established an uncontroverted disputable presumption that said property was separate property of decedent by reason of the fact that it was purchased in her name; at the same time respondent deeded to her any interest he might have in it, and the purchase price was paid from a bank account, also in decedent's name, wherein had been mingled, with her separate funds exceeding the amount of such purchase price, community funds of a less sum than said purchase price.

We have reviewed the record with care. It supports the action of the court below and contains evidence which, though meager, is sufficient to overcome the presumption raised by the aforesaid circumstances and to establish the community character of the estate. It is fundamental that a finding of the court below, supported by sufficient evidence, is binding and conclusive.

The order and decree appealed from is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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220 Cal. 392

G. H. DEACON INV. CO. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 14478.

Supreme Court of California.
March 28, 1934.

1. Eminent domain 🔑76.

Court ordering city in eminent domain proceedings to deposit in court money required as security to property owners had positive duty to enforce its order requiring deposit of sum court determined as value of property (Code Civ. Proc. § 1254; Const. art. 1, § 14).

2. Eminent domain 🔑76.

City in eminent domain proceedings, availing itself of immediate possession, had absolute obligation to deposit in court amount of money determined as necessary to give property owners adequate security (Code Civ. Proc. § 1254; Const. art. 1, § 14).

3. Eminent domain ⚷76.

City's compliance with court order directing city to deposit specified sum as security in eminent domain proceedings would not prejudice its appeal from judgment increasing amount of deposit or render question moot, since deposit was not subject to withdrawal until after entry of final decree in condemnation, and final decree could be made only after appeal was disposed of (Code Civ. Proc. § 1254; Const. art. 1, § 14).

◆

In Bank.

Petition by the G. H. Deacon Investment Company and others for a writ of mandamus to be directed to the Superior Court of Los Angeles County and others.

Writ granted.

Prior opinion, 24 P.(2d) 534.

Oliver O. Clark, Victor T. Watkins, and David Fulwider, all of Los Angeles, for petitioners.

Erwin P. Werner, City Atty., Arthur W. Nordstrom, Deputy City Atty., Arthur Loveland, Everett W. Mattoon, Co. Counsel, Beach Vasey, Deputy Co. Counsel, Ray L. Chesebro, City Atty., and Frederick Von Schrader, Asst. City Atty., all of Los Angeles, for respondents.

PER CURIAM.

After a further consideration of the questions involved in this proceeding, we find ourselves in accord with the conclusions reached by the District Court of Appeal in its opinion rendered therein and written by Mr. Presiding Justice Conrey. We have therefore incorporated the major portion of said opinion in our opinion, indicating the same by quotation marks, and have followed it with certain observations of our own. The complete opinion and decision of the court herein is as follows:

"Following the commencement of an action by the city of Los Angeles for the condemnation for public highway purposes of certain property of which the petitioners were the owners, the city deposited with the court the sum of $4,243.84 as security to the owners for the payment to them of just compensation, etc., for the property proposed to be taken. This was done pursuant to an order obtained upon ex parte application made by the plaintiff, in accordance with the permission given by section 14 of article 1 of the Constitution of California. That section contains the following provisions, pertinent to the questions now before us in this case: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner; * * * provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, * * * the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, * * * as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. * * *'

"Thus having paid into court said sum of $4,243.84, the city immediately took possession of said property. Thereafter, and on the same day on which an interlocutory judgment was made and entered by which the value of the property and interest thereon was determined, the respondent court made its order by which the said city was directed to increase the amount of its deposit in said action in the additional sum of $75,750. Without complying with said order, the city filed its notice of appeal from the judgment. Thereupon, in pursuance of a hearing before the respondent court on an order to show cause why the city of Los Angeles and certain of its officers should not be held in contempt of court for their failure to comply with the order of said court by which the said city of Los Angeles was so directed to increase the amount of its deposit in the action, the respondent court made the following order:

" 'In the above entitled cause defendants filed a petition and secured an order to show cause why plaintiff, its officers, agents and representatives should not be punished for contempt, for non-compliance with an order made by the Court herein on January 30th

1933. The order last above referred to required plaintiff to deposit with the County Clerk of Los Angeles County forthwith certain monies as an additional amount to secure the immediate payment to defendants as compensation for taking of their property. The plaintiff has not complied with the order. Upon making said deposit by plaintiff the defendants can immediately draw down said money, and there is no provision of law to recover same in the event a new trial is ordered on an appeal, and a lesser amount awarded. This practically prevents plaintiff from having an appeal from the awards made by the Court. It is not the intent or desire of the Court to prevent plaintiff proceeding with an appeal, and it appears to me unjustified to do so.

"'Therefore, it is hereby ordered that plaintiff be, and hereby is, relieved of complying with the order of the court dated January 30th, 1933, requiring it to deposit certain monies with the Clerk of the Court, that it be purged of contempt and the petition dismissed.'

"Following the entry of this order, the defendants in the action procured from this court its alternative writ of mandate by which the respondent court was directed to enforce its former order by which the said city of Los Angeles was required to increase the amount of its deposit in the action as aforesaid; or that respondent court appear and show cause why it has not enforced its said order. The writ was directed to all of the respondents named in the petition, including the city and certain of its officers; but it will be sufficient for us to consider, as our principal subject, the duty of respondent court.

"Respondents have replied both by demurrer to the petition and by answer. The facts alleged by petitioner are admitted, in all essential particulars. Therefore the case presents for decision the single question: On the facts as stated, does there rest upon respondent court a positive duty to enforce the order requiring that said money be deposited in court as security for the owner?

[1] "Referring to the provisions of the state Constitution, quoted above, we find that the city is given the privilege to take possession of the defendants' property, in advance of actual payment therefor, only by first depositing in court such amount of money as the court has found to be 'reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation,' etc., as soon as the same can be ascertained according to law. The court, by its order altering the amount of such security, has fixed and determined the amount of the deposit to be made. The right of the defendants, thus determined, is derived directly from the Constitution, and not from any allowance thereof by the court. It is the court's duty to determine the amount to be deposited, and to make its order accordingly. But the court is not vested with any discretionary authority to grant or withhold the security to which the defendants are entitled.

[2] "The provisions of the statute in relation to the right of the plaintiff, in a condemnation case, to abandon the proceeding, have no relation to the present matter. The plaintiff here has not abandoned the proceeding. On the contrary, plaintiff has taken the property and has actually made the proposed improvement and opened it to public use. Whatever right of election it had, with respect to availing itself of the 'immediate possession' provisions of the Constitution, the plaintiff has exercised. There remains the absolute obligation, correlative with the owner's constitutional rights, to deposit in court the amount of money which has been determined to be the amount necessary to give adequate security."

As to the ultimate right of the city of Los Angeles to abandon said condemnation proceedings either before or after the final decree of condemnation, we express no opinion, as we do not consider that question is before us in this proceeding, and we expressly refrain from expressing any opinion relative thereto.

[3] It has been suggested, as justification for the failure of plaintiff to deposit said money, that, if it does make the deposit, the defendants will have a right to withdraw the money, and that their appeal from the judgment will be dismissed on the ground that it has become a "moot case." There is no merit in this suggestion. The deposit of money in court was made in compliance with the provisions of section 14 of article 1 of the Constitution. It is not subject to withdrawal either by the plaintiff or defendant in the condemnation proceeding until after the entry of the final decree of condemnation, and then only by order of the court in which it is deposited. The final decree of condemnation can be made only after the pending appeal of the plaintiff in the condemnation case is disposed of. Plaintiff therein is therefore not prejudiced in any manner in its right of appeal therein, nor does any question become moot by reason of its compliance with said

order of January 30, 1933. As to the status of money deposited in court under said section of the Constitution, see Marblehead Land Co. v. Superior Court, 60 Cal. App. 644, 652, 213 P. 718, 722, where the court in discussion of that question said: "It is to be observed that, as a prerequisite to the making of an order for possession and use, the Constitution provides that the plaintiffs in a condemnation suit shall give 'such security in the way of money deposits as the court * * * may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner * * * immediate payment of just compensation * * * as soon as the same can be ascertained according to law.' It is certain that, when such money deposits are made and the consequent order for possession and use follows, the court making the order has exclusive control of the money deposited. The cash is to be deposited merely as security for the immediate payment of compensation when the amount of compensation is ascertained. For the time being neither the plaintiff nor the defendant has any right to the possession of it, and neither may exercise any control over it. If the compensation is not paid by the plaintiff to the defendant immediately, or perhaps within a reasonable time, after the amount to be paid is finally ascertained, then the court must make some order transmuting the money deposited from security into payment; that is, the cash must by appropriate order be turned over to the defendant. If the compensation be promptly paid by the plaintiff, then the court, perforce, must order the cash to be returned to the plaintiff." The rule is entirely different where the plaintiff in a condemnation proceeding attempts to act under section 1254 of the Code of Civil Procedure and in pursuance of the terms of that section deposits money in court in order to secure possession of the property sought to be condemned. Under said section of the Code, as expressly provided therein, the money deposited in court must under order of court be paid to the defendant upon his filing a satisfaction of the judgment. This difference between the provisions of the section of the Constitution and those of the Code section renders the case of Mt. Shasta Power Corp. v. Dennis, 66 Cal. App. 186, 225 P. 877, relied upon by the respondents, readily distinguishable from the instant case. In that case the condemnor, a public service corporation, in pursuance of section 1254, Code of Civil Procedure, deposited in court the full amount of the judgment rendered against it in order that it might take possession of the property involved in said action. At the same time it attempted to appeal from said judgment. The court very properly held that, as it had paid and satisfied the judgment in full, no appeal would lie therefrom, and accordingly dismissed the appeal.

In our opinion it is the present duty of the city of Los Angeles to deposit in court the amount of the required security, and it is the present duty of the respondent court to enforce its order in the premises.

Let the peremptory writ issue.

220 Cal. 505

KEMP v. LYNCH.

L. A. 14287.

Supreme Court of California.
April 9, 1934.

1. Appeal and error 🔑891.

Application to Supreme Court for permission to introduce additional evidence would be denied where no proof was offered which was not available to applicant upon hearing of proceeding (Code Civ. Proc. § 956a).

2. Judgment 🔑688.

In suit to quiet title, defendant, claiming under regularly issued sheriff's certificate of sale under execution upon judgment for costs in probate proceedings to which plaintiff was party only as guardian for minor, could not prevail on theory plaintiff was real party in interest in probate proceedings and bound by judgment for costs.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Helen Kemp against H. L. Lynch, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals and applies for permission to introduce additional evidence.

Application to introduce additional evidence denied, and judgment affirmed.

Will H. Light, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

PRESTON, Justice.

Action by plaintiff, Helen Kemp, to quiet her title to certain land located in Los Angeles county. Defendant answered alleging that he had an interest in said property by virtue of a sheriff's certificate of sale issued to him pursuant to execution and sale regularly made by said sheriff upon a judgment for costs rendered in defendant's favor in a will contest entitled In re the Estate of Ma Rheinschild, etc., Deceased, No. 124346; further alleging that plaintiff "was a party to said contest proceedings," which were regularly had and judgment rendered therein about July 25, 1932. Defendant also filed a cross-complaint praying for a decree quieting his title to said property.

Upon issues so joined, the cause went to trial. Plaintiff showed that in 1920 she had inherited the land in dispute, which was vacant property, and, other than that she had subjected it to an oil lease, she had from said year been in continuous possession thereof and had paid all taxes upon it. Defendant offered in evidence his sheriff's certificate, and counsel stipulated that there had been a levy upon the property under the execution issued upon said judgment for costs in defendant's favor in the probate proceeding. Objection was thereupon interposed to receipt of the certificate in evidence because it showed that the said judgment was against one Patricia Rheinschild by her guardian ad litem (this plaintiff), but said judgment was not against this plaintiff and could not bind her or affect property owned by her. Counsel for defendant admitted that plaintiff was not named as a party to the probate proceedings, save as guardian for the minor contestant, although she was personally present at all hearings therein. The court thereupon sustained the objection to introduction of said certificate in evidence and thereafter made findings and gave judgment for plaintiff as prayed, quieting her title to said property. Defendant appealed.

[1, 2] The cause has now been submitted to us upon motion of plaintiff to dismiss said appeal or to affirm the judgment. We have no hesitancy in pursuing the latter course. There is nothing whatsoever in the record to substantiate the statement of facts set forth in appellant's brief, upon which he bases his several contentions to the effect that this plaintiff and one Walter Rheinschild were the real parties in interest in said probate proceeding and made the minor child their agent to contest the probate of the will of the decedent; that, in rendering judgment for costs in said matter for this appellant, the court gave judgment, not against the minor alone, but binding also the real parties in interest, one of whom was this plaintiff; that in the instant cause the court erred in not receiving in evidence said sheriff's certificate and in not permitting appellant to prove his contention that, although the probate contest was on record in the name of the minor, this plaintiff and said Rheinschild instigated it, carried it forward, and were the real parties in interest.

In October, 1933, appellant made an application to this court, in the form of an affidavit, for permission to introduce additional evidence, under section 956a of the Code of Civil Procedure, in support of the above assertions, which application was continued to be disposed of upon consideration of the cause on its merits. It will have to be denied. No proof is offered which was not available to appellant upon the hearing of this proceeding. Furthermore, appellant could not prevail here upon evidence affecting the relationship of the parties to said probate proceeding and attempting to impeach the judgment rendered therein because in this cause, and under the issues here joined, he bases his entire claim to relief upon the certificate of sale regularly issued to him pursuant to the judgment rendered in his favor in said probate proceeding. Admittedly, in said probate contest, appellant did not secure a decree against this plaintiff, even though he may have been entitled to it. So far as the record before us is concerned, it shows that appellant offered in evidence only said sheriff's certificate of sale, which showed on its face that this plaintiff was not a party to said probate contest.

The application to introduce additional evidence is denied. The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

220 Cal. 449

KING v. MOORE et al.

L. A. 14522.

Supreme Court of California.
March 30, 1934.

1. Brokers 🔑86(1).

In action against brokers for one-half of commissions earned on specified realty sales, evidence *held* to support finding that brokers agreed to pay plaintiff one-half of gross commissions received from sale of property to prospects introduced to them by plaintiff.

2. Contracts 🔑170(1).

Acts of parties subsequent to agreement may be competent evidence of its terms.

3. Brokers 🔑85(1).

In action against brokers for one-half of commissions on realty sales, testimony of witnesses interested in selling their own property that plaintiff had introduced them to one of brokers on business transaction *held* admissible to corroborate alleged agreement to divide commissions on property purchased.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by J. E. King against J. Earlton Moore and others, copartners, under the firm name and style of J. Earlton Moore & Sons. From a judgment for plaintiff, defendants appeal.

Affirmed.

For prior opinion, see 24 P.(2d) 938.

Dockweiler & Dockweiler, Walter R. Leeds, and Dockweiler & Dockweiler & Finch, all of Los Angeles, for appellants.

Kaye & Johnstone, of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 2. We hereby adopt the following statement of facts and review of the evidence by Mr. Justice pro tem. Archbald as part of the opinion of this court:

Appeal by defendants from a judgment against them for one-half of certain commissions and profits earned by them in effecting certain sales of real estate.

The amended complaint alleges substantially that on or about the 15th day of September, 1928, defendants as real estate brokers entered into an agreement with plaintiff to pay him one-half "of the gross commission, compensation or profits" which they might receive from sales made of properties then held by them or which might thereafter be held by them for sale to "anyone interested" by plaintiff therein or to whom plaintiff "would introduce" them. The pleading contains three counts. The first alleges the sale of the estate of "Frances Marion, widow of Fred Thomson, deceased," on or about April 2, 1929, to "a prospective purchaser" whom the plaintiff, "relying on his said agreement with defendants, had theretofore procured or caused to be introduced to the said defendants," on which sale the latter received a total commission of $38,000. The second count alleges a similar sale on April 20, 1929, of property held by defendants on an option procured from Frank Muller and Walter Muller on or about April 4, 1929, on which sale a profit of $15,000 was made. The third count alleges a third sale on or about August 1, 1929, of property known as the "Charles Ray" residence, upon which sale defendants earned as commission and profit $3,500. The jury returned a verdict for $24,082.50 in favor of plaintiff. Defendants' motion for a new trial was denied as to the first two counts, but granted as to the third, the judgment thereupon rendered being reduced by $1,750, the amount of the verdict on such count. The appeal is from the judgment as so modified.

The evidence shows that the sale involved in the first count was made by defendant Harley Moore to one L. S. Barnes, and in the second count by said defendant through said Barnes to the Elbe Oil Company, of which Mr. Barnes was secretary-treasurer and general manager. Plaintiff testified that he met Harley Moore in 1926 when said defendant and his mother inspected the Casa del Mar Club, which was then about completed and where plaintiff was working at the time; that shortly after such meeting Harley Moore and his mother invited plaintiff to visit them at their home, which he did; that thereafter plaintiff saw said defendant four or five times, until in 1928, when Harley Moore and his father, the defendant J. Earlton Moore, visited the "Times home" in Mira Mar Estates, where plaintiff was employed by the Mira Mar Sales Corporation, at which time he was introduced by Harley Moore to J. Earlton Moore and that he invited them to lunch. After that, according to plaintiff's testimony, he paid two or three visits to the offices of defendants in Beverly Hills, and that in the "forepart of September" on one of such visits Harley Moore asked "if I didn't have quite a lot of wealthy clients that would be interested in Beverly Hills property * * * and he said if I had anyone he would * * * give me 50 per cent of * * * his gross commission on any sales that might be consummated through their firm. * * * I didn't mention any of the names until we had agreed upon a plan of commission. The plan was that if I would make the introduction to Harley Moore, that they would agree to give me one-half of the gross commissions on all sales made. I agreed to the proposition after I had asked him if we could have a little memorandum * * * to that effect so that I would be protected by an agreement. He says, 'Well, we don't usually do that. * * * We would rather put your name right in the escrow along with ours in case anything is done, and you will be paid direct from escrow and the bank will handle the money and * * * you will be positively protected that way.'" He testified further that: "J. Earlton Moore, who was at his desk, turning, said, 'Yes, that is the best way to do it; that is the way we would prefer to do it.'"

Plaintiff then testified that he told the above-named defendants the next day of Alfred F. Smith, who was living at the Beverly Hills Hotel, and made an appointment to go with Harley Moore to the hotel to meet Mr. Smith that afternoon. There is quite a sharp conflict in the evidence, not only as to the agreement to share commissions, testified to by plaintiff, but also as to the purpose of the visit to Mr. and Mrs. Smith. According to plaintiff's testimony, the Smiths "were going to buy a place" and were shown a house by Harley Moore at the corner of Bedford drive and Sunset boulevard that defendants had for sale. Mr. Smith testified that he had just come to Beverly Hills and was temporarily residing at the Beverly Hills Hotel, and that plaintiff called on him with a Mr. Cottrell (another realtor); that he had never seen either of them before; that there was no discussion of the sale of a house to him, but that he wanted to rent a house; that plaintiff and Cottrell showed the Smiths several places for rent, as did other realtors; that plaintiff brought Harley Moore out and introduced him, and that they looked at the house at Bedford and Sunset as a rental proposition; that nothing was said about purchasing it—"We were not in the market to purchase." Mr. Smith's testimony is corroborated by that of Harley Moore. He further testified that he rented the Lita Gray Chaplin place from another realtor for one year and lived in it "for nearly a year and a half"; that he played golf with Harley Moore beginning in the spring of 1929, and that through the efforts of Mr. Moore he purchased the Charles Ray place, but that Mrs. Smith was the one who first spoke to Mr. Moore about buying the property, and "the first I knew of it she had looked at it before I had ever been there."

About a week after he introduced Harley Moore to Mr. Smith, plaintiff met the former in his office and "told him that I knew a family by the name of Barnes in Beverly Hills and asked him if he knew them. He said no, he did not; didn't know where they lived. I told him that I had known Gloria Barnes, the daughter, quite well, and had met Mr. and Mrs. Barnes on one occasion. Q. Was anything said with reference to whether they were looking for property? A. Yes there was. I told him that Gloria had told me during the summer that they bought an estate in Beverly Hills, that Mr. Barnes was a real estate buyer and was looking for investments and I should meet him. She said that anything that she and her mother would select would be satisfactory to Mr. Barnes. Gloria Barnes was quite a horsewoman and was looking for a place where they could have stables for their horses. * * * On that occasion I discussed Miss Roma Seger * * * an unmarried woman," who with her mother lived in Beverly Hills, and "I discussed Miss Rita Seevers" and "Miss Le Pelletier," who were afterwards introduced by plaintiff to Harley Moore. Plaintiff further testified that on that occasion he told Harley Moore, "I thought the best method of approach, meeting the family, would be through the door—they would go horseback riding. He agreed that would be the best plan;" that "the last part of September or probably the first part of October * * * 1928 * * * we [Harley Moore and plaintiff] had been out to the beach and upon arriving at his office in Beverly Hills he suggested that I get Miss Barnes on the telephone and arrange a meeting that evening at a picture show, or something, in order to get acquainted. I called her on the telephone. She was out of town at the time." The evidence shows that Harley Moore did call Miss Barnes on the telephone and met her about ten days after the conversation above mentioned with plaintiff; that he was introduced by the daughter to Mr. and Mrs. Barnes in October or November of 1928, leaving the house with the daughter immediately afterwards for a horseback ride; that after the death of Fred Thomson on "Christmas day, 1929," defendants obtained a listing of the estate; that Gloria Barnes, reading that the Thomson horses were to be sold, visited the place to see them and saw the stables; that her mother had been planning a home to be built on property which Mr. Barnes had purchased for that purpose some time before, and as Gloria thought the plan of the Thomson stables good, she went with her mother to visit them in February of 1929; that Harley Moore visited the Ambassador horse show with Miss Barnes during the week of February 16, and that she then told him that "they were going to build a new home across from Doheney's in Beverly Hills, and she was going to have stables there and keep her horses there; and she said she had been up [to the Frances Marion Thomson property] and inspected the stables, or bought a horse from Mrs. Frances Marion Thomson, and that they had fine stables up there; and I told her at that time that I had the place for sale." Harley Moore further testified that about a week after the horse show he asked Miss Barnes if she thought her father "would consider buying the Thomson property instead of building a home, and she said she was quite sure he would not; that they had their plans all drawn and her mother had been working on them for a couple of years, and she didn't think she would be interested." Moore evidently spoke to Mrs. Barnes the next time he saw her, and "Mrs. Barnes told me she had already seen the property but had never been inside of the house. * * * I told her we had it for sale and would she like to look through the house. She said yes, and I took Mrs. Barnes and Miss Gloria Barnes up and showed them through the house; * * * that was in March, 1929." The evidence shows that thereafter "either Mr. or Mrs. Barnes" phoned Harley Moore one Sunday morning and asked him to take them to see the Thomson house, which he did; that a few days later Mr. Barnes asked him to come and see him, and that when he did so Mr. Barnes made an offer for the Thomson property. This was refused by Mrs. Thomson, and Mr. Barnes made "a further offer of more money," which was taken to Mrs. Thomson, who accepted "after three or four days, * * * about the first of April, 1929."

With regard to the second sale, Harley Moore testified that two or three days after the deal for the Thomson property went into escrow "we were speaking about real estate in general, and I told him [Mr. Barnes] that I had an option on what I considered the finest corner in * * * the Beverly Hills section, and that I would very much like to show it to him, that he might be interested in its purchase," and that about two weeks later Mr. Barnes purchased said property.

It is apparent from the evidence that plaintiff was introduced to Mr. and Mrs. Barnes, but that such introduction did not register with them, as neither had any recollection of meeting plaintiff until after the Thomson property was purchased, when he came to inquire if they had bought it. Mr. Barnes testified, and he is corroborated by his wife and daughter, that neither of the latter said anything to him about purchasing the property, but that they told him about the riding rings and stable and "wanted I should see them so they could put something similar" on the property he had bought to build on; that he went with Mrs. Barnes to look the place over; that "about a week or ten days afterwards I got to thinking about it and I suggested to Mrs. Barnes that we might not build; that there was shrubbery on this other place and we might buy the place and sell the other"; that "there were two or three conversations about it, and I finally sent for Mr. Harley Moore and made an offer on the place, which was rejected. Some time later he told me that he thought that we could buy the place at a price that I was agreeable to pay."

Harley Moore testified that plaintiff told him about Mr. Smith desiring to rent a "large house with four or five master bedrooms" and asked if he had any that might please him, "and I told him that I had"; that plaintiff then said he would like to introduce Mr. Smith to him, and asked "if we were successful in renting Mr. Smith a house, would I split the commission with him, I told him I would"; that at no time did he ever tell plaintiff he would give him one-half of the gross commission, compensation, or profits that he might make from a sale of properties then held or which might thereafter be held by his firm to any one produced or introduced by plaintiff.

As to the episode related by plaintiff with respect to the Barnes family, said defendant testified: "That was on the day that Mr. King * * * was trying to sell me a lot in the Bel Air Club * * * and I went down to look at it with him. We came back to Beverly Hills and I took Mr. King to dinner * * * and went back to our office and sat down * * * about 8:30 in the evening. I asked Mr. King if he wanted to go out and play a little bridge somewhere, and he said, 'Well, let us get a couple of girls and go to a picture show.' I said, "Well we will have to get someone in Beverly Hills. It is about time for the second show.' He asked me if I knew any girls in Beverly Hills, and I told him I didn't know any that I could call up just at that hour; that most of my girl friends lived in Los Angeles or Hollywood; and he said he knew a young lady in Beverly Hills who had not lived there very long and was a neighbor of mine, and * * * he said her name was Miss Gloria Barnes, and she was a fine horsewoman, and that I rode horseback some, and that probably it would be a good thing if we were acquainted with each other; * * * I said 'all right, call her up.' And he called the Barnes home and Miss Barnes was not there; * * * Mr. King said to me that he would like to have me know Miss Barnes * * * and that he would give me his card with her name, phone number and address on it, and some time at my leisure I might call her up and say to her that I was a friend of his and that way I might meet her."

[1] The foregoing review of the pleadings and testimony demonstrates that the jury's verdict is supported by substantial evidence, and that the judgment should be sustained unless serious error is shown. Defendants strenuously contend that prejudicial error was committed by the trial court in the reception of certain testimony, and that this alleged error is ground for reversal of the judgment.

The testimony referred to is that of Miss Le Pelletier, Miss Seevers, and Miss Seger, each of whom testified over objection that plaintiff introduced them to defendant Harley Moore on "a business transaction." It appears that defendants did not sell these witnesses any property, and that in fact they were principally interested, at the time, in selling their own property, rather than in purchasing property through defendants. Defendants make the point that the fact that these three women listed their properties for sale could not be probative on the issue of an agreement to divide commissions on property purchased.

Preliminarily, we deem it proper to state that, in a record such as that before us, with substantial evidence to support the plaintiff's claim, it is not easy to characterize this evidence as seriously prejudicial, even if improper. The contention is that it was irrelevant, but, while collateral matters not connected with the issues should be excluded, prejudicial error from their admission should reasonably appear, and we doubt whether the confusion of the jury in this case was as great as appellants maintain.

[2, 3] But in fact the evidence was admissible. Plaintiff testified to an oral agreement by which he was to introduce defendants to wealthy "clients" and "prospects," and defendants were to do the work of selling, and divide commissions with plaintiff. Plaintiff's duty was solely to make the contacts or introductions. Plaintiff was permitted to testify without objection that, on the occasion of arriving at this agreement, they discussed the names of several prospects, that is, the details of plaintiff's anticipated performance, and at this conversation plaintiff and defendant discussed the names of the Barnes family, Miss Seger, Miss Seevers, and Miss Le Pelletier. Any evidence showing that plaintiff brought these very people in contact with defendants tends to corroborate the fact of the agreement itself, which was in dispute. The rule that acts of the parties subsequent to an agreement may be competent evidence of its terms is well settled. Tennant v. Wilde, 98 Cal. App. 437, 277 P. 137. See, also, as to the admissibility of the testimony in question, Moody v. Peirano, 4 Cal. App. 411, 88 P. 380; Lobree v. White Lumber Co., 53 Cal. App. 85, 199 P. 821.

Moreover, it appears from the testimony of one of these witnesses, Miss Seger, that she was a future prospect. On cross-examination by counsel for defendants, as to whether there was any understanding between herself and plaintiff that upon sale of her property she might buy, she testified: "I said I might be interested * * * but would not be further interested until I would dispose of the Beverly Hills house."

Finally, it appears that the very evidence objected to—the fact that these three women were introduced by plaintiff to defendant and were interested in selling their property—was also given by defendant Harley Moore, who, under examination of his own counsel, recited the same matters, that is, that plaintiff introduced him to these women, and that they listed property with defendants for sale.

The record shows, therefore, that the introduction to these three women was part of the agreement as related in plaintiff's testimony; that their names and the facts concerning the transactions had with them were given in evidence both by plaintiff and defendants, without objection; and that one of them was interested in purchasing property in the future. It seems to us that their testimony tended to corroborate the essential fact of the agreement, and, though subject to different inferences, was admissible. In any event, the jury, having before them their names and the very facts to which they testified, could not have been prejudiced by their direct testimony.

We find no reversible error. The judgment is affirmed.

* * *

220 Cal. 438

SWARZWALD v. COOLEY et al.

COOLEY v. SWARZWALD et al.

L. A. 13331.

Supreme Court of California.

March 30, 1934.

Rehearing Denied April 26, 1934.

1. Navigable waters 🔑**36(6).**

In action to quiet title and locate oceanward extremity of common boundary line, evidence *held* insufficient to support court's finding as to location of disputed line and as to accretions gathering in front of lots.

2. Navigable waters 🔑**36(6).**

In action to locate oceanward extremity of common boundary line, in which lots had been conveyed by metes and bounds description, mean high tide line as of certain date was natural monument fixing boundary of lots and such natural monument would control measurement found in contracts and conveyances.

3. Navigable waters 🔑**44(4).**

General rule, subject to modification, is that if accretions occur in front of land, boundary line between lots as to such accretions is line extending into water perpendicular to original shore line in its general course and not line of boundary extended in its original direction.

4. Navigable waters 🔑**44(4).**

Accretions should be so apportioned as to do justice to each adjoining owner, giving each fair portion of accretions and access to waters in view of contour and location of respective lands before accretions were formed.

In Bank.

Appeal from Superior Court, Orange County.

Action to quiet title by Eugene Swarzwald and another against Hallam Cooley and others in which named defendant filed a cross-complaint against Eugene Swarzwald and others. From an adverse judgment, plaintiffs appeal.

Reversed with directions.

Libby & Sherwin and Warren E. Libby, all of Los Angeles, for appellants.

Victor Ford Collins, Walter Haas, Harold C. Johnston, Vinetz & Gitelson, and Haas & Dunnigan, all of Los Angeles, for respondents.

PRESTON, Justice.

The record shows an action by plaintiffs Swarzwald and a cross-action by defendant Cooley, both in form to quiet title and to locate the oceanward extremity of a common boundary line. The bank and the other defendants are only nominally interested in the result of this litigation, the former being the trustee and the latter beneficiaries under a real estate subdivision trust, of which the lands in question are a part.

The controlling question is the true location of the common point in the line of ordinary high tide, or mean high tide, of the Pacific Ocean, which, in May and June, 1927, marked the southerly terminus of the northwest boundary line of lot 9 and the like terminus of the southeast boundary line of lot 8, both situate in a subdivision of Laguna Beach lands in Orange county, Cal., officially designated as Arch Palisades No. 2.

Description of these lots originates in the southwest boundary line of the state coast highway. They are each 100 feet in width along this highway and the laterals are uniform lines parallel to each other and perpendicular to said highway line, terminating in said mean high tide line, or ordinary high tide line, of the ocean. After meeting said tide line, lot 8 extends in the shape of a tongue or promontory several hundred feet further into deep water. The two lots are a part of some 17 lots in said subdivision, all of which originate at said highway line, have fairly uniform side lines, and in a similar manner meet said tide line as their southerly boundary. Lot 17 is similarly situated, with respect to the said promontory feature, to lot 8. Although a regular subdivision map of said tract was filed in the office of the county recorder of said Orange county on March 26, 1927, these lots were conveyed by a metes and bounds description on a survey presumably made about November 15, 1926.

The contention of respondent Cooley (defendant and cross-complainant), who prevailed in the court below, is that the northwest boundary of lot 9 is a line exactly 376 feet long, extending from the point of beginning on a course south 59 degrees 21 minutes 30 seconds west from said point of beginning. The contention of appellants Swarzwald (plaintiffs and cross-defendants) is that said line terminates, not at 376 feet, but at 592 feet along the same course from the point of beginning, or at least that it is 80 feet longer than 376 feet, which would terminate it where the irregular shape of lot 8 juts athwart its course.

[1, 2] The casus belli is the existence of a sandy beach in front of these lots and principally in front of lot 9, between the toe of the bluff line and the line of mean high tide. The court below made findings and gave its decree favoring the contention of Cooley and plaintiffs appealed upon a full record. The court made two important findings of fact, as follows: (1) That the southeasterly boundary of said lot 9 terminated at the line of ordinary high tide as of May 9 or June 10, 1927, at exactly 382 feet along a line perpendicular to said highway and that its northwest boundary line terminated at exactly 376 feet from the point of beginning of said lot, along a line whose course was south 59 degrees 21 minutes 30 seconds west. (2) That no accretion had gathered in front of said lots between November 15, 1926, and June 10, 1927, but that such accretions had occurred between June 10, 1927, and November 22 or December 28, 1928; and further that the ancient or original mean high tide line, at said point 376 feet from the point of beginning of the northwest boundary of lot 9 and the northeast boundary of lot 8, was circular in character; presumably said ancient high tide line was found to be exactly circular or so nearly so that for practical purposes it could be so treated.

Pursuant to the latter finding the court, on its own motion, appointed an expert who proceeded to measure said original arc in said shore line at the point where it met said common boundary between these lots and to there construct a tangent to same, followed by projecting a perpendicular line to said tangent until it met the present line of mean high tide. The court adopted the result of this effort of the expert and declared that a line projected in said manner was the equitable division line fixing the rights of the parties in and to said accreted lands. The course of this line was south 12 degrees 0 minutes west from said terminus. The effect of said action was to vary the boundary line between said lots in excess of 47 degrees from its last and final course and, to that extent, cause it to pass in front of lot 9. A line so constructed would in effect place a large part of the accreted land belonging to lot 8 prominently in front of lot 9.

We have reached the conclusion that the learned trial court fell into prejudicial error in both of the above findings. Treating them in the order stated, we can discover no sufficient evidence to justify the finding that the line of mean high tide would be exactly 376 feet on the northwest boundary or 382 feet on the southwest boundary of lot 9. The official map was conclusively shown to be inaccurate as to the location of the tide line and, in this behalf, it was entirely disregarded by the expert appointed by the court. The map, too, was off scale as much as 40 to 50 feet in some of its boundaries and the expert appointed by the court thought that the line here in dispute had that percentage of error on the map. Even taking the map as accurate, it does not purport to measure said distance either at 376 feet to the one point or 382 feet to the other. The measurements are given as exact only to the ocean bluff and the measurements from that point to the line of ordinary or mean high tide are only approximations. The engineer who made the survey was examined as a witness and his field notes were placed in the record. He frankly admitted that the measurements, as the notes show, were only approximations from the bluff line to the tide line. In fact, he said that they were estimates made with the eye only, said observations being made from the top of the bluff overlooking the ocean. No measurements with chains or instruments were made and there was no effort to locate the tide line as of that day in any manner whatsoever. As already noted, this survey was as of November 15, 1926. These parties made their purchases in said subdivision in May and June, 1927. The court found that the line of ordinary high tide had not changed during this period. Yet the survey of one Peabody, made December 22, 1928, indicates that said line of ordinary high tide met the northwest boundary of lot 9 at a distance of approximately 415 feet from the point of beginning, or some 39 feet beyond the point found by the court as of June, 1927. It is strange that no sand or alluvium was deposited in the first year and that much was deposited in the second. Plaintiffs' witnesses fixed this line, by a survey made November 22, 1928, at 592 feet from point of beginning. Moreover, the pleadings admit that said line was in excess of 376 feet in length when this action was instituted on March 1, 1929. We are, therefore, utterly unable to find any evidence that even tends to support the finding in question or, in fact, any finding as to the location of said tide line previous to the fall of 1928.

Secondly, if the point where the court erected the arc, tangent and perpendicular does not correctly designate the southerly terminus of the northwest boundary of lot 9, it follows as of course that the whole superstructure, built on the assumption that the point is properly located, must fall. Moreover, the method employed by the expert in establishing this arc seems entirely unreliable. He assumed the northwest boundary line to terminate at 376 feet and the southeast boundary line at 382 feet. He then set his instrument at a point marking 376 feet and, with the naked eye, viewed the ocean bluff as it then appeared to him; then by using his judgment, he projected the arc found by the court. No point on the ancient shore line at any place, either northwest or southwest of said 376 foot point, was located, nor was any effort made by the use of any such point to establish a mean curve to mark the ancient shore line nor to project a tangent and perpendicular thereto at said point when located.

We, therefore, conclude that the mean high tide line, as of May or June, 1927, was a natural monument, fixing the southerly boundary of all these lots and that no sufficient evidence whatsoever can be found in the record to establish the said line as of that date, if indeed any change at all has occurred in it since then. We further hold that said natural monument will control the measurement found in the contracts and conveyances made.

[3] We are asked to interpret the case of Fraser's, etc., P. Co. v. Ocean Park P. Co., 185 Cal. 464, 197 P. 328, 331, 198 P. 212, and set up a proper formula for the division of accreted lands at a point such as the one in question. It will be noted that here the latest surveys before us are the ones made in November and December, 1928, now more than five years ago. But inasmuch as both parties seem to concede that probably there may be accretions existing which this property abuts, we feel impelled to say that we interpret the above case as setting forth the general rule of the common law by which accretions are to be subdivided. The court there said: "If accretions occur in front of the land the boundary line between them as to such accretions is a line extending into the water perpendicular to the original shore line in its general course and not by the line of the boundary extended in its original direction. If this were not the case, it will be seen that where the boundary line strikes the shore line at an acute angle the rights of one proprietor would extend in front of the land of the other so as to practically cut him off from the use of the water. The authorities are all to the effect that this is not the case. 3 Farnham on Waters, pp. 2476, 2477; Menasha, etc., Co. v. Lawson, 70 Wis. 600, 36 N. W. 412; People v. Schermerhorn, 19 Barb. (N. Y.) 540."

This rule follows closely the case of Inhabitants of Deerfield v. Pliny Arms, 17 Pick. (34 Mass.) 41, 28 Am. Dec. 276, where the court said: "The rule is, 1. To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards or feet, each riparian proprietor owned on the river line. 2. The next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line, as he owned rods on the old. Then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. The new lines, thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals, or exceeds or falls short of the old."

This doctrine has, in turn, been confirmed by the United States Supreme Court in the case of Johnston v. Jones, 1 Black (66 U. S.) 209, 223, 17 L. Ed. 117.

But both of the above cases also recognize exceptions to the general rule, as witness the following further language from the Deerfield Case, supra: "It may require modification perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such case, it should be reduced by an equitable and judicious estimate, to the general available line of the land upon the river."

This latter exception was indorsed and applied in the case of Brown v. Spreckels, 18

Hawaii, 91, 103. The court there held, under facts similar to those of the instant case, that there was enough to justify a finding that the accretion belonged to the land in front of which it was formed.

[4] A general statement of the object to be accomplished by subdivision of accretions is found in Allen v. Wood, 256 Mass. 343, 152 N. E. 617, 621, as follows: "The object of apportioning accretions is that they shall be so apportioned as to do justice to each owner, in the absence of a positive prescribed rule and of direct judicial decision to guide, and their division on a nonnavigable river frontage is so made as to give each relatively the same proportion in his ownership of the new river line that he had in the old."

See, also, Brown v. Spreckels, supra, at page 103 of 18 Hawaii, where the court said: "The correct and more general rule is that the division of accretions should be equitable with a view to giving each proprietor a fair portion of the accretions and access to the water, in view of the contour and location of the respective lands before the accretions were formed. For instance, the general line of the shore would ordinarily be taken and the relative lengths of frontage upon it irrespective of deep indentations and sharp projections."

There is nothing in the case of Fraser's, etc., P. Co. v. Ocean Park P. Co., supra, at variance with these principles or with the exceptions noted to the general rule. By use of the phrases "at that point" and "at that place" the court did not mean to limit its other pronouncement defining the original line as the "general course" of the "original shore line." One point will not determine a line nor two points an arc. At least three points are necessary to describe an arc. What is meant by the original general shore line is the general course of the line marking the margin of the properties as a whole and it is altogether possible that to determine it in some cases it would be necessary to consider points in the shore line nearby the particular margin in question. And applying this observation to the case before us, it may be found advisable to consider the whole marginal front from lot 8 to lot 17 to determine the general course of the ancient shore line. In fact, the court, on a reinvestigation of this case, may find it feasible to merely project the parallel lines on all of these lots to properly subdivide accretions between the several owners of frontage.

The judgment is reversed with directions to proceed in a manner not inconsistent with the conclusions above announced.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

220 Cal. 420

SOUTHERN CALIFORNIA EDISON CO., Limited, et al. v. STATE BOARD OF EQUALIZATION.

L. A. 14008.

Supreme Court of California.
March 30, 1934.

1. Taxation 🔑382.

Gross receipts of public utility corporation's subsidiary are computed as part of gross proceeds from parent company's operations in assessing their taxes (Const. art. 13, § 14).

2. Taxation 🔑393.

Amount charged to electric power company on its subsidiary railway company's books for shipments by former company should not be considered part of railroad company's gross receipts in assessing companies' taxes (Const. art. 13, § 14; Pol. Code, § 3669, subd. 3).

3. Taxation 🔑37.

Statute requiring corporations to include their subsidiary companies' property and business in annual reports to state board of equalization of their gross receipts for tax purposes *held* not at variance with constitutional requirements (Const. art. 13, § 14; Pol. Code, § 3665c, subd. 11).

◆

In Bank.

Application by the Southern California Edison Company, Limited, and another for a writ of mandate to the State Board of Equalization.

Writ granted.

Prior opinion, 24 P.(2d) 762.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioners.

Thomas J. Straub and W. H. Spaulding, both of San Francisco, amici curiæ for Pacific Gas & Electric Co.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

CURTIS, Justice.

Petitioners, the Southern California Edison Company, Limited, a corporation, and the San Joaquin & Eastern Railroad Company, a corporation, filed herein their petition asking for an alternative writ of mandate requiring respondent, the state board of equalization, to grant certain credit on future payment of taxes to become due from petitioners, and to issue the certificate to the state board of control provided for under subdivision 3 of section 3669 of the Political Code, stating the amount of said credit. Petitioners further pray, upon a hearing after the return on said alternative writ, that the writ be made peremptory. The alternative writ was issued and regularly served upon the respondent. The return of respondent to the writ is a demurrer thereto on the ground that the petition does not state facts sufficient to constitute a cause of action or any ground for relief.

Petitioner Southern California Edison Company, Limited, hereinafter referred to as "Edison Company," is engaged in the business of generating and distributing electric energy as a public utility. A part of its generating system, known as the Big Creek project, is located in the mountains of Fresno county. Petitioner San Joaquin & Eastern Railroad Company, hereinafter referred to as "railroad company," was originally organized at the instigation of Pacific Light & Power Corporation, Edison Company's predecessor in the ownership of the Big Creek project, for the purpose of building and operating a short line railroad between El Prado and Big Creek, Fresno county, Cal., to be used in constructing, maintaining, and operating the Big Creek hydroelectric plants. At the time Edison Company acquired the Big Creek project in 1917, it also acquired the ownership of all the stock of the railroad company, and since that time has operated the railroad through its subsidiary, the railroad company, as a necessary adjunct to the maintenance and operation of the Big Creek project. The railroad system has also at all times been operated as a common carrier, and during the past few years the railroad company has also operated in connection with its railroad system the highway transportation system between Fresno and Huntington Lake, which is a part of the Big Creek project. This highway transportation system, like the railroad system, has been operated as a common carrier, and also for the transportation of freight and express used by the Edison Company in the maintenance and operation of the Big Creek project.

Respondent board, in computing state taxes against the operative properties of petitioners for the fiscal years 1920–1921, included as part of the gross receipts of the railroad company, upon which its tax is based, charges made by the railroad company for transportation of materials and supplies for the Edison Company at the regular filed rates of the railroad company. Subsequent thereto, petitioners requested of respondent board an allowance for credit on the next taxes coming due, on the theory that the charges made by the railroad company against the Edison Company, which charges are hereinafter referred to as "inter-company revenue," should not have been included in the gross receipts of the railroad company on which the tax was computed. This application for credit was duly allowed by the board, and thereafter, in following years, and up to and including the tax computed for the fiscal year 1931–1932, the board followed this method of computing the petitioners' taxes, on the theory that under the law the intercompany revenue should be excluded from the gross receipts.

In computing petitioners' taxes for fiscal year 1932–1933, respondent board departed from its previous interpretation of the law, and included in the gross receipts of the railroad company intercompany revenue derived by the railroad from carrying materials and supplies as freight and express for the Edison Company in connection with the operation and maintenance of the Big Creek project. This method of computing the taxes has resulted in an increase over what it would have been if computed by the old method of $448.86 on the railroad system, and of $474.22 on the highway transportation system. At the same time, respondent board assessed taxes against all the operative properties of Edison Company used by it in the generation and transmission of electric energy in the amount of $2,997,136.26 for the fiscal year 1932–1933.

The first half of the tax thus assessed on the railroad company's property has been paid by petitioners under protest, and, after making this payment, petitioners filed with the board a claim for credit on the next taxes to become due from them, after the allowance of such claim, on account of the alleged erroneous method followed by the board in computing the taxes against the railway system and the highway transportation system of the railroad company. These claims are for $224.43 on account of the overpayment of taxes on the railroad system and for $237.11 on account of the overpayment of taxes on the highway transportation system. These claims the respondent board duly denied on the ground that the intercompany revenue should be included as a part of the gross receipts upon which such taxes are computed.

Subdivision 3 of section 3669 of the Political Code provides that whenever any taxes, paid to the state treasurer, shall have been paid more than once, or shall have been erroneously or illegally collected, or shall have been computed contrary to law, the state board of equalization shall certify to the state board of control the amount of said taxes collected in excess of what was legally due, from whom they were collected, or by whom paid, and, if approved by said board of control, the same shall be credited to the person or company to whom it rightfully belongs, at the time of the next payment of taxes.

[1, 2] It is the contention of petitioners that the two amounts of $224.42 and $237.11, aggregating the sum of $461.53, were erroneously collected from them as taxes for the fiscal year 1932–1933. This claim is based upon the fact that the amount paid by the Edison Company to the railroad company during said year for the transportation of materials and supplies as freight and express in connection with the operation and maintenance of its light and power enterprise—referred to above as intercompany business—should not be included as a part of the gross receipts of the railroad company. There seems to be no question that the railroad company is but a subsidiary company of the Edison Company, the latter company being the legal owner of all the stock of the former. In such a case its gross receipts are computed as a part of the gross proceeds of the Edison Company. San Francisco-Oakland T. Rys. v. Johnson, 210 Cal. 138, 154, 155, 291 P. 197. Therefore petitioners contend that, when the Edison Company paid the railroad company freight and express charges for carrying its own commodities, it was in reality paying these charges to itself, and that such receipts by the railroad company should not be considered in computing its gross receipts. This contention, we think, must be sustained. By section 14 of article 13 of the Constitution the taxes levied against the property of certain corporations therein named, including power companies and railroads, are computed upon their gross receipts from the operation of said companies for the calendar year next prior to said levy. Under the decisions of this court as noted above, when one company is a subsidiary of the other, the taxes are computed upon the total gross receipts of the combined companies. But such receipts must be actual receipts, and not revenue only fictitiously or theoretically received. In the present proceeding it appears that the subsidiary company actually received no revenue or other remuneration whatever from the parent company for carrying materials and supplies as freight and express over its railroad lines. There were, therefore, no gross receipts, nor any receipts whatever from this branch of its business. For reasons of its own, the Edison Company, or parent company, kept the accounts of its subsidiary company separated from its own and charged itself upon the books of the subsidiary company for all freight and express shipped by it over the lines of said company. These charges were offset by other entries purporting to show their payment. But no money or cash whatever passed from the parent company to the subsidiary company in any of these transactions. They, therefore, represented no receipts upon which a tax might be computed.

In State v. Minnesota & International Ry. Co., 106 Minn. 176, 118 N. W. 679, 681, 1007, 16 Ann. Cas. 426, the Supreme Court of Minnesota, in passing upon the question as to what are gross receipts under the taxation system of that state, ruled as follows: "Items 16 and 17, amounting to about $3,500, are claimed by the state as gross earnings upon the theory that the company occupied the position of a shipper when it transported its own supplies and material over its own lines in the state of Minnesota. The company could not be required to pay itself for carrying its own material, and it should not be charged with the amount which it would have received had the material been shipped by other companies. The law does not refer to benefits or privileges of this character." Our own court has also given expression to a similar statement of the law (Payne v. Richardson, 189 Cal. 103, 104, 207 P. 547, 548), where the court held that, "The rule is well settled that the carrier's own transportation should not be considered in estimating the gross receipts of the railroad." (Citing cases.) While these cases did not involve revenue of a subsidiary company for services rendered to the parent company, we can perceive no reason why the rule should be any different when applied to intercompany revenue.

It was the duty, therefore, of the respondent, in determining the gross receipts of the

Edison Company, to include therein only the revenue actually received by the railroad company from the operation of its railway and highway transportation systems, and to exclude from such gross receipts all revenue purporting to have been paid (but no part of which was actually paid) by the Edison Company to its subsidiary corporation, the railroad company, for services rendered in carrying freight and express over the lines of its subsidiary company. The method, therefore, pursued by the respondent during the years prior to the fiscal year 1931–1932 of allowing petitioner credit for this "intercompany revenue" on its taxes coming due the following year was not at variance with any requirement of said section of the Constitution under which said taxes were levied and collected, but was in strict compliance with the provisions of subdivision 3 of section 3669 of the Political Code. There is nothing contrary to this interpretation of the law to be found in the case of Pacific Gas & Electric Company v. Roberts, 176 Cal. 183, 167 P. 845. In that case the plaintiff sued to recover certain taxes, which it claimed were illegally assessed against it for the fiscal year beginning July 1, 1911. A portion of these taxes were computed upon the gross earnings of the Suburban Light & Power Company for the year 1910. During that year the Suburban Company was operated as an independent company, but between January 1, 1911, and March 1, 1911, the Pacific Gas & Electric Company acquired the properties of the Suburban Company and operated the same as a subsidiary company for the year 1911. During the year 1910, while the Suburban Company was being operated as an independent company, the Pacific Gas & Electric Company sold to it large quantities of gas and electricity at a cost of $52,717.99. The total gross receipts of the Suburban Company for that year were $188,401.60, and plaintiff contended in said action that this sum of $52,717.99 should be deducted from the sum of $188,401.60, and that the difference between these two amounts would represent the gross receipts of the Suburban Company for the year 1910. The court held that no such deduction should be made. It will be noted that that case did not involve in any manner whatever so-called "intercompany revenue," as the gross receipts therein involved, and all receipts of both companies which the court then had under consideration, were receipts from the properties of said companies during the year 1910, when each company was owned and operated independently of the other, and before the Pacific Gas & Electric Company had purchased the properties of the Suburban Company. It is true that in our former decision in this case we held that it was decisive of the questions involved in the instant case. But our holding was predicated upon a misconception of the facts in that case. At the former hearing it was contended by respondent that the Suburban Company, during the year 1910, and at the time when it purchased from the Pacific Gas & Electric Company gas and electricity at a cost of $52,717.99, was being operated by the plaintiff, the Pacific Gas & Electric Company, as a subsidiary company, and, therefore, whatever receipts came to it from the Suburban Company were simply theoretical receipts from the subsidiary to the parent corporation, or in other words, "intercompany revenue." A closer study of the decision in the Roberts Case, with the aid of the record and briefs therein, makes clear the fact that the Suburban Company was operated during the year 1910, as an independent company, and that the question of "intercompany revenue" was not involved therein. The Roberts Case is, therefore, distinguishable from the instant case, and as correctly understood it is not decisive of any question involved herein.

[3] In view of what we have said, it is apparent that there is no merit in the contention of respondent that certain provisions of section 3665c of the Political Code are at variance with section 14 of article 13 of the Constitution, and are for that reason ineffective. This section provides for the filing with the state board of equalization of annual reports by those companies whose property is subject to state taxation. These reports are required to show the gross receipts of the company and any other information the state board of equalization may deem necessary in order to enable it to levy the taxes provided for in section 14, article 13, of the Constitution. The provisions of this section to which the respondent makes objection are found in subdivision 11 of said section 3665c, and they provide that each such company shall include in its annual report to the board of equalization the property and business of all subsidiary companies and that no separate report need be rendered by a subsidiary company whose property, franchise, and operations are fully covered by the report of the operating company, unless the board of equalization shall deem a separate report necessary. In this section of the Code a subsidiary company is defined and, as so defined, there can be no question but that the railroad company herein involved is a subsidiary company of the Ed

son Company. While this section does not expressly provide that the board of equalization shall eliminate "intercompany revenue" from the gross receipts of the parent company, it at least requires information in the annual reports which will enable the board to do just that thing. It may be inferred from the language of the section that the Legislature intended that the board of equalization should follow such a procedure. But this section does not attempt to confer any such power upon the board of equalization. The Constitution fixes the basis of computing the taxes to be paid by such corporations and that basis is, as we have seen, the gross receipts of each such corporation. But, as held above, the gross receipts of a company are limited to its actual revenue and do not include fictitious or theoretical receipts which are mere matters of bookkeeping only and which have in fact no real existence. Had section 3665c of the Political Code expressly empowered the board of equalization to eliminate such fictitious items in computing the amount of gross receipts of such companies, it could not for that reason be held to be unconstitutional. In that case, it would only have expressly directed the board of equalization to do that which the Constitution had impliedly authorized to be done. It follows that section 3665c as now in force cannot be held to be in variance with the Constitution.

Let the writ of mandate issue as prayed for.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.

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220 Cal. 508

ALLEN et al. v. McCRARY.

S. F. 15017.

Supreme Court of California.

April 9, 1934.

Divorce 🔑255.

Interlocutory divorce decree adjudicating issue raised by parties that wife's realty was her separate property *held* res judicata in action by wife's grantees to quiet title to realty which husband claimed was community property.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Walter Vinzant Allen and another against W. L. McCrary, individually and as administrator with the will annexed of the estate of Artee Allen McCrary, deceased, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant individually appeals, and plaintiffs move to dismiss the appeal or affirm the judgment.

Motion granted, and judgment affirmed.

W. J. Hennessey, of Oakland (Pierre A. Fontaine, of Oakland, of counsel), for appellant.

Abe P. Leach, Vaughns & Larche, George R. Vaughns, and Frank M. Larche, all of Oakland, for respondents.

SHENK, Justice.

Motion to dismiss the appeal or affirm the judgment.

The appeal is from a judgment for the plaintiffs in an action to quiet their title to certain real property in Alameda county.

The plaintiffs based their claim of title on a deed to said property executed and delivered to the plaintiff Walter Vinzant Allen, by Artee Allen McCrary in October, 1926. Artee Allen McCrary died in October, 1930. The defendant W. L. McCrary is the administrator of her estate, and is sued in that capacity as well as in his individual capacity.

The defendant filed a cross-complaint claiming to be the owner and entitled to the possession of said property. His claim to the property was based on its alleged community character. The plea of res adjudicata establishing the separate character of the property was interposed as part of the plaintiffs' answer to the cross-complaint. Over the objection of the defendant the trial court received evidence in support of that plea.

The ground of the defendant's appeal is the asserted error of the trial court in admitting evidence in support of the plea of res adjudicata and in concluding that such evidence barred the right of the defendant to any relief on his cross-complaint; also, that the court erred in refusing to admit evidence of the community character of the property.

The defendant and Artee Allen McCrary in her lifetime were husband and wife. In 1923 an interlocutory decree of divorce from her husband was granted to the wife in an action commenced by her. No appeal was taken from the interlocutory decree entered in that action. A final decree was never entered. The judgment roll in said action was received in evidence in support of the plaintiffs' plea in bar.

In the complaint in the divorce action it was alleged that there was no community property of the spouses. This allegation was denied by the answer, and in his cross-complaint filed in that action the defendant alleged that the real property here in controversy was the community property of the spouses. From the interlocutory decree it appears that formal findings of fact were waived, but in the decree it is recited: "and it appearing to the court and it is hereby found that there is no community property belonging to the parties hereto * * * Wherefore it is hereby ordered, adjudged and decreed that a divorce ought to be granted to said plaintiff * * * and it is further ordered, adjudged and decreed that the defendant take nothing by his cross-complaint."

The pleadings in the divorce action show that the property rights of the spouses including specifically the property involved herein were in issue. In such a case the interlocutory decree adjudicated the adverse claims with respect to that property. It was therefore a final adjudication of the property rights of the parties and becomes res adjudicata in any subsequent action where, as here, the plea may appropriately be interposed. Klebora v. Klebora, 118 Cal. App. 613, 5 P.(2d) 965. No error is shown.

The motion is granted, and the judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; THOMPSON, J.

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220 Cal. 476

EVANS v. GIBSON et al.

L. A. 13740.

Supreme Court of California.
March 30, 1934.

1. Fraud 🔑58(1).

Evidence sustained finding that defendant participated in fraudulent misrepresentations which induced plaintiff to part with realty in exchange for worthless note secured by second trust deed.

2. Fraud 🔑52.

In action for fraudulently inducing plaintiff to part with realty in exchange for worthless note secured by second trust deed, evidence respecting another note secured by same trust deed, and respecting note secured by first trust deed executed contemporaneously with note involved, *held* properly admitted in evidence to show defendant's participation in comprehensive plan for mulcting innocent persons.

3. Fraud 🔑52.

Where charge of fraud is made, evidence of similar transactions is admissible.

4. Fraud 🔑30.

Where landowner participated with his attorney in scheme to defraud by having executed notes secured by deeds of trust, largely in excess of value of land, that note transferred to plaintiff in exchange for realty by fraudulent misrepresentation had been awarded to landowner's attorney for legal services *held* not to exonerate landowner from liability for fraud.

5. Depositions 🔑88.
Evidence 🔑576.

In action for fraudulent misrepresentations inducing exchange of realty for worthless note, deposition of deceased defendant taken before trial and transcript of his testimony in another fraud action introduced in evidence pursuant to stipulation *held* competent to prove decedent's fraud (Code Civ. Proc. §§ 2055, 1880, subd. 3).

6. Abatement and revival 🔑58(2).

Tort action to recover compensatory damages for injury to property survives defendant's death.

7. Damages 🔑93.

Where defendant in fraud action died after commencement of action but before trial, his executrices could not be held liable for exemplary damages, either directly or by nunc pro tunc entry (Civ. Code, § 3294).

8. Fraud 🔑59(2).

One defrauded in exchange of property is entitled to recover difference between actual value of what he received and value it would have had if it had been as represented.

9. Fraud 🔑60.

In action for fraudulent misrepresentations inducing plaintiff to accept worthless note secured by second trust deed, in exchange for plaintiff's realty, judgment properly allowed plaintiff 8 per cent. interest.

which was rate specified in note, to date of findings and judgment.

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In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Lillian E. Evans against Grace Ina Gibson and another, as executrices of John W. Gibson, deceased, and others. From an adverse judgment, named defendant and certain other defendants appeal.

Modified and affirmed.

Anderson & Anderson and Frederick M. Kincaid, all of Los Angeles, for appellants.

J. K. Wilson, of Beverly Hills, and J. C. Landry, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff, Lillian E. Evans, owned real property in the city of San Diego which was found by the court to be of the reasonable value of $31,500, and was subject to incumbrances in the amount of $15,500. She was induced to exchange said real property for a promissory note in the sum of $16,000, executed by defendant James L. O'Donahue. This note, together with another note for $16,000, also executed by O'Donahue, was secured by a second deed of trust lien for $32,000 on property in Riverside county known as the Granite Hill ranch. Plaintiff prayed judgment against all defendants for $16,000, with interest, on the theory that the note transferred to her and found by the court to be worthless would have been worth its face value if the representations had been true which, she alleged, were made to her, in pursuance of a conspiracy between the defendants, concerning the financial responsibility of the maker, O'Donahue, and the value of the Granite Hill ranch as security. 12 Cal. Jur. 843.

The court entered judgment in favor of plaintiff for actual damages in the sum of $21,313.06, which represents the face value of the note plus interest, and for exemplary damages in the sum of $5,000. Of the several defendants, only Grace I. Gibson and Thelma Gibson, as executrices of the estate of John W. Gibson, and Frederick M. Kincaid have appealed. It is contended that if the judgment is not reversed, at least it should be modified by reducing the amount of interest included as actual damages, and by eliminating the award of exemplary damages against defendant executrices. Plaintiff's appeal from an order granting a new trial as to defendant Grace I. Gibson in her individual capacity was heretofore dismissed. 217 Cal. 171, 17 P.(2d) 701. An order granting a new trial is appealable only in an action tried by a jury where trial by jury is a matter of right. Section 963, Code Civ. Proc.

The essentials of the fraudulent scheme which the court found was perpetrated on plaintiff were as follows: John W. Gibson, who died before trial, and whose executrices were made parties defendant, was the beneficial owner of the Granite Hill ranch, but record title thereto stood in the name of defendant Frederick M. Kincaid, who was Gibson's lawyer. The court found that the value of said ranch did not exceed $22,000. On December 5, 1927, Kincaid executed a deed to the ranch naming James L. O'Donahue, his brother-in-law, as grantee. On the same date O'Donahue executed three notes, payable to Kincaid, for the total sum of $77,000, one for $45,000, and two for $16,000 each. One of the $16,000 notes was payable one year from date, and the other two years from date. The note for $45,000 was secured by a first deed of trust lien executed by O'Donahue on the ranch, and the two $16,000 notes by a single deed of trust for $32,000, which was a second lien. At the same time O'Donahue signed and delivered to Gibson a deed to the ranch naming Gibson's daughter, Thelma Gibson, as grantee, which deed was never recorded. O'Donahue was a single man, under thirty years of age, and was employed as a truck driver at a wage of $4.50 a day. He was without other assets, and, as noted above, was Kincaid's brother-in-law.

This transaction with O'Donahue, plaintiff contends, and the evidence will support no other inference, was not a bona fide sale or transfer, but was a simulated transaction had solely for the purpose of bringing into existence the several notes and deeds of trust therein executed, with the intent and design that said instruments should be used to cheat and defraud persons ignorant of the circumstances of their origin.

The $45,000 note secured by a first deed of trust, which was for a sum far exceeding the value of the Granite Hill ranch as fixed by the court, was transferred to Mrs. Ellis Hill Rogers on December 23, 1927, in exchange for unencumbered property in Pasadena. Gibson took title to the Rogers property in the name of Kincaid, and within a short time traded it for real property in Glendale.

The $16,000 note due two years from date was assigned in February, 1928, to a Mrs. Andrews, who gave in exchange therefor residence property in San Diego. Mrs. Andrews brought an action against certain of the defendants herein which was compromised before trial.

The $16,000 note due one year from date, on December 5, 1928, was transferred to plaintiff herein, Lillian E. Evans, in exchange for her real property in San Diego, consisting of a building with several stores and apartments and worth $16,000 over and above all incumbrances. The exchange was consummated on April 5, 1928, through an escrow in the office of a title insurance company in San Diego. Plaintiff was induced to make the exchange in reliance on false and fraudulent representations made by defendant Fred A. Newby, also known as Albert Newby. Newby falsely represented that the ranch had recently been purchased by a millionaire at a price of $135,000, and that the purchaser had paid $25,000 in cash, turned in other real property, and for the balance executed the note and deed of trust for $45,000, which was secured by a first lien, and the two $16,000 second lien notes, one of which was being offered to plaintiff. It was represented that the owner of the ranch was in poor health and could not be seen; that the climate of Riverside county where the ranch was situate was beneficial to the asthmatic condition from which he suffered; that he had already spent large sums in improving the ranch, and contemplated making further expenditures; that a large acreage was planted in lemons; and that the proceeds of the lemon crop alone would be sufficient to pay the note which was offered to plaintiff. In fact, a small acreage was planted in lemons, and the ranch was in such condition that the county horticultural commissioner served notice to abate black and red scale, which infested the trees, as a nuisance.

It was further falsely represented that the purchaser of the note for $45,000 secured by the first deed of trust was Rogers, the silverware king (obviously intended to connote a connection with the Rogers Bros. Company, well-known manufacturers of silverware), and that he had made a thorough investigation of the ranch prior to his purchase of the $45,000 note and had received a bank appraisement of $97,000; that by reason of the wealth of the owner of the ranch the note offered to plaintiff would be paid promptly at its maturity on December 5, 1928, and was "as good as cash," as Mrs. Andrews, the holder of the $16,000 note due after the note offered plaintiff, would be required to protect plaintiff in order to preserve her own security. In substantiation of these representations there was exhibited to plaintiff a duplicate of a certificate, dated December 30, 1927, guaranteeing title to the ranch in the sum of $104,000, which Gibson had procured and delivered to Newby.

No payments whatsoever were made on either of the $16,000 notes, and the only payment made on the $45,000 note, assigned to Mrs. Rogers, was a quarterly payment of interest due in March, 1928, in the sum of $787.50. Kincaid gave O'Donahue the money with which this payment was made. He claimed that he made this payment for services rendered by O'Donahue in inspecting land for him in Oregon, but this explanation is too inherently improbable to be given credence. The court below no doubt inferred that the quarterly interest was paid to preserve the appearance of a bona fide transaction until both $16,000 notes should be disposed of. Mrs. Rogers subsequently foreclosed.

[1-3] Appellants contend that the evidence fails utterly to establish that either John W. Gibson, Grace I. Gibson, his wife, or Frederick M. Kincaid was a guilty participant in the fraud which Newby perpetrated on plaintiff. The trial court found against this contention, and in our view could reach no other reasonable conclusion on the evidence before it. Over the objection of counsel for defendants Gibson and Kincaid, the court permitted plaintiff to introduce evidence as to the transactions with Mrs. Rogers and Mrs. Andrews, respectively, relating to the $45,000 note and the second maturing $16,000 note, executed contemporaneously with the note which plaintiff received, and evidence as to certain transactions involving the ranch which were had prior to execution of said notes.

The evidence discloses that the exchange with plaintiff was not an entirely separate and distinct transaction, but one of a series of successive transactions closely following each other in time and part of a comprehensive plan for mulcting innocent persons. Where a charge of fraud is made, evidence of similar transactions is admissible. Thompson v. Modern School, etc., 183 Cal. 112, 190 P. 451; Kornblum v. Arthurs, 154 Cal. 246, 97 P. 420; Liberty Bank v. Nonnenmann, 96 Cal. App. 478, 274 P. 568; Wellnitz v. Sacramento Suburban, etc., Co., 97 Cal. App. 51, 274 P. 1016, 276 P. 154; Exchange Bank v. Moss (C. C. A.) 149 F. 340. The numerous transactions as to which the court herein admitted evidence reveal a carefully designed plan of concealment calculated to make it difficult, if not impossible, to detect through a maze of manipulation the participation of the defendants who did not deal directly with the persons defrauded. The part which each of the defendants had in the fraudulent scheme can be understood clearly only by consideration of the several exchanges together, with reference to what took place both before and after the exchange with plaintiff, Lillian Evans. Acts which might be deemed equivocal were they viewed in relation to a single exchange permit of but one inference when they are considered in the light of the several successive transactions. A comprehensive account of the entire fraudulent scheme is also important in assessing exemplary damages.

With these preliminary observations we shall review certain transactions involving the Granite Hill ranch prior to the execution of the note transferred to plaintiff. In 1925, the ranch was sold to one Van Wickle at probate sale, confirmed by the court, for $23,400. A first mortgage for $18,400 was placed on the property, and notes for the aggregate sum of $31,500, payable to one Stokes and wife, and secured by a second deed of trust lien, were executed. John W. Gibson and wife, by assignment, became the holder of said notes and second lien for $31,500. On July 17, 1926, they gave notice of default, and acting through Z. B. Barker, admittedly a "dummy," foreclosed said deed of trust, bid the property in for $1,200, and brought suit for a deficiency judgment. A trustee's deed was issued to Barker on December 7, 1926.

On March 31, 1927, several interdependent escrows involving the Granite Hill ranch were closed in the office of a title insurance company. In one of said escrows the mortgage for $18,400, executed by the Van Wickles when they acquired the property in 1925, was paid and released. In another escrow Barker, who held title to the Granite Hill ranch for the Gibsons, executed a deed, dated January 31, 1927, conveying the ranch to Phil D. Rice, who in turn executed a note for $40,000 and a deed of trust, both dated February 1, 1927, in favor of Gibson. This deed of trust constituted a first lien on the ranch.

A deed dated February 8, 1927, executed by Fred A. Newby as attorney in fact for Rice, and conveying the ranch to John L. Hittson, was also deposited in escrow. Hittson executed a note and deed of trust in favor of Rice for $32,000. This instrument, when recorded on March 31, 1927, constituted a second lien on the ranch. These several transfers prepared the way for the transaction in which F. A. Leavitt and wife and A. J. Leavitt and wife were defrauded.

The Rice-Hittson note for $32,000, together with said second deed of trust lien, were assigned by Rice, acting through Newby as his attorney in fact, to the Leavitts. The Leavitts, by deed dated March 18, 1927, and deposited in escrow with another title company, conveyed to Rice unencumbered real property in Pasadena designated as the Fair Oaks avenue property. Rice, through Newby as his attorney in fact, conveyed the Fair Oaks avenue property deraigned from the Leavitts to Z. B. Barker, the same person who had held title to the Granite Hill ranch for Gibson. In addition to the $32,000 second deed of trust note, $10,000 in cash was paid to the Leavitts, which was raised through a bank loan for which Barker executed a note and first mortgage on the property deraigned from the Leavitts. These several instruments, commencing with the release of the $18,400 mortgage on the ranch and including the power of attorney from Rice to Newby, were all recorded on March 31, 1927.

No payments of principal or interest were ever made on the $32,000 note executed by Hittson to Rice, and assigned to the Leavitts, nor were any payments made on the $40,000 note executed by Rice in favor of Gibson, which was secured by first lien on the Granite Hill ranch. Said note and first deed of trust lien were assigned by Gibson to Kincaid, who recorded a notice of default on May 20, 1927, less than two months after the closing of the escrows on March 31, 1927. Kincaid received a trustee's deed to the ranch on October 4, 1927. That he was acting for Gibson in causing the property to be sold under the deed of trust is an admitted fact.

The Leavitts thereafter brought an action against Gibson, Kincaid, and others, claiming that they had been victims of a fraudulent scheme similar to that which plaintiff, Evans, alleges herein. They recovered judgment for $35,000 actual damages, and $25,000 exemplary damages. Said action is now pending in this court upon an appeal taken by certain of the defendants. The comments we here make upon the evidence introduced in the instant action as to the Leavitt transaction are not for the purpose of prejudging the appeal in the action brought by the Leavitts, but we are considering said evidence for its relevancy in determining questions of fact herein. The appeal in the Leavitt suit will be determined in due course on its own record.

The evidence strongly points to the fraudulent character of the Gibson-Rice-Hittson-Leavitt transactions. The Rice conveyance to Hittson, by Newby as attorney in fact for Rice, was not a bona fide transfer. To interrogatories propounded to him, Hittson answered that at the request of one McCann, whom he understood to be Kincaid's father-in-law, he became the maker of the note and deed of trust for $32,000, and executed a deed conveying land owned by him in Texas, and worth approximately $300, to Rice. No claim is made that Hittson gave any other consideration for the transfer to him of the Granite Hill ranch. It is apparent that the deed to the Texas land was placed in the escrow to give the aspect of a bona fide exchange. Hittson was never on the Granite Hill ranch and was worth not more than $1,000, he testified, when he executed the note for $32,000, which he had no intention of paying. On June 13, 1927, he executed a quitclaim deed conveying the ranch to James L. O'Donahue, the same person who figures in the later transaction, and this deed was recorded on June 15, 1927.

The conclusion is virtually inescapable that the transfer from Gibson to Rice was not a bona fide conveyance. Rice was described by witnesses as a young man from the East who was touring California. He executed the note and deed of trust for $40,000, dated February 1, 1927, personally, but the Rice-Hittson deed, dated February 8, 1927, and the Rice-Barker deed of March 18th, by which the Leavitts' Fair Oaks avenue property was conveyed to Gibson's agent, Barker, were executed by Newby, as attorney in fact for Rice under a power of attorney dated February 2, 1927, and recorded with the other instruments on March 31, 1927. The explanation given for this was that Rice had left for the East.

The deposition of John W. Gibson, taken before trial, and the transcript of his testimony in the Leavitt v. Gibson (Cal. App.) 28 P.(2d) 41, action, were introduced herein. Gibson claimed that the transfer to Rice was a bona fide sale for $60,000, with a payment of cash in the sum of $20,000, and the execution of the note and deed of trust for the balance. However, he admitted that Rice did not make a cash payment in any sum whatsoever, but he himself paid $19,600 into escrow, which was used to discharge the mortgage for $18,400 which had existed prior to Gibson's acquiring the ranch. By deed recorded concurrently with the other instruments, Rice conveyed the property deraigned from the Leavitts to Barker, and Barker, who was admittedly acting for Gibson, executed a note and mortgage on said property to raise $10,000 from a bank, which sum was paid to the Leavitts. The loan papers were also recorded on March 31st. To follow the tortuous chain still further, the property deraigned from the Leavitts was part of the consideration given for the transfer by Gertmanian and wife of Pasadena property which subsequently reached Gibson's name through a further intermediary, one Anna Jackson, mother-in-law of Newby.

The claim, reiterated and emphasized throughout this appeal, is that the sum of $19,600, used to discharge the pre-existing $18,400 mortgage, was loaned by Gibson to Rice, and that Gibson took as security title to the Leavitts' property in the name of Barker, and permitted Rice to raise the $10,000 paid the Leavitts through a mortgage executed by Barker. The $20,000, or $19,600, cash paid to Gibson by Rice for the conveyance of the ranch was the money which Gibson himself had loaned to Rice. The court rejected this unconvincing explanation.

The final step in the fraud perpetrated on the Leavitts was accomplished through the foreclosure of the first deed of trust lien for $40,000 executed by the dummy Rice in favor of Gibson, which revested title to the ranch in Gibson (in the name of Kincaid), free of the lien of the $32,000 second deed of trust held by the Leavitts. The trustee's deed to Kincaid is dated October 4, 1927. The first steps were taken on December 5, 1927, to the accomplishment of a similar fraudulent scheme, in which not one fraudulent deal, as in the case of the Leavitt exchange, but three separate fraudulent exchanges were made. It is contended on this appeal that the evidence fails to show Gibson's and Kincaid's fraudulent connection with the deal with plaintiff, Evans. This contention must be rejected, as was the similar contention advanced as to the Rice-Hittson-Leavitt transaction.

It is urged that the evidence does not show that Gibson authorized Newby to make the false representations as to the financial responsibility of O'Donahue and the value of the Granite Hill ranch upon which plaintiff, Evans, relied in making the exchange, or had any knowledge that Newby was making said statements. The conclusion is inevitable that the transaction whereby O'Donahue appeared to be vested with title to the ranch and to execute notes and deeds of trust thereon for sums far exceeding the value of the ranch was not a bona fide transfer, but had for the express purpose of creating said notes and deeds of trust to be used for the express purpose for which they were used—to accomplish flagrant frauds. Gibson himself took the three notes and two deeds of trust to O'Donahue, Kincaid's brother-in-law, for execution on December 5, 1927, and at the same time procured O'Donahue to execute and deliver to him a deed conveying the ranch to Gibson's daughter. On the following day he took the deed from Kincaid to O'Donahue and the two deeds of trust to the recorder's office. The deed to Gibson's daughter was not recorded. Gibson was enabled to dispose of the three notes through the activities of Newby. He knew that these notes, executed by a financially irresponsible maker for amounts far exceeding the value of the ranch, in a purely fictitious transaction, could not be disposed of without the practice of fraud and deception. He cannot escape liability on the pretext, inherently incredible, that he did not authorize or sanction the false representations in fact made. Gibson was engaged in buying and selling real estate, investments, and securities on a large scale, and left an estate appraised at more than $788,946. Newby had acted for him in a number of transactions over a period of years.

[4] The executrices of Gibson's estate also sought to exonerate him on the ground that the note transferred to plaintiff, Mrs. Evans, was not the property of Gibson, but awarded by him to Kincaid for legal services. The trial court by its findings as amended found against this transfer. Even if said note was the property of Kincaid, Gibson was active in causing the instruments of fraud to be created relating to land owned by him, and he could not escape liability when the note was used as intended simply because it may have represented Kincaid's share of the profits of the venture.

The appealing defendants also sought to establish that the transactions by which they disposed of the two $16,000 notes were with Newby as principal on the other side, and that they neither directly or through the agency of Newby or any other person dealt with either Mrs. Andrews or Mrs. Evans. The trial court by its findings rejected this claim. Said defendants urge that Newby on his own account acquired title to the Andrews' and Evans' property, and that the exchange of the second maturing $16,000 note was for a third deed of trust note for $10,000 on the Andrews property executed by Newby, and the exchange of the $16,000 note due one year from date was for a $15,000 fourth deed of trust note on the Evans property, executed by Anna Jackson, a dummy for Newby. The subsequent transactions with reference to the Evans and Andrews property strongly indicate that the Evans and Andrews transactions were conducted by Newby on behalf of Gibson, or Gibson and Kincaid, and that the $10,000 and $15,000 notes were sham notes. Gibson actually viewed all the properties involved. Disputes also arose out of notes and deeds of trust created on property derived through the Evans and Andrews exchanges by defendants.

The evidence abundantly establishes Kincaid's fraudulent connection with the venture. Before he was admitted to the bar, he was employed by a title insurance company as an escrow examiner and escrow agent. He acted as Gibson's attorney throughout the period of the transactions involving the Granite Hill ranch. He had been on the ranch a number of times and was familiar with land values. Upon Gibson's death he became the attorney for the executrices of his estate. Kincaid prepared and was grantor in the deed of December 5, 1927, transferring the ranch to O'Donahue, his brother-in-law, and also prepared the notes and deeds of trust executed by O'Donahue, through whom the sham transaction of December 5, 1927, was had, and the deed of December 5th from O'Donahue to Thelma Gibson. Kincaid was the payee of said notes, and thereafter assigned them without recourse, and gave written escrow instructions by which they were exchanged for other property. O'Donahue, Kincaid's brother-in-law, was also grantee in the Hittson deed of June 13, 1927, and Kincaid testified that he advised to whom said deed should run. Kincaid claimed to be the owner in his personal right of the $16,000 note maturing one year from date, as compensation for services rendered to Gibson, and Gibson testified that Kincaid had represented him in the Andrews exchange.

In response to a letter written by one Williams, a real estate broker who participated in the transactions with plaintiff, Evans, and with Mrs. Andrews, Kincaid replied, concerning his brother-in-law: "I wish to advise that in my dealings with Mr. O'Donahue I found him to be dependable and I believe him to be possessed of unusually good moral character. In the transaction in which the note which your friend contemplates purchasing was delivered, no inquiry was made by the undersigned concerning Mr. O'Donahue's general affairs, owing to the fact that reliance was upon the security rather than any such general assets. My contact wtih Mr. O'Donahue is not such as will enable me to give you any helpful information concerning his business generally, but I am pleased to report to you my very favorable impression as to his moral character."

Kincaid also participated in the Leavitt transaction. As assignee of Gibson, he caused the ranch to be sold under the $40,000 Rice deed of trust, and at the sale purchased on behalf of Gibson. In negotiations with the Leavitts he suggested that the foreclosure proceedings would be abandoned if the Leavitts, who held the second lien, would accept a deed to the ranch, pay several thousand dollars on the Rice note and guarantee the balance.

[5] Appellant executrices contend that much of the testimony of plaintiff and of certain other party witnesses is inadmissible against them under section 1880, subd. 3, Code of Civil Procedure. Said section provides that parties cannot be witnesses upon a claim or demand against the estate of a deceased person as to any matter or fact occurring before the death of such deceased person. Excluding the evidence which may be incompetent, sufficient remains to sustain the judgment against the executrices. The deposition of Gibson taken in the case before trial under section 2055, Code of Civil Procedure, was introduced, and the transcript of his testimony taken in the Leavitt v. Gibson action was introduced herein pursuant to stipulation. Said deposition and transcript in themselves provide damaging evidence against Gibson. Furthermore, there is some authority that the adverse party may render himself competent by introducing the deposition of the decedent taken before his death. Jones on Evidence (3 Ed.) p. 1211.

[6, 7] The judgment must be affirmed in so far as it awards compensatory damages to plaintiff. But the award of $5,000 exemplary damages against all defendants cannot be sustained as to the defendant executrices. An action in tort to recover compensatory damages for injury to property, rather than to the person, survives, but after the death of the defendant tort-feasor exemplary damages cannot be awarded against his estate or his executrices. Such damages are allowed "in addition to the actual damages," and "for the sake of example and by way of punishing the defendant." Section 3294, Civ. Code. In Pacific, etc., Co. v. Packers' Ass'n, 138 Cal. 632, 638, 72 P. 161, 164, it is declared that "punitive damages are given as punishment beyond what a plaintiff has actually suffered." Since the purpose of punitive damages is to punish the wrongdoer for his acts, accompanied by evil motive, and to deter him from the commission of like wrongs in the future, the reason for such damages ceases to exist with his death. It is true that the infliction of punishment serves as a deterrent to the commission of future wrongs by others as well as by the wrongdoer, but punitive damages by way of example to others should be imposed only on actual wrongdoers.

The author of an annotation in 65 A. L. R. 1049 finds the rule well settled that punitive or vindictive damages cannot be awarded against the estate of the tort-feasor. Sullivan v. Associated Bill posters, etc. (C. C. A.) 6 F.(2d) 1000, 42 A. L. R. 503; Lane v. Schilling, 130 Or. 119, 279 P. 267, 65 A. L. R. 1042; Morris v. Duncan, 126 Ga. 467, 54 S. E. 1045, 1046, 115 Am. St. Rep. 105; Sheik v. Hobson, 64 Iowa, 146, 19 N. W. 875; Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682; Rippey v. Miller, 33 N. C. 247; Wright v. Donnell, 34 Tex. 291. The annotation cites no cases announcing the contrary rule, counsel in the appeal herein have cited none, and we have found no contrary authority. In Morris v. Duncan, supra, the rule is thus stated:

"Damages which are given merely as a punishment to deter the wrongdoer from a repetition of the offense clearly have no reference to compensation for the wrong inflicted. The award of such damages against the estate of a wrongdoer no longer in life must fail of its object, and could not therefore be allowed."

There are other applications of the rule that punitive damages may be visited only upon the actual wrongdoer in proportion to his guilt. A principal, although liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary damages unless he is personally implicated. Warner v. S. P. Co., 113 Cal. 105, 45 P. 187, 54 Am. St. Rep. 327; 8 Cal. Jur. 870. Exemplary damages may be awarded against several joint tort-feasors in different amounts, depending upon the degree of culpability, but compensatory damages cannot be thus apportioned. Thomson v. Catalina, 205 Cal. 402, 271 P. 198, 62 A. L. R. 235. In Lane v. Schilling, 130 Or. 119, 279 P. 267, 65 A. L. R. 1042, it is held that the receiver of an insolvent bank is not liable in punitive damages for malicious acts of officers committed before he assumed control.

In Leavitt v. Gibson, to which we have heretofore referred, now pending in this court, both parties had presented their evidence and rested prior to the death of Gibson, and a certain minute order had been made. We do not here decide the question involved in that case as to the power of the trial court under such circumstances to preserve the plaintiff's right to exemplary damages by entry of judgment nunc pro tunc as of a date antedating Gibson's death. In the instant case Gibson died after commencement of the action but prior to trial, and his executrices cannot be held liable for exemplary damages either directly or by nunc pro tunc entry.

[8, 9] The appellants contend that the judgment includes interest erroneously computed. One defrauded in the exchange of property is entitled to recover the difference between the actual value of what he received and the value it would have had if it had been as represented. The note received by plaintiff was found to be worthless. Appellants contend that if it had been as represented it would have been paid at maturity, on December 5, 1928, one year from its date, and that its represented value is its due date value—$16,000, plus interest for one year at 8 per cent., the rate fixed in the note. The court below correctly allowed interest at the rate of 8 per cent. up to the date of the findings and judgment, September 26, 1931. It does not follow that the note would have been paid at maturity if the representations concerning it had been true. Notes executed by solvent makers are frequently permitted to run beyond their due dates. In fact the note herein was not paid. In this situation, if it had been as represented, its value would have included interest beyond its maturity date, as provided for in the note.

We find no error requiring a reversal of the judgment. If the second deposition of Newby as a matter of law was inadmissible, said deposition is not necessary to sustain the judgment against appellants.

The judgment is modified by eliminating the award of exemplary damages against the defendant executrices. As thus modified it is affirmed, each party to bear his own costs on appeal.

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137 Cal.App. 620

SCHOMER v. R. L. CRAIG CO. et al.

Civ. 5087.

District Court of Appeal, Third District, California.

March 30, 1934.

Hearing Denied by Supreme Court May 29, 1934.

1. Automobiles 🔑244(36).

Evidence supported finding that driver's negligence in failing to sound horn and look ahead when making left turn at street intersection was proximate cause of accident when his automobile struck pedestrian.

2. Automobiles 🔑244(43).

Evidence *held* not to show contributory negligence of pedestrian when struck by automobile while attempting to cross street on favorable signal light and after having looked in direction from which automobile came and which made a left turn without warning.

3. Appeal and error 🔑1072.

Since motion for new trial was automatically denied 60 days after filing of notice of intention to move for new trial where no service of written notice of entry of judgment was made, fact that trial court subsequently formally denied motion was harmless to movent (Code Civ. Proc. § 660).

4. Records 🔑17(7).

Presumption exists that document was filed after it was handed to clerk of court for filing, and careless misplacement of document does not rebut such presumption.

5. Records 🔑17(7).

Judicial knowledge of trial judge that he made findings in pending case which were lost was sufficient evidence of loss thereof to authorize him to make ex parte order for filing of copy thereof (Code Civ. Proc. §§ 632, 1045).

6. Evidence 🔑43(2), 48.

Court takes judicial notice of its official acts and of condition of record in pending case.

7. Trial 🔑395(6).

When allegations of complaint are sufficiently specific to charge essential facts relied upon, finding that allegations of specified count are true constitutes adequate finding upon facts therein contained.

8. Trial 🔑404(1).

Findings should receive such construction as will uphold rather than defeat the judgment.

9. Trial 🔑395(2).

Finding that specifically numbered paragraphs were not true without reference to complaint or answer, both of which contained such numbered paragraphs, *held* void because of uncertainty.

10. Trial 🔑404(1).

Finding that paragraphs of complaint were not true except where specifically found to be true must be construed to mean that only paragraph referring to fictitious defendants was not true in order to support judgment for plaintiff, where court specifically found that other paragraphs were true.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by T. A. Schomer against the R. L. Craig Company and another. From a judgment in favor of plaintiff and from an order authorizing the filing of a copy of the findings of court in lieu of the original findings which were held to have been lost, defendants appeal.

Affirmed.

Arthur W. Kennedy and Martin Forrest, both of Los Angeles, for appellants.

John L. Bland, of Los Angeles, and Clark Dilley, Jr., of Glendale, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment of $2,400 which was rendered against them for personal injuries sustained by the plaintiff in an automobile casualty which occurred at the intersection of streets in Los Angeles, in which the plaintiff while crossing the street on foot was struck by the defendants' automobile and knocked down. The defendants have also appealed from an order of court made pursuant to section 1045 of the Code of Civil Procedure, subsequent to the rendering of judgment, authorizing the filing of a copy of the findings of court as a substitute for the original findings which were held by the court to have been lost.

Mateo and East Seventh streets in the city of Los Angeles intersect at right angles. Mateo street extends east and west. Double street car tracks were maintained on both of these streets. The streets are supplied with automatic electric signals to regulate the traffic. At 7:30 o'clock on the morning of November 25, 1929, the plaintiff, carrying a grip containing seven dozen eggs, was en route to his place of business. He waited at the southeast corner of these streets for a favorable signal to cross East Seventh street in a northerly direction. Diagonally across the street two automobiles were also waiting on Mateo street for the same signal to cross East Seventh street in a southerly direction. The defendants' truck was stationed immediately behind the first car which stood at the northerly line of East Seventh street. Opposite the point where the plaintiff stood, a street car was stationed near a safety zone on the north side of East Seventh street. No other vehicles or pedestrians appear to have been in sight. When the signal changed to permit the crossing of East Seventh street, the plaintiff looked to his left and saw the automobiles which he supposed were going straight south across East Seventh street, and, finding his pathway unobstructed, he stepped from the curbing. Upon reaching the rails of the nearest street car track, he looked down to avoid stumbling. When he glanced up he found the defendants' truck, which had made a left-hand turn without warning of any sort to go easterly along East Seventh street, approaching within four feet of him. He jumped to avoid the machine, but was struck, knocked down, and seriously injured. The driver of the defendants' machine sounded no horn and gave the plaintiff no warning of his approach. The driver did not see the plaintiff until it was too late to avoid hitting him. The driver said to the plaintiff as he assisted in picking him up, "I did not see you." Regarding the care which was exercised by the plaintiff in crossing the street, he said:

"I never made a step down (from the curbing) until my second signal. * * * I looked when I got—before I stepped off the curb, I saw the car (standing at the northerly intersection of East Seventh street), the sign turned to 'Go' and the car coming at the same time; there was no car coming this way and no car making any turn that way (toward him). * * * Then I started across the street, and very carefully, too. * * * I came to this spot (the rails of the nearest track) when I stooped down, because I at one time stumbled down that track, and I stooped down and looked and got over that track and when I lifted my head the machine was right on top of me. * * *

"Q. When going across the street did you look to the left and right to see if there were any automobiles approaching? A. I looked to my left" (whence the defendants' machine approached).

The cause was tried without a jury. At the conclusion of the evidence and on submission of the cause on July 1, 1931, the judge dictated to the court reporter findings of facts favorable to the plaintiff, which were subsequently transcribed, signed by the judge, and given to the deputy clerk to be filed on August 8, 1931. Judgment against the defendants was rendered and entered August 8, 1931. Notice of intention to move for a new trial was filed August 13, 1931. September 25th a motion for new trial was argued and submitted. It appears this motion was not formally denied by the court until October 26, 1931. Upon presentation of the motion for a new trial it was discovered that the written findings of court had been misplaced and were not found in the records of this case. Thereupon the court, on the same date upon which the motion for new trial was formally denied, ordered that a copy of the original findings be filed in the cause under the provisions of section 1045 of the Code of Civil Procedure, which was done. This is an accurate copy of the original findings.

The appellants contend the judgment and last-mentioned order should be reversed because the evidence fails to support the judgment and findings that the defendants were guilty of negligence which proximately caused the accident complained of, and upon the contrary that it appears the plaintiff was guilty of contributory negligence; that the court erred in making an ex parte order to substitute a copy of the findings for the original lost copy thereof; that the order denying the motion for a new trial was not entered until after the statutory limitation therefor had expired as provided by section 660 of the Code of Civil Procedure; and that the findings are in irreconcilable conflict.

[1] The evidence is adequate to support the finding that the driver of defendants' automobile was guilty of negligence in the operation of their machine which was the proximate cause of the injuries sustained by the plaintiff. It was broad daylight. There was very little traffic at the intersection of the streets where the accident occurred. The plaintiff was engaged in crossing East Seventh street in consonance with the automatic signals and in the pedestrians' pathway, where he had a right to be walking. The driver of defendants' machine was afforded a clear view of him. The plaintiff was apparently attempting to cross the street in an open, unobstructed pathway. The driver of the automobile made a left-hand turn across the pedestrians' course without sounding his horn and evidently without looking ahead of his machine for pedestrians, for, when he was charged by the plaintiff with carelessly running him down, the driver said, "I know it, Dad, I didn't see you." These facts sufficiently support the finding of negligence on the part of the driver of defendants' machine.

[2] The finding exonerating the plaintiff from contributory negligence is also sufficiently supported by the evidence. After waiting on the curbing for the second signal authorizing the crossing of East Seventh street, the plaintiff looked and saw the machine as heretofore related, and then carefully proceeded to cross the street in the proper pedestrians' pathway. Before stepping from the curbing, he said, "I looked to my left." He had no warning of the approach of the defendants' machine in the attempt of the driver thereof to make the left-hand turn across his course. The plaintiff was looking down to avoid stumbling on the street car track, as he had done once before. He was naturally a little more cautious of his footing than usual on account of being burdened with the eggs. He had taken the precaution to look to his left whence he might reasonably expect the approach of a machine on the side of the street where he was struck. He had a right to reasonably assume the defendants' machine would cross East Seventh street, continuing southerly in the course in which it was headed, in the absence of some audible signal that the driver proposed to make the left-hand turn across his pathway. These facts amply support the finding that the plaintiff was not guilty of contributory negligence. Davis v. Tanner, 88 Cal. App. 67, 72, 262 P. 1106.

[3] There is no merit in the contention that the court failed to pass upon the motion for new trial until after the statutory time therefor had elapsed. The record contains no written notice of service of the entry of judgment. The defendants' notice of intention to move for a new trial was served and filed August 13, 1931. It was argued and submitted on the 25th day of September. The motion was therefore automatically denied October 12th, as provided by statute, which was sixty days after the filing of the notice of intention to move for a new trial. The fact that the court subsequently filed a written order to that effect on October 26th was surplusage and harmless. The last paragraph of section 660 of the Code of Civil Procedure provides in that regard: "The power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial. If such notice is not determined within said sixty (60) days, the effect shall be a denial of the motion without further order of the court."

[4, 5] It appears from the record that the written findings and decision of the court were regularly filed with the clerk as required by section 632 of the Code of Civil Procedure. When a document which is entitled to be filed in the records of the court is handed to the clerk in his office for the purpose of filing, in contemplation of law, it is

deemed to have been filed, and neither the clerk's omission to perform his ministerial duty of actually placing upon it the filing mark and indorsement, nor the careless misplacing of the instrument, will suffice to destroy the presumption of filing. Dillon v. Superior Court, 24 Cal. App. 760, 765, 142 P. 503; Keller v. Gerber, 49 Cal. App. 515, 193 P. 809; 21 Cal. Jur. p. 895, § 76. The findings in this case had been dictated to the court reporter by the judge at the close of the trial in the presence of respective counsel. They were transcribed and handed to the deputy clerk to be filed. These findings were inadvertently misplaced and lost. There is no question regarding the accuracy of the copy thereof which was subsequently filed by order of the court. The defendants were in no way prejudiced by the loss of the original findings or by the substitution of the copy thereof. We may assume it is necessary for the court to have competent evidence of the loss of an original pleading or paper constituting a part of the record of a pending proceeding, before it may properly authorize a copy of the document to be filed pursuant to section 1045 of the Code of Civil Procedure. It has been held that evidence of the loss of such a document may be properly furnished by affidavit filed in the case. Knowlton v. Mackenzie, 110 Cal. 183, 42 P. 580; Davis v. Schneider, 91 Cal. App. 187, 266 P. 959. The statute does not provide that the court's jurisdiction to make such an order shall be dependent upon previous notice to the respective litigants. No such notice is required by statute. There is no contention in the present case that the substituted copy of the findings is not an accurate duplication of the original findings.

[6] The judicial knowledge of the trial judge respecting the records in this particular case which was pending before him is evidence of the actual loss of the instrument sufficient to authorize him to direct the filing of a copy thereof. In the minute order authorizing the filing of the copy of the findings, the judge recites that: "It appearing to the court from his personal knowledge that findings of fact and conclusions of law in the above entitled and numbered action were regularly prepared and signed by the court, and were by the court filed with the deputy clerk of Department 35 of the above named court, * * * and that the said findings of fact and conclusions of law have become lost after having been made and filed in accordance with the provisions of section 632 of the Code of Civil Procedure." An affidavit was unnecessary in the present case to establish the loss of the document. A court will take judicial notice of the official acts which the judge himself personally performs in a pending case. A judge will also take judicial notice of the condition of the records of a case which is actually pending in his court. In 23 C. J. p. 61, § 1811, it is said: "A judge will assume judicial knowledge of facts which he has learned through former litigation in the same jurisdiction, or at an earlier hearing in the same case; and he may take judicial cognizance of what he has himself done as judge, as for example that he has in his official capacity signed a certain paper."

Numerous authorities from this and other jurisdictions, including the case of Hollenbach v. Schnabel, 101 Cal. 312, 35 P. 872, 40 Am. St. Rep. 57, supports the text in 15 Ruling Case Law, p. 1113, § 44, which reads in part: "A court has knowledge of the genuineness of its own records. Notice will uniformly be taken by a court of its own records in the case at bar."

Moreover, if it be deemed there was a departure from the proper procedure of authorizing the substitution of a copy of the original findings which were signed and delivered to the clerk for filing, the defendants are not harmed thereby, for it is not contended this copy is not an accurate duplication of the original document. Under such circumstances, the judgment should be affirmed in compliance with the provisions of article 6, § 4½, of the Constitution, for there appears to have been no miscarriage of justice in rendering judgment against the defendants. In the case of Gill v. Southern Pacific Co., 174 Cal. 84, 161 P. 1153, 1155, it is said: "A judgment will not be vacated for irregularity in procedure if it appears that upon the merits it was just and right. The party applying for such relief must show that he would be injured if the judgment is allowed to stand."

It is asserted the findings which were adopted by the court are in irreconcilable conflict and therefore fail to support the judgment. We are of the opinion the findings may be reasonably reconciled so as to support the judgment against the defendants. The court specifically found that the allegations of paragraphs II, III, IV, and V of the complaint were true. It failed to find that the allegations of paragraph I of the complaint were or were not true. The last-mentioned paragraph referred merely to certain defendants who were joined by reference to their fictitious names. This is not material because the cause was dismissed as to these fictitious parties. After specifically finding the nature and extent of the injuries which were received by the plaintiff, the court further specifically found "that the plaintiff looked in a westerly direction on Seventh street before leaving the curb," etc. This last-mentioned finding specifically refutes the affirmative allegation of the answer which charges the plaintiff with contributory negligence. But the court further finds in that regard "that the separate and distinct answer and defense set forth in the answer, that the accident resulted from negligence on the part of the plaintiff, is not true."

The alleged inconsistency in the findings is included in the final statement therein contained that, "The court finds that paragraphs I, II, III and IV (except wherein they have been specifically found to be true in the foregoing) are not true." It is contended this last-mentioned finding is in direct conflict with the previous findings to the effect that paragraphs II, III, IV, and V of the complaint are true. If this charge be true, then there is no valid finding that the defendants were guilty of negligence, for the alleged negligence of the defendants is stated in paragraph IV of the complaint, which reads: "That the said Alfred Bradford did then and there so negligently, carelessly and unlawfully without due regard for the rights of others using and occupying said streets drove, operated, maintained and equipped said automobile truck that it came into violent contact and collision with the plaintiff."

[7, 8] It has been uniformly held that, when the allegations of a complaint are sufficiently specific to charge the essential facts relied upon, a finding to the effect that all of the allegations of a specified count of such pleading is true, constitutes an adequate finding upon the facts therein contained. Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005; 24 Cal. Jur., p. 989, § 215. Findings should receive such construction as will uphold rather than defeat the judgment. Ensele v. Jolley, 188 Cal. 297, 303, 204 P. 1085; Metcalf v. Hill, 97 Cal. App. 597, 275 P. 994.

[9] In support of the judgment in the present case it may reasonably be held the last-challenged finding that "paragraphs I, II, III and IV (except wherein they have been specifically found to be true in the foregoing) are not true," is uncertain and void because it does not indicate whether the paragraphs referred to are contained in the complaint or in the answer. Both the complaiht and answer contain similarly numbered paragraphs. Regarding the invalidity of uncertain findings, it is said in 24 California Jurisprudence, p. 989, § 215: "Findings by reference to pleadings which leave something undetermined so that an appellate court may not ascertain precisely what facts are found are unquestionably insufficient."

[10] Moreover, if the challenged finding be held to also refer to the paragraphs of the complaint with sufficient accuracy to distinguish it from the answer, although that designation was omitted, it may still be reasonably reconciled with the former specific findings that paragraphs II, III, IV, and V of the complaint are true, by holding that the meaning of the challenged finding is that paragraph I of the complaint is untrue, since the court failed to previously find the truth or untruth of that particular paragraph. The allegations of the other paragraphs of the complaint were specifically found to be true. This construction will give effect to the exception contained in the challenged instruction. Otherwise that exception is meaningless. This construction of the last finding will uphold the judgment.

It is quite evident the court intended to adopt findings favorable to the plaintiff. We are of the opinion the findings are adequate. There is no miscarriage of justice disclosed by the record.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

137 Cal.App. 491

BARDWELL v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9542.

District Court of Appeal, Second District, Division 2, California.

March 22, 1934.

1. Justices of the peace 🔑154.

On appeal from justice's court to superior court, jurisdiction attaches to superior court when notice of appeal and undertaking has been filed and when notice thereof has been given, if everything has been done within required times and no step is fatally defective (Code Civ. Proc. §§ 978, 978a).

2. Justices of the peace 🔑159(6).

Upon failure of sureties to justify on undertaking on appeal from justice's court to superior court, jurisdiction of superior court is affected only as to power to proceed and is only divested on order of superior court to that effect (Code Civ. Proc. §§ 978, 978a).

3. Justices of the peace 🔑139.

Until jurisdiction of superior court has been divested as to one appeal from justice court, not fatally defective, another appeal cannot be maintained (Code Civ. Proc. §§ 978, 978a).

4. Justices of the peace 🔑139, 159(6).

Where first appeal from justice's court to superior court was not fatally defective, but lost its effectiveness only because sureties failed to justify, it was still pending in superior court, and second appeal would not lie (Code Civ. Proc. §§ 978, 978a).

◆

Petition by H. Bardwell against the Superior Court of the State of California in and for Los Angeles County and others, for a writ of mandate.

Peremptory writ granted.

Frederick H. Brock, of Pico, for petitioner.

Everett W. Mattoon, J. F. Moroney, and L. G. Shelton, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

A judgment was awarded in justice's court against the defendants there, who took all of the required steps to appeal. Notice was given her that the sureties on her appeal bond should appear and justify, but they did not do so within the required time. Thereafter and within the statutory time for appeal the said defendant filed a new notice of appeal and a new undertaking on appeal and caused a new notice thereof to be served on plaintiff, but paid no additional fee. The justice thereafter transmitted the case papers to superior court and the plaintiff duly moved therein to dismiss the latter appeal. The motion was denied. The plaintiff in the justice's court now prays that we issue our writ of mandate commanding superior court to dismiss the appeal, and for such further relief as they may be entitled to. Superior court appears by demurrer, alleging that the petition does not state a cause of action for the issuance of the writ of mandate or a cause of action against it.

The cause was argued herein upon the understanding that the demurrer should be taken as an answer.

We have examined all of the many cases cited by the parties, and while none of them arose from exactly the same state of facts that obtain in the instant case, we deduct the following conclusions from them:

[1] Upon an appeal from a justice's court to the superior court jurisdiction attaches to superior court when (a) the notice of appeal has been filed, (b) the undertaking has been filed, and (c) when notice thereof has been given. McCracken v. Superior Court, 86 Cal. 75, 24 P. 845. This assuming that everything has been done within the required times and no step is fatally defective. Tompkins v. Superior Court, 24 Cal. App. 656, 142 P. 96; Bennett v. Superior Court, 113 Cal. 440, 45 P. 808; Shriver v. Superior Court, 48 Cal. App. 576, 192 P. 124; Tompkins v. Montgomery, 116 Cal. 120, 47 P. 1006—appeal from superior to Supreme Court.

[2] That notwithstanding the wording of section 978a, Code of Civil Procedure, upon the failure of the sureties to justify upon the undertaking "the appeal must be regarded as if no such undertaking had been given"; that notwithstanding the wording of section 978, Code of Civil Procedure, unless such an undertaking is given "an appeal * * * is not effectual for any purpose" the jurisdiction of the superior court is thereby affected only as to its power to proceed with the case; that jurisdiction is not "ipso facto" divested, but is only divested upon an order of court to that effect. Moffat v. Greenwalt, 90 Cal. 368, 27 P. 296.

[3] That until jurisdiction has been divested as to one appeal, not fatally defective as above indicated, another appeal cannot be maintained (Farrisee v. Superior Court, 40

Cal. App. 470, 181 P. 73), but can be maintained when the first appeal is fatally defective (Shriver v. Superior Court, supra).

[4] As in the instant case, the first appeal was not fatally defective, but lost its effectiveness only because the sureties fail to justify, and as it is still pending in superior court, the second appeal was abortive.

The demurrer is overruled. Our peremptory writ will issue to the superior court directing it to dismiss the first appeal to dismiss the second attempted appeal, and to take such other steps as may be necessary to replace the case within the jurisdiction of the justice's court.

I concur: CRAIG, J.

ARCHBALD, Justice pro tem.

I concur. The case of McCracken v. Superior Court, supra, seems more in accord with the language of section 978, Code of Civil Procedure, but under the later case of Moffat v. Greenwalt, supra, the failure to justify after a timely exception does not seem to make the appeal ineffectual for any purpose, as the Code seems to say, without an order of Superior Court dismissing it.

* * *

137 Cal.App. 692

BURR v. FLOYD.

Civ. 1101.

District Court of Appeal, Fourth District, California.

April 3, 1934.

1. Executors and administrators 🔑221(5).

Evidence *held* to show that under oral agreement by which plaintiff agreed to serve testatrix in consideration that testatrix would will property to plaintiff, plaintiff was required to serve testatrix during her lifetime, but was not required to serve every minute of time, so as to preclude recovery from estate when testatrix failed to provide by will, because plaintiff left testatrix for short periods of time.

2. Executors and administrators 🔑221(5).

Evidence *held* to sustain finding that reasonable value of services performed during more than 6½ years by plaintiff for testatrix, who orally agreed to will property to plaintiff but failed to do so, was $5,460.

3. Limitation of actions 🔑197(1).

Action for reasonable value of services rendered to testatrix, who orally promised to will property to plaintiff but failed to do so, *held* not barred by limitations because plaintiff sought other employment more than two years prior to testatrix' death, where under agreement evidence showed that plaintiff was not required to devote her entire time to caring for testatrix (Code Civ. Proc. § 339, subd. 1).

4. Executors and administrators 🔑210.

Under express contract to compensate for services rendered by provision in will, law will imply promise to pay reasonable value of services rendered when express promise to compensate by will has failed of fulfillment.

5. Limitation of actions 🔑50(2).

In action for reasonable value of services rendered for more than 6½ years to testatrix who orally agreed to will property to plaintiff but failed to do so, no part of period of service was barred by limitation where cause of action did not accrue until day of death of testatrix (Code Civ. Proc. § 339, subd. 1).

6. Trial 🔑296(2).

Instruction that, if plaintiff substantially performed her part of agreement to render services, jury should fix reasonable value of services rendered, and that there was no contention that plaintiff had been paid any part of amount claimed in complaint, *held* not erroneous as advising jury that defendant admitted that he owed amount demanded in complaint but refused to pay, in view of stipulation and other instructions.

Parties stipulated that, since the death of the testatrix, plaintiff had not been paid anything on account of sum demanded in the complaint. In the other instructions, the jurors were advised that the primary issue to be determined was whether or not there was an agreement of the character alleged in the complaint, and that plaintiff could not succeed if agreement proved was different from that alleged in the complaint.

7. Trial 🔑295(1).

Instructions must be considered together.

8. Costs 🔑260(6½).

Record *held* not to warrant imposition of penalty upon executor who was sole beneficiary for appealing from judgment rendered against him, on ground that appeal was taken solely for delay at judgment creditor's expense.

Record disclosed that judgment was rendered against the executor for $5,460, that the assets of the estate consisted of a $6,000 home, and of securities worth $5,158.75, that liquidation of the estate at the time judgment was rendered would have diminished the assets, that the executor too would lose if the assets shrunk to an amount less than the judgment, that the property of the estate had not been distributed, and it was conceivable that there were creditors other than the judgment creditor, and although the executor lost on appeal, the appeal was not patently frivolous or obviously taken solely for purpose of delay.

◆

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Fay M. Burr against John G. Floyd, executor of the last will and testament of Eva W. Blake, deceased. Judgment for plaintiff, and defendant appeals.

Attempted appeal from order denying new trial dismissed, and judgment affirmed.

Dayton L. Ault and John A. Hewicker, both of San Diego, for appellant.

Harrison G. Sloane, of San Diego, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action to recover from the executor of the last will of Eva W. Blake the sum of $7,305, which was alleged to be the reasonable value of personal services rendered by plaintiff as a nurse and housekeeper for Eva W. Blake during a period of approximately seven years. The complaint alleged that during the month of January, 1925, Eva W. Blake, who then resided in Indiana, contemplated moving to California and that she proposed to plaintiff that the latter accompany her and orally agreed that if plaintiff would sever her connections in Indiana and would accompany her and remain with her and assist her until the time of her death she would compensate plaintiff therefor by providing in her will that plaintiff should have an income sufficient to support her. The complaint also alleged that plaintiff accepted the proposal shortly after January 1, 1925; that she severed her other connections and took up her abode with Eva W. Blake; and that she thenceforth resided with Eva W. Blake during her lifetime and served her and in every way fully performed her part of the agreement. The complaint further alleged that in February, 1928, Eva W. Blake executed a will wherein she provided that plaintiff should be paid $80 per month during her lifetime and so long as she should remain unmarried, but that on March 4, 1932, she made a new will wherein she made no provision for plaintiff's support but left all of her estate to her son, John G. Floyd, who was named in the will as executor.

The action was tried before a jury, which returned a verdict in plaintiff's favor for the sum of $5,460. In conformity with the verdict a judgment was thereupon entered that plaintiff should recover from defendant the above-stated sum together with costs and that defendant as executor should pay the amount of the judgment in due course of administration of the estate. This appeal is taken by the defendant from the judgment as rendered. The notice of appeal also states that the appeal is taken from the court's ruling in plaintiff's favor on defendant's motion for a new trial.

On this appeal appellant advances three contentions. These are: First, that the evidence is insufficient to sustain the verdict; second, that the cause of action is barred by the statute of limitations; and, third, that the court incorrectly instructed the jury to the prejudice of appellant. These three contentions will be considered seriatim.

Relative to the first contention it is urged that, assuming that there was an oral agreement by appellant's testatrix to compensate respondent by making provision therefor in her will, as alleged in the complaint, nevertheless respondent was not entitled to recover in quantum meruit since the evidence showed that respondent agreed to devote all of her time to caring for the decedent and the uncontradicted evidence showed that during the entire period covered by the agreement respondent sought and at times obtained other employment and on a number of occasions left the home of decedent and remained away for varying periods of time. This contention necessitates close examination of the evidence.

[1, 2] It must be conceded that the evidence which was produced during the trial of the action showed that from the time respondent took up her residence with appellant's testatrix until the latter's death in March, 1932, a period of approximately seven years, respondent did at various times endeavor to secure other employment and that on three occasions she was successful in this effort and secured outside employment. The evidence disclosed that the total period of time covered by the three occasions amounted to approximately three months and three weeks, and that during the time respondent was engaged in this outside employment she continued to reside with the decedent and

upon her return to the home in the afternoons she immediately resumed her accustomed duties. The evidence also showed that during the seven-year period respondent was absent from the home on three or four occasions for short periods of time; that on one such occasion she went to Santa Barbara and was gone for about a week; that on another occasion she went to a country resort where she remained for one or two weeks; that on the third occasion she left the home and took up her residence in a hotel in the city of San Diego, where she remained for approximately a week.

It appears to be appellant's contention that respondent's agreement was that she should devote her entire time to caring for the decedent and that since the evidence showed that she was absent from decedent's home on a number of occasions and that on some of these occasions she was engaged in other employment, she was not entitled to recover anything for the reasonable value of the services which she performed for the decedent during more than six and a half years of the period. The statement of the contention is sufficient to carry its own refutation. In the first place, we fail to discover from the evidence that respondent's agreement was so inflexible and so limited that it required respondent to devote every moment of her time to caring for the decedent. A number of witnesses called by respondent testified that the decedent had told each of them that she had persuaded respondent to come and stay with her and had agreed that if respondent would remain with her and care for her during her lifetime she would see that adequate provision was made for respondent after her death. The record shows that ample evidence was produced which showed that respondent cooked all food, assisted generally in the housework, procured supplies for the household, acted as business adviser, ran errands, and served as nurse; that the decedent expressed her satisfaction in the rendition of these services by respondent; that the value of respondent's services was not less than $25 per week. In this connection it is fair to observe that the evidence showed that decedent was often ill during the time respondent lived with her and required assistance on many occasions during the night hours. We think, therefore, that the record fails to sustain appellant's contention in this regard and that a fair statement of respondent's agreement, as shown by the evidence, is that respondent should remain with decedent and care for her during her lifetime. We think, also, that the evidence indicated that respondent did properly perform her agreement, and that the reasonable value of the services performed by her, eliminating all time which the evidence showed respondent was absent from decedent's home whether respondent was otherwise employed or not, was not less than the sum awarded by the jury's verdict.

[3] Appellant's second contention is that, assuming the existence of the oral agreement of the decedent to compensate respondent by making provision therefor in her will, the evidence showed a breach by respondent of her agreement to care for decedent in that respondent sought and obtained other employment more than two years prior to the time this action was instituted and the cause of action is therefore barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which requires an action upon a contract not founded upon a written instrument to be brought within two years after breach of such agreement. This contention, like the first, is based on the hypothesis that respondent was by her agreement obligated to devote her entire time to caring for appellant's testatrix. We have heretofore indicated that it is our opinion that the evidence respecting the agreement does not justify appellant's contention that respondent agreed that she would devote every moment of her time to caring for the decedent.

[4, 5] Furthermore, it must be observed that the action instituted by respondent was upon quantum meruit and that the agreement of the decedent as shown by the evidence was an express contract to compensate by will. It is settled that, under such circumstances, the law will imply a promise to pay the reasonable value of the services rendered when the express promise to compensate by will has failed of fulfillment. In re Estate of Rohrer, 160 Cal. 574, 576, 117 P. 672, Ann. Cas. 1913A, 479; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Warder v. Hutchison, 69 Cal. App. 291, 296, 231 P. 563; Lauritsen v. Goldsmith, 99 Cal. App. 671, 675, 279 P. 168. Not only does the law, under the circumstances disclosed by the record herein, imply a promise to pay the reasonable value of the services, but the implication of the law is that payment shall take place upon the termination of the services. The evidence established that the services were to be rendered during the lifetime of the promisor and that no compensation for them was to be paid until after the promisor's death. It was only upon the happening of this event that respondent's services were

to terminate. The cause of action for the reasonable value of respondent's services did not therefore come into existence until the day of the death of decedent, and it cannot successfully be contended that any part of the period of service was barred by the statute of limitations. Hagan v. McNary, 170 Cal. 141, 148 P. 937, L. R. A. 1915E, 562; Mayborne v. Citizens' T. & S. Bank, 46 Cal. App. 178, 188 P. 1034; Warder v. Hutchison, supra; Lauritsen v. Goldsmith, supra.

[6, 7] Appellant's third and final contention is that the trial court committed reversible error in giving to the jury a certain specified instruction. The record shows that during the early part of the trial of the action counsel for respondent called her as a witness and commenced to propound questions of a general nature relating to the allegations of the complaint. An objection by appellant on the ground that the witness was disqualified to testify generally as to any and all matters relative to her demand which had occurred prior to the death of the decedent because of the inhibition contained in subdivision 3 of section 1880 of the Code of Civil Procedure was sustained. Counsel for the respective parties then entered into the following stipulation: "That since the death of Eva W. Blake, plaintiff has not been paid anything on account of the sums demanded in the complaint." The court thereupon instructed the jury that the parties had entered into the foregoing stipulation and that it was to be regarded as an established fact in the case. After the taking of evidence had been concluded and counsel had argued the case to the jury, the court in advising the jury gave the following instruction which forms the basis for the objection now being considered: "In case you should find that plaintiff substantially performed her part of such agreement, as is alleged in the complaint, between the parties, you will then have to fix the reasonable value of the services rendered by the plaintiff during the period covered by the contract. There is no contention on the part of the defendant that plaintiff has received compensation in whole or in part. I had better say there is no contention that plaintiff has been paid any part of the amount claimed by her in her complaint."

It is argued that the practical effect of this instruction was to advise the jury that the appellant admitted that he owed respondent the amount demanded in the complaint and that he had failed and refused to pay the same. Appellant's criticism is particularly directed to the last sentence of the instruction which it is said amounted to telling the jury that appellant had made no contention that he had paid any part of the amount claimed by respondent and that there was no contention on his part that respondent was not entitled to the full amount demanded.

Appellant's contention in this regard is not sustainable. In the first place, the instruction, in and of itself, is not properly subject to the criticism directed to it. In the second place, as has been often remarked, it is not proper for a reviewing court to take one isolated instruction and consider it alone separate and apart from the other instructions given. The record herein demonstrates that in a number of instructions the jury was plainly advised that the primary issue to be determined was whether or not there was an agreement of the character alleged in the complaint; that if the contract proven was a different agreement than that respondent should be compensated for her services, appellant was not entitled to succeed; that if the evidence showed that respondent had failed, neglected, or refused to do the things required by her alleged oral agreement, she was not entitled to succeed; that if the evidence failed to establish the existence of the alleged agreement, a verdict should be returned in appellant's favor; that if the jury found from the evidence that the alleged agreement had been made, it would be necessary then to determine whether or not respondent had substantially performed her part of such agreement. It is thus apparent that the jury was fully and properly instructed relative to the necessity of discovering whether or not the alleged agreement had been made and whether or not respondent had substantially performed her part of it. Finally, the very verdict of the jury establishes that the jury was not misled by the criticized instruction. The total amount demanded by the complaint was $7,305 and evidence was produced from which the jury might have found that such an amount was due. The verdict, however, was for a sum substantially less than the amount demanded. Obviously, the jury did not place upon the criticized instruction the interpretation contended for by appellant, since, if it had, the verdict would have been for the full amount claimed.

[8] One contention by respondent deserves consideration. It is urged that it is apparent that this appeal was taken solely for delay and that the circumstances disclosed by the record are such as to warrant the imposition of a penalty upon appellant personally.

Respondent's argument in support of her contention that a penalty should be imposed upon appellant personally takes the following form: The record discloses that the appraised value of the decedent's estate was $11,408.11. Of this amount the sum of $6,000 represented the appraised value of decedent's home in San Diego and $5,158.75 was the appraised value of certain securities owned by decedent at the time of her death. Appellant was the sole beneficiary under decedent's last will. Appellant was justified in rejecting respondent's claim against the estate and in requiring her to make proof of it before a jury. The verdict of the jury and the judgment rendered in conformity with it on May 26, 1933, settled all legitimate doubts respecting the validity of the claim, and appellant should then have taken steps to pay the judgment. Liquidation of the estate in May, 1933, for the purpose of satisfying the judgment, would, however, have made a deep cut in the assets of the estate. Appellant chose, therefore, to prosecute this appeal solely for the purpose of delay. Appellant had everything to gain and nothing to lose by thus delaying final settlement. Since he was the sole beneficiary under the will, he alone would benefit if, during the pendency of the appeal, the property of the estate should appreciate in value. On the other hand, if the estate depreciated in value to an amount less than the amount of the judgment, respondent alone would suffer. It is therefore urged that the gamble of delay was taken by appellant solely at respondent's expense.

The above-stated argument is not impelling for several reasons. In the first place, assuming that it is patent that the appeal was taken solely for delay and assuming further that we are warranted in considering respondent and appellant personally as the only persons interested in the estate, the statement of the gamble which it is said appellant took is hardly a fair statement. It is entirely conceivable that, during the pendency of the appeal, the property of the estate might either appreciate or depreciate in value. If an appreciation should occur, manifestly, appellant alone would benefit. It is also true that if the value of the estate should depreciate so greatly that it would fall below the amount of respondent's judgment, respondent would suffer. However, in such event, respondent would not alone suffer. Appellant would likewise suffer. Furthermore, it was not reasonable to anticipate that the value of the estate would, during the pendency of the appeal, shrink more than 50 per cent. in value. If there should be a depreciation to any extent less than 50 per cent., appellant alone would suffer by the delay.

Furthermore, we are by no means convinced of the correctness of the above-stated assumptions. In the first place, although appellant was the sole beneficiary under the will, the property of the estate had not been distributed to him. Conceivably there may have been creditors other than respondent who had claims against the estate. Until distribution was made appellant was a trustee of the assets and property of the estate and owed to all persons interested the duty of conserving the assets. We are not prepared to declare that the proper performance of this duty required immediate satisfaction of respondent's judgment. Finally, although the contentions advanced in support of this appeal have not favorably impressed us, we are not disposed to accede to respondent's suggestion that the appeal is patently frivolous and that it was obviously taken solely for the purpose of delay.

The attempted appeal from the order denying a new trial is dismissed, and the judgment from which this appeal has been taken is affirmed.

We concur: BARNARD P. J.; MARKS, J.

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137 Cal.App. 662

Ex parte MORFORD et al.

Cr. 2490.

District Court of Appeal, Second District, Division 2, California.

April 3, 1934.

1. Contempt 🔑54(2).

Affidavits which form basis of contempt proceeding in effect constitute complaint in the case.

2. Injunction 🔑230(2).

Affidavits alleging that certain persons, not parties to injunction suit, conspired with enjoined defendants to disobey and evade injunctive order, and that such persons, through transfer of defendants' business to them and certain overt acts, carried out the scheme and violated the order, *held* to support contempt judgment against such persons.

3. **Injunction** ⚷228.

One not party to injunction suit may be held in contempt for violation of injunctive order, where he, knowing of court's order, aids and abets violation of order by another who was directly enjoined by the order.

4. **Injunction** ⚷223(1).

Mere agreement between enjoined defendants and persons not parties to injunction suit to violate injunctive order would not, without overt act, constitute "contempt."

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

5. **Habeas corpus** ⚷30(3).

Where court has jurisdiction to punish respondents in contempt proceedings for contempt, that court erroneously imposed single sentence instead of more than one sentence will not entitle respondents to relief on habeas corpus.

6. **Habeas corpus** ⚷30(3).

Habeas corpus does not lie to correct erroneous judgment, but lies only where judgment is void for want of jurisdiction.

◆

Habeas corpus proceeding on the application of W. E. Morford and another against the Sheriff of Los Angeles County.

Writ discharged, and petitioners remanded to the custody of the Sheriff.

Walter H. Hewicker, of Los Angeles, for petitioners.

Mathes & Sheppard and Robert A. Cushman, all of Los Angeles, for respondent.

HAHN, Justice pro tem.

This application for a writ of habeas corpus arises out of a judgment of the superior court of Los Angeles county holding petitioners in contempt by reason of their violation of the terms of certain orders of said court previously made, restraining and enjoining the defendants named in said action, their agents, servants, and employees, from "delivering or furnishing linens or linen supplies to be used by any customers or former customers of the plaintiff * * * heretofore furnished with linen supplies by the plaintiff, through the defendants, or any of them, or otherwise during the period of time while said defendants, or any or either of them, were in the employ of the plaintiff and furnishing linen supplies to such customers for the plaintiff."

It appears from the affidavits upon which the order to show cause was issued and upon the hearing of which petitioners were adjudged guilty of contempt that on August 8, 1933, the United Linen Supply Company, a corporation engaged in the business in Los Angeles of supplying linen service to business and professional offices, secured from the superior court a restraining order against the defendants named in the action, in substance as hereinbefore set forth.

On August 25, 1933, the same court upon a hearing had on an order to show cause issued an injunction pendente lite in substantially the same form as the earlier restraining order.

On October 27, 1933, after a trial of the action, the court by its judgment granted to plaintiff a permanent injunction prohibiting the defendants, their agents, servants, and employees, from engaging in the acts previously restrained and enjoined pending trial of the action.

Upon a hearing on an order to show cause, petitioners, with several others who were named as defendants in the action out of which the orders were made, were adjudged to have violated the restraining and injunctive orders of the court, and judgments of fines, or in lieu thereof imprisonment in the county jail were entered.

The petitioners here, who were not named as defendants in the suit, or served with any order or process of the court, except a copy of the permanent injunction, seek this review of the contempt proceedings so far as they are affected thereby. The general contention urged is that the affidavits which form the basis of the order to show cause are so lacking in necessary allegations as to leave the court without jurisdiction to make the order and judgment of contempt complained of.

[1] The affidavits which form the basis of the contempt proceedings in effect constitute the complaint in the case. Berger v. Superior Court, 175 Cal. 719, 167 P. 143, 15 A. L. R. 373. The affidavit of B. F. Richter, after setting forth the matters pertaining to the issuance of the temporary restraining order, the injunction pendente lite, and the permanent injunction, together with copies of each of said orders, alleges that petitioners on or about August 8, 1933, after the temporary restraining order had been issued and served on the enjoined defendants, entered into a plan or conspiracy with the enjoined defendants to disobey and evade such order and any other order of the court that might be issued restraining or enjoining defendants from en-

gaging in certain acts complained of in the complaint of the United Linen Supply Company. The affidavit proceeds to recite as among the overt acts which were engaged in and carried out in fulfillment of the conspiracy the following matters:

[2] (1) That immediately upon the issuance of the temporary restraining order petitioners began preparations to engage in the towel and linen supply business under the firm name of White City Towel & Linen Supply Company.

(2) That on or about October 4, 1933, the Associated Towel & Linen Supply Company, one of the enjoined defendants, entered into an agreement to sell and transfer to petitioners the business and accounts of certain customers who had formerly been regular customers of the plaintiff and whose patronage had been solicited by the defendants after they left the employ of plaintiff and after they had been served with the restraining order issued in the case.

(3) That continuously from October 1, 1933, petitioners furnished towels and linen supply services to those whose business accounts and patronage had been transferred by the Associated Towel & Linen Supply Company to petitioners for the purpose of defeating and evading the several orders of court issued in said action.

(4) That petitioners had at all times knowledge of the pendency of said action and of the existence and terms of the orders of court issued in said cause restraining and enjoining defendants from delivering or furnishing towels or linen supplies to those patrons who were customers of plaintiff at the time defendants were employed by plaintiff and who were served by defendants while in plaintiff's employ.

(5) That petitioners aided and abetted said defendants in disobeying the several orders of court, by entering into a conspiracy with them to evade and disobey said court orders, and specifies in particular as overt acts of said conspiracy a number of instances where former customers of plaintiff were served with towels and linen supplies by the enjoined defendants and petitioners after the restraining and injunctive orders had been issued and served.

Petitioners' contention that the affidavit does not contain the necessary allegations to support the judgment of the court is without merit. The gravamen of the complaint is the conspiracy between the defendants and petitioners to evade and disregard the court's order and the overt acts perpetrated in the consummation of the conspiracy.

[3] It has been repeatedly held in this state that one may be held in contempt for a violation of a court order even though he may not himself be a party to an injunction suit, where he, knowing of the court's order, aids and abets another who was directly enjoined by the order from doing certain things. Judicial approval has been given in this state to the proposition that a person not a party to the action may nevertheless be bound by an injunction if he had knowledge of it, provided he acted in collusion with the person directly restrained by the order. Golden Gate Consolidated, etc., Co. v. Superior Court, 65 Cal. 187, 3 P. 628.

The court in the case of Berger v. Superior Court, 175 Cal. 719, 167 P. 143, 144, 15 A. L. R. 373, in sustaining this rule says: "In matters of injunction, however, it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the enjoined party, who are in fact his aiders and abettors. As we have said, this practice is thoroughly settled and approved by the courts, and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction."

Our Supreme Court, in the case of Morton v. Superior Court, 65 Cal. 496, 4 P. 489, 490, quoted with approval the well-worded statement of the rule from the case of People v. Pendleton, 64 N. Y. 622, 624: "Injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them. They may be violated by aiding, countenancing, and abetting others in violation thereof, as well as doing it directly; and courts do not look with indulgence upon schemes, however skillfully devised, designed to thwart their orders."

[4] Finally, petitioners urge: "The commitment is void for the reason that it finds petitioners guilty of contempt for various acts alleged to have been committed in the first and fourth causes of action of the affidavit."

As already pointed out, the contempt charged was a conspiracy entered into between petitioners and the enjoined defendants, whereby petitioners agreed to do and did do the very things defendants had been forbidden to do by the court's order. The plan agreed to and the overt acts in effect aided and abetted the defendants in accomplishing the very ends forbidden to them by the court. Count 1 of the affidavit sets out the scheme, and count 4 relates in detail the overt acts of petitioners in carrying out the plan. The planning and the consummation of the plan constituted a single offense.

The mere agreement without any overt act, which in itself was in violation of the court's order, would not have constituted actionable conduct on the part of the conspirators. It was the fulfilled conspiracy which constitutes the gravamen of the complaint. There is nothing in the case of Lindsley v. Superior Court, 76 Cal. App. 433, 245 P. 212, cited by petitioners, that militates against this conclusion. In that case the affidavit charged four separate publications, each of which constituted a separate act of contempt. The court entered four separate judgments and imposed a separate sentence upon each judgment. This action was sustained on appeal.

[5, 6] In opposition to the granting of the writ, respondent points out that, if it be held that the affidavit contains sufficient allegations to give the court jurisdiction of petitioners to punish them for contempt, the mere fact that the court erroneously imposed a single sentence when more than one sentence should have been imposed will not entitle them to be released on habeas corpus—this on the theory that the writ of habeas corpus will not lie to correct an erroneous judgment. To be entitled to a writ, it must appear that the judgment is void for want of jurisdiction. The point is well taken. In re Reed, 143 Cal. 634, 77 P. 660, 101 Am. St. Rep. 138; Ex parte Soto, 88 Cal. 624, 26 P. 530.

For the foregoing reasons the prayer of the petition is denied, the writ is discharged, and the petitioners remanded to the custody of the sheriff of Los Angeles county.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 716

PEOPLE v. CRANE et al.

Cr. 2512.

District Court of Appeal, Second District, Division 1, California.

April 5, 1934.

Criminal law ⚷1159(2).

Where there is direct evidence to sustain conviction, and jury is properly instructed, reviewing court cannot consider weight of evidence.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Vernon E. Crane and another were convicted of robbery in the first degree, and they appeal.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, Justice.

In an information the defendants were jointly accused of the crime of robbery. By verdicts of the jury, they were each found guilty of robbery in the first degree. From the judgments of conviction, and from the order denying their motion for a new trial, they prosecute this appeal.

Appellants specify the following as errors on the part of the trial court by which they were prevented from having a fair trial:

"1. Error of the trial court in refusing certain instructions requested by the defendants and appellants, and giving certain instructions of its own motion.

"2. Error of the trial court in giving certain instructions requested by the People.

"3. Error of the trial court in the admission of certain evidence.

"4. Error of the trial court in denying defendants' motion for a new trial."

This case was argued at length by appellants' attorney, and considering this argument, together with the arguments advanced in appellants' opening brief—the attorney stating that his oral argument would take the place of a closing brief—I am unable to find anything in any of the points advanced that really in my opinion merits discussion.

There was direct evidence connecting the defendants with the robbery and the jury

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

was correctly and fully instructed as to the law of the case, such instructions following forms approved by our Supreme Court. There is nothing in any of the propositions submitted by appellants that raises any real questions, except only one that would require this court to weigh the evidence. Where there is direct evidence to sustain the conviction, and the jury is correctly instructed, this court is certainly without any power to consider the weight of the evidence.

The judgments and order are affirmed.

HOUSER, Justice.

I concur in the judgment.

CONREY, Presiding Justice.

I concur in the judgment. The instruction given to the jury, relating to the evidence of reputation of the defendants "for truth, honesty and integrity and for peace and quiet," is criticized by appellants, because the court, after stating (in language to which no objection is made) the rule concerning the application of such evidence to the case, further instructed the jury as follows: "However, if you are satisfied to a moral certainty and beyond a reasonable doubt that the defendants or either of them is guilty as charged in the information herein, it will be your duty to so find, notwithstanding such evidence of good character." In support of appellants' claim that this was error, they rely upon People v. Harris, 80 Cal. App. 328, 251 P. 823, and other cases therein cited. That decision is among those considered in People v. Miller, 126 Cal. App. 162, 168, 14 P.(2d) 342, where the subject is reviewed at length, and the conclusion is plainly indicated that an instruction which fully and correctly defines the consideration which should be given by the jury to evidence of good character, is not rendered erroneous by the addition of a clause such as that above quoted, given in the case at bar. The court having thus given an appropriate instruction bearing upon the evidence of good reputation, there was no error in refusing defendants' proposed instruction No. 16 on the same subject.

Appellants contend that the court erred in giving the instruction concerning the evidence of flight of the defendants from the scene of the crime. The instruction as given is taken verbatim from section 1127c, as added to the Penal Code by Statutes of 1929, page 1939. That is sufficient authority for the instruction unless, as contended by defendants, that section is unconstitutional on the ground that it provides for a charge to the jury with respect to matters of fact. Constitution of California, art. 6, § 19. It is true that certain instructions on the subject of flight, which frequently had been given by the trial court, were severely criticized by the Supreme Court. One of the grounds of criticism was that those instructions invaded the province of the jury. People v. Jones, 160 Cal. 358, 369, 117 P. 176; People v. Erno, 195 Cal. 272, 280, 232 P. 710; People v. Goodwin, 202 Cal. 527, 540, 261 P. 1009. But the instruction provided for by section 1127c, and given to the jury in the case at bar, seems to have been carefully written to avoid the imputation of an instruction "with respect to matters of fact." I suspect that the legislators obtained a hint from People v. Ellis, 188 Cal. 682, 693, 206 P. 753, 758, where the instruction under review referred to evidence of an escape of the defendant after arrest. The Supreme Court said: "The jury was correctly told that it was 'a circumstance' which it might consider 'in determining his (defendant's) guilt or innocence,' and it was in no wise misleading or uncertain or ambiguous, and substantially conformed to the law as above stated."

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137 Cal.App. 737

PEOPLE v. LANHAM.

Cr. 1313.

District Court of Appeal, Third District, California.

April 9, 1934.

1. Rape 🔑**64.**

Statute providing that jury may fix place of imprisonment in certain prosecutions for rape *held* inapplicable to prosecution for attempt to commit rape, which is punishable under statute providing penalties for attempts to commit crimes (Pen. Code, § 261, subd. 1, and §§ 264, 664).

2. Infants 🔑**20.**

Crime of committing lewd or lascivious acts upon body of child may be completed without actual contact with child's body (Pen. Code, § 288; St. 1933, p. 1028).

3. Infants 🔑**20.**

Evidence showing that defendant removed panties from child, who then ran away and escaped any further lustful actions, *held* to support conviction under statute prohibiting lewd or lascivious act upon body of child (Pen. Code, § 288; St. 1933, p. 1028).

4. **Criminal law** ⚿1218.

Statute providing that jury may fix place of imprisonment in certain prosecutions for rape, being contrary to general provisions placing such power in court, is to be strictly construed (Pen. Code, § 261, subd. 1, and § 264).

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Ray Lanham was convicted of attempt to commit rape and violation of Penal Code, § 288, and he appeals.

Affirmed.

Edward S. Bell, of Napa, and Ray T. Coughlin, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted upon counts 2 and 3 of an information containing five counts. Count 2 charged the defendant with the crime of attempt to commit rape. Count 3 charged the defendant with the violation of section 288 of the Penal Code, naming the child.

The defendant's motion for a new trial being denied, this appeal is from the order of the court denying his motion, and also from the judgment pronounced following the verdict of the jury finding the defendant guilty as above stated.

[1] Upon this appeal no question is made as to the sufficiency of the testimony to support the verdict of the jury, so far as it related to count 2 finding the defendant guilty of an attempt to commit rape. It is, however, urged as grounds for reversal that the jury failed to follow the provisions of section 264 of the Penal Code, which provides that in prosecutions for rape, where subdivision 1 of section 261 of the Penal Code applies, the jury must fix the place of imprisonment.

In the instant case, the question of the place of punishment was not submitted to the jury. In considering this question, we must take into view the purpose of the Legislature in enacting section 264, supra, and section 664 of the Penal Code: this action being prosecuted under the latter section.

In the enactment of section 264, the Legislature had in thought in many cases prosecuted under the first subdivision of section 261, the female involved might so nearly have reached the age of maturity as to be able to give practical, though not legal, consent, and as pointed out in the cases of People v. Rambaud, 78 Cal. App. 688, 248 P. 954, and followed in the case of People v. Sachau, 78 Cal. App. 702, 248 P. 960, the circumstances surrounding the offense might be such as to justify the jury in modifying the sentence to be imposed by fixing the place of punishment in the county jail rather than the state penitentiary.

Section 664 of the Penal Code is under a different title, has to do, not with the actual commission of the offense of unlawful intercourse with females, but only with the attempt. No question of consent, or seeming consent, is involved in offenses prosecuted under section 664, supra, or, at least, no such intention appears to have been in the mind of the Legislature, when enacting the section under which the present prosecution was had.

Again, section 664, supra, is general in its application and applies to all cases of attempts, while section 264, supra, so far as it vests power in the jury to designate the place of punishment, is specifically limited to cases of actual rape prosecuted under subdivision 1 of section 261.

That attempts to commit offenses are punishable under section 664 of the Penal Code is supported by the following cases: People v. Erwin, 4 Cal. App. 394, 88 P. 371; People v. Gardner, 98 Cal. 127, 32 P. 880 (the case involved an attempt to commit rape); People v. Burns, 138 Cal. 159, 69 P. 16, 70 P. 1087, 60 L. R. A. 270. Other cases might be cited, but these are sufficient to uphold the prosecution in this case.

[2, 3] The appellant further contends that the verdict of the jury is not supported by the testimony as to the offense charged in the third count. Section 288 of the Penal Code, upon which the second count in the information rests, read, at the time of the commission of the offense charged, as follows: "Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two (part one) of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for not less than one year."

A reference to *part 2* in this section should have read *part 1*. This correction was made by the Legislature in 1933 (St. 1933, p. 1028).

The contention of the appellant is that the evidence does not show that the defendant actually placed his hands upon, or that they came in contact with, the legs or any portion of the body of the child.

The information does specifically allege that the defendant so acted; that his hands came in contact with the legs of the little girl. The crime, however, denounced by section 288, supra, is complete, or may be completed without any such actual contact. However, the following statement shows that in either case the jury was well warranted in concluding that the act, as stated in the information, had actually been committed:

The testimony shows that the defendant placed his hands under the clothing of the child and removed from her person the panties she was wearing. It is common knowledge and common experience to conclude that in removing the panties of the child the hands of the one removing the panties would necessarily and undoubtedly come in contact with the body of the child so outraged.

The child in this instance, after her panties had been removed, ran away from the defendant, and thus escaped any further lustful actions on the part of the defendant. The simple act which we have set forth is in and of itself sufficient to support the verdict, and relieves us of the necessity of setting out the testimony.

The acts of the defendant involved in this case are very similar to the acts charged in the case of People v. Dabner, 25 Cal. App. 630, 144 P. 975, where the lewd conduct consisted in unbuttoning the trousers of the female, save and except that in the Dabner Case the defendant did hug and kiss the child in question. In that case it was held that the criminal act was performed, even though it was a physical possibility to unbutton the trousers of the child without touching her naked body.

[4] The cases of People v. Rambaud, 78 Cal. App. 685, 248 P. 954, and People v. Sachau, 78 Cal. App. 702, 248 P. 960, have to do with subdivision 1 of section 261 of the Penal Code, as modified and controlled by the last clause of section 264 of the Penal Code, placing the power in the hands of the jury to designate the place of punishment. There is nothing in section 264, supra, which extends the power of the jury in such particular to any other case, and, as the provision is contrary to the general provisions of the Penal Code placing the power to fix the punishment, or place of punishment, in the court, the provision is to be strictly construed and not extended beyond the meaning of the section and the express limitation placed upon the power of the court to fix the place of punishment. The cases referred to resting upon the provisions of the section, which we have just mentioned, are readily distinguishable from the sections of the Penal Code relative to punishments specified for attempts, and those cases are not controlling here.

The order and judgment are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

137 Cal.App. 640

ELECTRIC UTILITIES CO. v. SMALLPAGE et al.

Civ. 5081.

District Court of Appeal, Third District.
California.
March 31, 1934.

1. Attorney and client 🔑96.

Party represented by attorney of record has no legal authority to appear and file points and authorities on appeal or control procedure on appeal in own behalf.

2. Appeal and error 🔑767(1).

Where record did not show termination of authority or substitution of appellant's attorney of record, points and authorities on appeal filed by appellant in his proper person were stricken from record (Code Civ. Proc. § 284).

3. Appeal and error 🔑801(1).

Motion to dismiss appeal under rules of court should receive liberal construction to end that cause may be heard on merits.

4. Bankruptcy 🔑390.

Where legal authority to maintain action brought by plaintiff was vested solely in trustee in bankruptcy of plaintiff's estate, demurrer on ground of defect in party plaintiff *held* properly sustained (Code Civ. Proc. § 430).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by the Electric Utilities Company against Lafayette J. Smallpage and others. Judgment of dismissal, and plaintiff appeals, and defendants move to dismiss the appeal.

Appeal dismissed.

A. H. Carpenter and B. M. Bainbridge, both of Stockton, for appellant.

Lafayette J. Smallpage and Chas. H. Epperson, both of Stockton, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have moved to dismiss the appeal which was taken from a judgment rendered and entered against the plaintiff for failure to amend his third amended complaint within the time allowed after a demurrer thereto had been sustained. The motion to dismiss the appeal is made pursuant to rule V of the Rules for the Supreme Court and District Courts of Appeal, for failure on the part of the appellant to file his points and authorities as required, and on the further ground that the appeal was taken merely for delay and presents questions only of unsubstantial merit.

It appears from the complaint that Charles A. Menne was doing business under the fictitious name of Electric Utilities Company. The third amended complaint was filed in the name of Electric Utilities Company. It also appears from the complaint that the plaintiff had been declared a bankrupt prior to the commencement of his action, and that a trustee of his estate had been appointed and qualified. To this third amended complaint the defendants filed a demurrer under the provisions of section 430 of the Code of Civil Procedure, upon the ground, among numerous other grounds which were stated, that there is a defect of party plaintiff, since it appears the plaintiff is a bankrupt, and that the legal authority to maintain the action in his behalf is vested solely in his trustee in bankruptcy. April 24, 1933, this demurrer was sustained and the plaintiff was granted ten days in which to amend his pleading. The plaintiff failed and neglected to amend his complaint within the time allowed, or at all. After due notice, and upon hearing, judgment of dismissal of the action was rendered against the plaintiff because of his default. From this judgment, the plaintiff appealed.

[1] The plaintiff's attorneys of record, as appears from the third amended complaint, were B. M. Bainbridge and A. H. Carpenter. Since filing the complaint above mentioned, Mr. Carpenter died. Mr. Bainbridge still appears to be a surviving attorney of record in behalf of the plaintiff. The transcript on appeal was filed January 9, 1934. On February 8, 1934, appellant's purported points and authorities were signed only by Charles A. Menne, "In Pro. Per.," and filed in this court. While the plaintiff is still represented by an attorney of record, he has no legal authority to appear and file points and authorities or control the proceedings on appeal in his own behalf. There is no evidence in the record of a termination of the employment of plaintiff's attorney, B. M. Bainbridge, or of a substitution of attorneys pursuant to section 284 of the Code of Civil Procedure. While a litigant has a duly employed attorney of record, that attorney retains the exclusive right to appear and control the court proceedings upon trial or on appeal of the case. 6 C. J., p. 643, § 147; Anglo California Trust Co. v. Kelly, 95 Cal. App. 390, 272 P. 1080; Boca, etc., R. R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718. In the Boca Case last cited the syllabus correctly states the rule which usually precludes a litigant from appearing in his own behalf when he has an attorney of record, as follows: "A plaintiff in an action may either appear in his own proper person or by attorney; but he cannot do both, and if he has appeared by attorney, he has no power of control over the action otherwise than through his original or substituted attorney of record."

[2] We are of the opinion the plaintiff in this case was without authority to file points and authorities in his proper person, since he had an attorney of record, and that the appellant's purported brief on appeal should therefore be stricken from the records. It follows that the motion to dismiss the appeal should be granted for failure on the part of the plaintiff to file his points and authorities as required by law.

[3, 4] A motion to dismiss an appeal under the rules of court should usually receive a liberal construction to the end that the cause may be heard on its merits. In the present case, however, it appears that the appeal is without substantial merit, for the reason that the plaintiff has been declared a bankrupt, and that the trustee of his bankrupt estate has the exclusive right to maintain the action in his behalf. 7 C. J., p. 348, § 614. The de-

murrer to the third amended complaint was therefore necessarily and properly sustained.

It is ordered that the appellant's purported points and authorities be stricken from the record and that the motion to dismiss the appeal be and it is hereby granted. The appeal is dismissed.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 741

CARL INGALLS, INC., v. HARTFORD FIRE INS. CO.

Civ. 1269.

District Court of Appeal, Fourth District, California.

April 9, 1934.

Hearing Denied by Supreme Court June 7, 1934.

1. Insurance 🔑146(1).

Risk fairly within contemplation of insurance policy is not to be avoided by any nice distinction or artificial refinement in use of words (Civ. Code, § 1644).

2. Contracts 🔑152.

Ordinary and popular sense to be attributed to words of contract is to be related to circumstances under which they are used, having in mind purpose of contract and general situation which brought it into existence.

3. Insurance 🔑146(3).

Ambiguous insurance policy is to be construed liberally in favor of insured.

4. Insurance 🔑424.

Where truck partially tipped over, spilling contents, but with load removed righted itself, there was "overturning of truck" within insurance policy covering transportation of material, since anything has been "overturned" when it has been sufficiently tipped over to spill contents.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Carl Ingalls, Incorporated, against Hartford Fire Insurance Company. Judgment for defendant, and plaintiff appeals.

Reversed.

Brittan & Mack, of Bakersfield, for appellant.

George H. Hauerken, of San Francisco, and Borton & Petrini, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff, who was engaged in the trucking business in Bakersfield, contracted with the Southern California Edison Company to haul a quantity of flume iron from Bakersfield to Borel. Between those points there is a winding mountain road. Before beginning the work the plaintiff secured from the defendant an insurance policy denominated "Trip Transit Insurance" covering the transportation of this material between the places named.

While one load was being hauled, a portion of the flume iron was damaged under the following circumstances: The truck and trailer upon which the material was loaded, and which with the load weighed about twenty-one tons, was proceeding slowly around a sharp curve on this mountain road. At that point a bank had been built up on the right-hand side so that the right side of the road was considerably higher than the left side. The right slope of this bank consisted of dirt recently filled in and which was much softer than the roadbed proper. As the truck and trailer went around this curve the driver kept so far to the right that the trailer straddled this bank in such a manner that its right wheels were near the bottom of the right slope of the bank and were then approximately at a level two feet lower than the level of the left wheels, which remained on the road proper. While the trailer was in this position the right-hand wheels thereof sank into the soft dirt some six inches or a foot more and this, combined with the higher elevation of the left wheels, caused the left wheels of the trailer, or some of them, to raise about a foot from the ground, which, in turn, caused the heavy load to slide off to the ground, resulting in the damage in question. According to one part of the evidence the left wheels of the truck were raised about a foot from the ground, and according to another part of the evidence a particular witness only saw the left rear wheels of the trailer raise about a foot from the ground at a particular time. In any event, while the left wheels of the vehicle were elevated some two and one-half or three feet above the right wheels, a part of the left wheels left the ground and the truck turned over to the right side sufficiently to dump the load. After the load slipped to the ground the left wheels settled back to the roadbed and the driver was able to pull the trailer back on the road. The flume iron was damaged by being thrown from the trailer to the extent that it was unfit for the use intended and was rejected by the consignee, and the plaintiff was compelled to replace it with new iron. This action followed to recover under the policy for the loss sustained. At the close of the plaintiff's case the defendant moved for a nonsuit upon the ground that the cause of the loss was not a peril insured against in the policy, and upon the further ground that the plaintiff had not established the amount of damages with sufficient certainty. The motion was granted and a judgment of nonsuit entered, from which this appeal was taken.

There is sufficient evidence as to the amount of damage to sustain a judgment and the only real question presented is as to whether, under the terms of the policy, the loss in question occurred from one of the perils insured against.

The contract of insurance in question consisted of a general open policy, to which was attached a rider and a certificate. The policy itself contains the following clause:

"This Policy Insures

"(Within the foregoing provisions, and except as hereinafter provided.)

"While on land against loss or damage caused by fire, lightning, cyclone, tornado, flood (Meaning thereby the rising of navigable waters), earthquake, explosion, landslide, collision (the coming together of cars during coupling not to be deemed a collision), derailment, overturning of vehicle, collapse of bridge or culvert, and other perils of transportation * * *."

Among the conditions named therein is the following: "It is a condition of this policy, that liability hereunder shall attach as the said goods, wares, and/or merchandise are delivered to and accepted by the railroad company or other carrier at or on its automobile, conveyance, wharf or depot and shall continue (while in transit) until the arrival of same or the several portions thereof at the destination hereinbefore named and for the additional time reasonably necessary for the removal of said property or the several portions thereof from the automobile, car, conveyance, wharf or depot (as the case may be)."

The rider contains the following clauses:

"While on Automobile Truck:—Covering only while on truck in transit between places named therein. Against direct loss or damage caused by fire, lightning, cyclone, tornado, flood (meaning rising waters), collision, overturning of the truck and collapse of bridges."

"Should any claim arise hereon for loss or injury to any part of the interest insured this policy to be liable only for the cost of replacing the part or parts lost or damaged."

The certificate, like the policy and the rider, is headed "Trip Transit Insurance." It certifies that the company insures the appellant under the policy named on 108 pieces of flume iron weighing twenty-two tons on a trip from Bakersfield, Cal., to Borel, Cal., to be shipped by motor truck and/or trailer, giving the valuation of the shipment and the premium. It contains the following clause:

"The Policy Covers

"While on Automobile Truck: Covering only while on truck in transit between places named. Against direct loss or damage caused by fire, lightning, cyclone, tornado, flood (meaning rising waters), collision, overturning of the truck and collapse of bridges."

[1-4] The appellant contends that the accident causing the damage to this iron was within the perils insured against by the policy, both because it occurred through the overturning of the trailer and because it was one of the "other perils of transportation" set forth in the insuring clause of the policy. The respondent contends that there was no overturning of this vehicle within the meaning of the policy and that the policy did not insure against "other perils of transportation," since that portion of the insuring clause set forth in the policy is omitted from the statement of what the policy covers which is set forth both in the rider and in the certificate. Under the view we take of the first of these propositions it will be unnecessary to consider the second.

All three portions of the policy referred to include the provision that the merchandise in question shall be insured, with certain exceptions not here material, while the same was in transit between the places named, against loss or damage caused by certain designated things, including the overturning of the truck. By the certificate these provisions were made applicable to the trailer. The policy and the rider are general in their nature while the certificate particularly designates the merchandise to be carried, between what points it was to be carried, and that it was to be carried either on a truck or a trailer.

The most important question presented is as to the meaning of the phrase "overturning of the truck." The respondent contends that nothing less than a complete overturning of the vehicle was contemplated by the policy and that the truck or trailer could not be said to have overturned until it had completely tipped over or until it had come to rest upon some part or parts thereof other than the wheels. We are unable to agree with this interpretation of the language used. As was said in Granger v. New Jersey Ins. Co., 108 Cal. App. 290, 291 P. 698, 700: "A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words." Section 1644 of the Civil Code provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

In Moblad v. Western Indemnity Co., 53 Cal. App. 683, 200 P. 750, the court quotes from another case (Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179) as follows: "'It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract.'"

We take it that the ordinary and popular sense thus to be attributed to the words of a contract is to be related to the circumstances under which they are used, having in mind the purpose of the contract and the general situation which brought it into existence. In the case of Meyerstein v. Great American Ins. Co., 82 Cal. App. 131, 255 P. 220, 222, the court said: "Where, then, the language may be understood in more senses than one, the rule of law is that an insurance policy is to be construed liberally in favor of the insured, and any uncertainty or ambiguity in the contract is to be interpreted most strongly against the insurer."

In examining this contract, with these rules in mind, it not only appears that the purpose for which this insurance was taken was to insure this cargo while in transit between the two points, but it is to be noted that the perils insured against are those which might naturally be expected to affect the merchandise while thus being transported, including such items as collision, overturning of the vehicle and collapse of bridges. It was the merchandise rather than the vehicle which was insured and the safety of the merchandise was the object of taking out the insurance. While it must be conceded that the liability of the insurance company is limited by the terms of the policy and that the same does not extend to a damage arising from some peril not insured against, the perils named in all portions of the policy indicate an intention to cover most of the natural risks usually to be expected in transporting the property. A collision or a collapse of a bridge would be important only as it affected the merchandise being transported. Similarly the overturning of the truck is important only for the same reason. The effect of an overturning on the merchandise, which may thereby be dumped on the ground, is the same whether that overturning be complete or only partial, so long as it is sufficient to cause the injury. We see nothing in the language used to compel the conclusion that the insurance company was to be liable in case the vehicle completely overturned and be free from liability in case it only partially overturned. It is perfectly apparent from the evidence here that if the chains by which the load was fastened on this trailer had not broken, the trailer would have come to rest on its side and would then have been "overturned" within the meaning contended for by the respondent. The fact that the chains broke and the load slipped off before the trailer came to rest and that, with the load removed, the vehicle righted itself, is not conclusive unless the overturning referred to in the policy and in the certificate must be construed to be a complete and permanent overturning. Even then the question would remain whether a vehicle lying on its side would be overturned or whether all wheels must be in the air in order to come within the language used. It is significant that the covering clause limits the kind of flood insured against, but places no limitation or definition upon the other perils covered. It could hardly be argued that a loss caused by a collapse of part of a bridge was not covered because there had not been a total collapse of the bridge. The degree or amount of overturning of the vehicle used is no more fixed by the language used than is the degree or extent of collapse in a bridge.

Having in mind the purpose of the policy the general circumstances, and the other provisions of the policy, as well as the clause here in question, and under the rules above referred to, we are of the opinion that there was an overturning of this vehicle within the meaning of the policy. It must be admitted that the vehicle partially overturned, causing the damage in question, and the language used in the policy is broad enough to cover both a partial and a complete overturning of the vehicle. In ordinary parlance, anything has been overturned when it has been sufficiently tipped over to spill its contents and, in the absence of anything in the policy indicating a different meaning, the ordinary sense of the words used should not "by any nice distinction or artificial refinement" be changed in order to avoid a risk which seems to have been fairly within the contemplation of the policy.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

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137 Cal.App. 687

KIMBALL et al. v. HASTINGS TRACT RECLAMATION DIST. NO. 2060 et al. (CALIFORNIA PACKING CORPORATION, Intervener).

Civ. 5062.

District Court of Appeal, Third District, California.

April 3, 1934.

Drains 🔑18.

Where, owing to delinquencies, sum collected pursuant to special levy to pay specified matured bonds and accrued interest thereon of reclamation district was insufficient to pay both in full, undistributed amount after proration of certain sum to payment of bonds and interest must be applied to satisfaction of principal and interest of such matured bonds in proportion which principal and interest, respectively, bear to sum for distribution, and not retained for payment of bonds to mature (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Mandamus proceeding by Rufus Hatch Kimball, Jr., and others, by Rufus Hatch Kimball, as guardian of their persons and estates, in behalf of themselves and other bondholders of the Hastings Tract Reclamation District No. 2060, against the Hastings Tract Reclamation District No. 2060 and another, wherein the California Packing Corporation intervened. From a judgment for plaintiffs, the intervener appeals.

Reversed, with instructions.

Pillsbury, Madison & Sutro, M. D. L. Fuller, and L. B. Groezinger, all of San Francisco, for appellants.

Rufus H. Kimball, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a writ of mandamus issued by the superior court of Solano county, directing the treasurer of a reclamation district to distribute a portion of a special fund collected pursuant to a levy assessed for the special purpose of paying particular matured bonds and the accrued interest thereon, in settlement of future obligations of the district, other than the ones for which the call was made.

The appellant is a reclamation district which was organized under the laws of California, February 15, 1922. It comprises 7396.77 acres of land in Solano county. Pursuant to section 3480 of the Political Code, as the statute then existed, the district authorized the issuance of bonds of the aggregate par value of $500,000, all of which were ultimately sold. These bonds bear a uniform rate of 6 per cent. interest, payable semiannually. The bonds matured serially in blocks from July 1, 1926, to July 1, 1942. All of the bonds which matured prior to July 1, 1932, aggregating the par value of $100,000, together with accrued interest thereon, were fully paid.

July 1, 1933, bonds aggregating the sum of $40,000 matured. There was also due upon the matured bonds and upon other unmatured bonds the additional sum of $12,000 interest. This aggregate sum of $52,000 was due and unpaid. There was then no money in the treasury of the reclamation district with which to pay these obligations. Pursuant to section 3480 of the Political Code as amended by St. 1931, p. 762, § 6, the defendant George Weniger, as treasurer of Solano county, estimated that the amount of money

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

which was necessary to be raised by assessment upon the property of the Hastings tract reclamation district No. 2060, to pay these outstanding obligations, was the sum of $52,000, to which amount he added the further sum of $7,800 "to cover possible delinquencies." This made an aggregate estimate of $59,800, for the collection of which a levy was duly issued pursuant to law April 20, 1933. Upon this call there was collected from three landowners upon fifteen separate assessed tracts of land the aggregate sum of $49,582.04. The remaining sum of $10,217.96, assessed against the respective properties in said district belonging to other landowners, was not paid, and thereupon became delinquent.

The money thus collected and paid into the county treasury under the special call therefor was prorated as follows: To the payment of the principal on bonds due July 1, 1933, the sum of $33,662.72; to the payment of interest on bonds which was due at that time, the sum of $11,442.02. This left an undistributed balance of the assessment fund amounting to the sum of $4,477.30. There is no dispute regarding the foregoing facts.

The petitioners in their own behalf, as holders of certain bonds which matured July 1, 1933, and in behalf of other interested bondholders, filed in the superior court of Solano county a petition for a writ of mandamus, praying for an order directing the prorating and distribution of the remainder of the undistributed fund, amounting to $4,477.30. The California Packing Corporation, which is also a landowner in Hastings tract reclamation district No. 2060, intervened in that mandamus proceeding, asking that the aforesaid undistributed portion of the fund be retained in the reclamation district treasury subject to the future order of the court. To this petition the Hastings tract reclamation district No. 2060 filed an answer, praying for an order of distribution of the balance of the fund, and for such further relief as may be deemed proper in the premises. Upon hearing, the trial court issued a writ of mandamus directing the treasurer to prorate $45,104.77 of the money collected, in accordance with his previous estimation, leaving a balance on hand of $4,477.30, which the court ordered to be applied pro rata upon other bonds when they accrue July 1, 1934. From this decree the Hastings tract reclamation district No. 2060 has appealed.

The only question to be determined on this appeal is whether the treasurer of a reclamation district is authorized by law to withhold any portion of a special fund which is collected pursuant to section 3480 of the Political Code upon an express call for the payment of specified matured bonds due July 1, 1933, and the accrued interest thereon, and apply the residue "in the payment of successive annual instalments * * * on account of each of the $40,000 annual maturities of said bonds, which mature serially from July 1, 1934, to July 1, 1942, inclusive," as directed by the trial court. In other words, does the law authorize the application of any portion of a special assessment, levied for the particular purpose of paying specified matured bonds and the accrued interest thereon, to the payment of other future obligations, while a portion of the bonds and interest for which the assessment was levied remains unpaid?

We are of the opinion the entire fund, including both principal and interest, which is raised by special assessment pursuant to section 3480 of the Political Code, for the payment of specified matured bonds and the accrued interest thereon, should be applied pro rata to the payment only of the particular matured bonds and interest for which it was levied and collected, so long as any portion of such obligations remain unpaid. Cooper v. Gibson (Cal. App.) 24 P.(2d) 952, 956. It follows that the undistributed portion of the fund, amounting to the sum of $4,477.30, which remains in the hands of the treasurer for the designated purpose of applying it to future obligations, as directed by the trial court, should be prorated and applied towards the immediate payment of the specified matured bonds and the accrued interest thereon, in the proportion which said undistributed sum of $4,477.30 bears to the unpaid items of principal and interest which are contained therein as specified in the call for the assessment.

Section 3480 of the Political Code, as amended by St. 1931, p. 762, § 6 reads in part: "*Bond Fund.* All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, * * * shall be by such treasurer forthwith paid into the main county treasury and * * * shall be credited to the bond fund of such reclamation district *and used exclusively for the payment of principal and interest of said bonds issued on such assessment*, and of the principal and interest of any refunding bonds issued thereon."

The fund above mentioned is provided for by a subsequent subdivision of the same section in the following language: "Estimate of amount to pay interest and principal. At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof, and shall add thereto fifteen per cent of such aggregate sum to cover possible delinquencies."

It is apparent from the language of the statute above quoted that the funds which are levied and collected for the payment of particular bonds and the accrued interest thereon which falls due on a specified date must be used "*exclusively* for the payment of principal and interest of *said* bonds issued on such assessment." It is equally clear that no part of that special "ear-marked fund" may be used to pay other subsequent obligations, while any portion of the particular bonds or the accrued interest thereon, for which the assessment was levied, remains unpaid.

In the Cooper Case, supra, in construing section 3480 of the Political Code, in a proceeding involving the distribution of a reclamation district fund which was levied for the purpose of paying the interest which had accrued on similar bonds, this court said: "The money received on account of each call is so far earmarked that, if ordered distributed it should be ordered distributed so as to apply the money received on account of the call intended to make payment of the interest coupons falling due on July 1, 1932, to the payment of such interest coupons only, and that the moneys received on account of an installment call intended to raise money for the payment of interest coupons falling due on January 1, 1933, should be applied to the payment of such interest coupons only."

While it is conceded by the respondents in this proceeding that the statute was correctly construed in the Cooper Case with relation to the payment of interest coupons, it is asserted that rule has no application to the payment of the principal sums represented by the bonds. In this contention we are satisfied the respondents are in error. There is no distinction in the language of the statute regarding the application of the funds derived from a special assessment between the payment of principal and interest. The statute requires such special funds to be "used exclusively for the payment of principal and interest of said bonds issued on such assessment."

There appears to be nothing in the case of Rohwer v. Gibson, 126 Cal. App. 707, 14 P.(2d) 1051, relied upon by the respondent in this case, which is in conflict with the foregoing principle decided by the Cooper Case. In fact, the Rohwer opinion recognizes the well-established rule that moneys which are collected by special assessments for a particular purpose constitute trust funds which must be expended for the express purposes for which they are collected. Jeweill v. City of Superior (C. C. A.) 135 F. 19; Conway v. City of Chicago, 237 Ill. 128, 86 N. E. 619; People v. Flynn, 265 Ill. 414, 106 N. E. 961.

The judgment is reversed, with instructions to direct the treasurer to pay the remaining undistributed portion of said special fund, amounting to the sum of $4,477.30, pro rata towards the satisfaction of the bonds which matured July 1, 1933, and the accrued interest thereon, in the proportions which the items of principal and interest bear to the residue of the fund on hand.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 730

WIGHT v. ROHLFFS.

Civ. 9396.

District Court of Appeal, First District,
Division 1, California.
April 9, 1934.

Hearing Denied by Supreme Court
June 7, 1934.

1. Appeal and error 🔑110.

Whether action involves legal issues so that appeal would lie from order granting new trial, or issues of equitable cognizance, must be determined from pleadings and facts alleged therein without considering evidence (Code Civ. Proc. § 963, subd. 2, as amended by St. 1933, p. 2472).

2. Appeal and error 🔑110.

Suit by one alleging deceased held plaintiff's share of property in trust and seeking accounting for proceeds of sale was one involving issues of equitable nature, so that jury trial was not matter of right, and appeal would not lie from order granting new trial (Code Civ. Proc. § 963, subd. 2, as amended by St. 1933, p. 2472).

3. Appeal and error ⚷797(2).

Motion to dismiss appeal from order granting a new trial which required a determination whether issues involved were legal or equitable was not premature because reporter's transcript containing evidence adduced at trial was not on file when motion was presented (Rules V and VI for the Supreme Court and District Courts of Appeal).

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Wilder Wight against Alma Rebecca Rohlffs, as administratrix with the will annexed of the estate of Patrick Cahill, deceased. Judgment was entered for defendant, but thereafter plaintiff was granted a new trial, and, from the order granting the new trial, defendant appeals, and plaintiff moves to dismiss the appeal.

Motion granted, and appeal dismissed.

Prior opinion, 30 P.(2d) 77.

M. A. Ross, of San Francisco, for appellant.

H. Raymond Hall, of Oakland, for respondent.

KNIGHT, Justice.

The above-entitled cause was tried by the court sitting without a jury and judgment entered in favor of defendant. Thereafter plaintiff moved for and was granted a new trial upon the ground of insufficiency of evidence. Defendant appealed, and plaintiff now moves to dismiss the appeal upon the ground that the action was one in which defendant was not entitled as a matter of right to a trial by jury, and that consequently, under section 963 of the Code of Civil Procedure, the order granting the new trial is not appealable.

[1] Subdivision 2 of said Code section, as amended in 1933 (St. 1933, p. 2472) provides: "An appeal may be taken from a superior court in the following cases: * * * 2. From an order granting a new trial * * * where a trial by jury is a matter of right. * * *" It follows, therefore, that, in an action wherein a trial by jury is not a matter of right, no appeal lies from an order granting a new trial; and it is fundamental that an equitable proceeding is such an action. At the time the motion to dismiss came on for hearing, the transcript on appeal had not been completed, and said motion was presented on a record consisting of the county clerk's certificate setting forth certain matters appearing of record in the action, annexed to which were copies of the pleadings in the action, consisting of the second amended complaint, the answer thereto, and an amendment to the answer; also copies of the minute order granting the new trial, the notice of appeal, and certain affidavits. After the motion was argued and submitted, the transcripts on appeal prepared by the county clerk and the phonographic reporter were presented to the clerk of this court for filing. It is well settled, however, that the question of whether an action involves legal issues or issues of equitable cognizance must be determined from the pleadings and the facts alleged therein, Davis v. Judson, 159 Cal. 121, 113 P. 147; Woolsey v. Woolsey, 121 Cal. App. 576, 9 P.(2d) 605; and, inasmuch as copies of all of the pleadings were incorporated in the clerk's certificate filed in support of the motion, the transcripts on appeal serve no useful purpose in the determination of the merit of said motion.

[2] Turning then to the pleadings, the second amended complaint alleges that on June 6, 1917, plaintiff and Patrick Cahill became the sole owners of the real estate and farm in controversy; that plaintiff owned an undivided one-third interest therein, but that the legal title to said property was vested in Patrick Cahill; that plaintiff originally invested $4,641.98 in said property, and on December 9, 1918, for the purpose of protecting plaintiff's interest therein in the event of the death of either party, the said Cahill executed and delivered to plaintiff a written memorandum to the effect that Cahill held one-third of said property in trust for plaintiff, subject to certain incumbrances, and subject to an accounting between them; that on or about May 1, 1921, it was agreed between plaintiff and said Cahill that said Cahill would continue to operate the business of said farm and that he would dispose of it when a profitable disposal of same could be made, and would then account to plaintiff for the amount invested by him and for one-third of the net profits; that on or about May 24, 1929, Cahill disposed of said property, but that plaintiff had no knowledge of such disposal until June 25, 1931; that thereafter, on November 10, 1931, plaintiff filed his creditor's claim against the estate of Patrick Cahill, deceased. The prayer of the complaint is that defendant be required to account for the proceeds of said sale and the profits arising from the operation of

said property. The answer and the amendment thereto deny the allegations of the complaint and allege that on March 15, 1918, plaintiff had executed his deed to said Cahill for all his interest in said property and had given his receipt for all sums owing to him by Cahill on account of his interest in said property.

It thus clearly appears from the facts alleged that the action is one to declare a trust and for an accounting, and that therefore the issues presented for trial are in their nature equitable. That being so, a trial by jury was not a matter of right, Dean v. Midland Farms Co., 96 Cal. App. 214, 274 P. 71; Nason v. Shinjo, 72 Cal. App. 530, 237 P. 559; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589; and no appeal lies from the order granting the new trial.

[3] Defendant contends that the question of whether the issues in an action are in their nature legal or equitable must be determined "from the facts of the particular case" as well as from the pleadings, and that, inasmuch as the reporter's transcript containing the evidence adduced at the trial was not on file herein at the time the motion to dismiss was presented, said motion was premature. The case of Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.(2d) 659, and rules V and VI of the Supreme Court and the District Courts of Appeal are cited in furtherance of such contention. There is no merit in the point. An examination of the opinion in that case will show that the clause "and the facts of a particular case," as used therein and upon which defendant seems to rely, means the facts alleged in the pleadings (Davis v. Judson, supra), not those adduced at the trial. In other words, the substance of what was there said was that in determining whether an action is legal or equitable, and consequently whether trial by jury is a matter of right, the court is not bound by the form of the action, but rather by the nature of the rights involved as they appear from the facts alleged in the pleadings. Obviously, to adopt the theory advanced by defendant in the present case would lead to absurd results, because it would require a trial court to try an action on the merits before it could determine whether the parties thereto were entitled as a matter of right to a jury trial. Nor do the rules of court above cited give the slightest support to defendant's contention that the motion is prematurely presented. The subject-matters dealt with therein are entirely foreign to the character of motion here involved.

For the reasons stated, the motion is granted, and the appeal dismissed.

We concur: TYLER, P. J.; CASHIN, J.

137 Cal.App. 612

PEOPLE v. PHAIR.

Cr. 2458.

District Court of Appeal, Second District,
Division 2, California.
March 29, 1934.

1. **Statutes** 🔑158.

Law does not favor repeal by implication.

2. **Statutes** 🔑142, 159.

Later act does not change or repeal previously enacted law, where change or repeal is not specifically declared, unless later act indicates intention to effect change or repeal, or acts conflict so that each cannot be given effect clearly intended.

3. **Criminal law** 🔑1208(1).

Statute, as amended, fixes maximum imprisonment at six months for any misdemeanor, whether prescribed by Penal Code or other law, except where law specifies different punishment (Pen. Code, § 19, as amended by St. 1933, p. 2216, § 1).

4. **Infants** 🔑20.

Statutory amendment limits incarceration in county jail to one year for offenses prescribed by Juvenile Court Act (Pen. Code, § 19, as amended by St. 1933, p. 2216, § 1; § 19a, as added by St. 1933, p. 2217, § 2; St. 1915, p. 1225, as amended; p. 1246, § 21, as amended by St. 1921, p. 773).

> Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2, provides that in no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year.

5. **Infants** 🔑20.

Accused, convicted of contributing to delinquency of minor, an offense declared a misdemeanor by Juvenile Court Act, could not be imprisoned in county jail for longer than one year, in view of limitation imposed by Penal Code provision, enacted after Juvenile Court Act, on imprisonment for misdemeanors, notwithstanding Juvenile Court Act authorized imprisonment for two years (Pen. Code, § 19, as amended by St. 1933, p. 2216, § 1; § 19a, as added by St. 1933, p. 2217, § 2; St. 1915, p. 1225, as amended; p. 1246, § 21, as amended by St. 1921, p. 773).

◆

Appeal from Superior Court, Los Angeles County; William O. Doran, Judge.

Gordon Phair was convicted of contributing to the delinquency of a minor, and he appeals.

Reversed, and remanded for resentence.

Aileen M. MacLymont, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Defendant was found guilty on each of four counts charging him with the offense of contributing to delinquency, declared to be a misdemeanor under the "Juvenile Court Law" (St. 1915, p. 1225, as amended). The judgment of the court was that he be punished by imprisonment in the Los Angeles county jail for a period of two years on each count. Sentences on three counts were to run concurrently, and, on the fourth, to run consecutively with the sentences on the other counts.

In his appeal from the judgment defendant urges that this judgment of imprisonment is contrary to law, for the reason that the provisions of section 21 of the Juvenile Court Act (St. 1915, p. 1246, § 21, as amended by St. 1921, p. 773), which provides for a maximum imprisonment of two years in the county jail upon conviction of an offense prescribed by that act, was modified or repealed by section 19a of the Penal Code, enacted in 1933 (as added by St. 1933, p. 2217, § 2), wherein it is provided that "in no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year." As there is no provision in this section which directly repeals or modifies the penalty provision of section 21 of the Juvenile Court Act, such repeal or modification, if any, must be by implication.

[1, 2] It is a well-established rule that the law does not favor repeal by implication. It has been declared in effect by the Supreme and Appellate Courts of this state that a later act does not change or repeal a previously enacted law, where such change or repeal is not specifically declared, unless it appears from the later act that it was the intention so to do, or that the two acts are so in conflict that each cannot be given the force and effect clearly intended. Bateman v. Colgan, 111 Cal. 586, 44 P. 238; People v. Superior Court, 64 Cal. App. 770, 222 P. 864; In re Petition of Johnson, 167 Cal. 142, 138 P. 740.

The acts charged against defendant by the terms of section 21 of the Juvenile Court Law constitute a misdemeanor. This section further provides that, upon conviction of any of the offenses therein prescribed, the punishment shall be by a fine of not exceeding $1,000, or by imprisonment in the county jail of not more than two years, or by both such fine and imprisonment.

The sole question here involved is whether or not section 19a of the Penal Code repealed or modified the penal provisions of the Juvenile Court Act, so as to limit incarceration in the county jail to one year in all cases of conviction for offenses prescribed by this act.

[3-5] In determining the intent of the Legislature in the enactment of section 19a, it is important to note that at the same time this section was adopted the Legislature also amended section 19 of the Penal Code (St. 1933, p. 2216, § 1). Section 19 before amendment read as follows: "Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both." As amended it reads: "Except in cases where a different punishment is prescribed by any law of this State, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both."

It is clear that the Legislature intended by the amendment to remove the words of limitation which made the section applicable to misdemeanors prescribed by the Penal Code, and make it applicable to all misdemeanors "prescribed by any law of the state." Hence, as amended, the section fixed the maximum imprisonment at six months for any misdemeanor, "except in cases where a different punishment is prescribed by any law of this state."

The wording of the first part of section 19a, limiting imprisonment in the county jail for misdemeanors to one year, is very comprehensive in its language. When read in connection with the amendment to section 19, it would seem clear that this provision in the new section was intended to cover all cases of misdemeanors not included in section 19 as amended. That such was the purpose of the Legislature is confirmed by the remainder of the section, which provides that, where a penal farm is established, or a "State institution for long-term misdemeanants" is established, then persons found guilty of misdemeanors may be committed to such an institution for any length of time within the limits prescribed by the statute under which the conviction was had. This latter part of section 19a clearly recognizes the existence of statutes that provide as punishment for misdemeanors maximum periods of incarceration in excess of one year, and provides for the enforcement of such longer periods of imprisonment only in certain types of penal institutions, which clearly do not include county jails.

From the foregoing considerations, as also others that might be dwelt upon, there would seem no escape from the conclusion that in adding section 19a to the Penal Code it was the intention to limit the period of confinement in the county jail to one year in any and all cases where a misdemeanor has been committed.

It is not contended that in Los Angeles county there is established any penal farm, nor in the state of California "any state institution for long term misdemeanants."

The judgment of sentence is reversed and the cause remanded for resentence of the defendant.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 729

PEOPLE v. HUDSON.

Cr. 2480.

District Court of Appeal, Second District, Division 1, California.

April 7, 1934.

Criminal law 🔑956(4).

Refusal of defendant's motion for new trial *held* abuse of discretion, where uncontradicted affidavits showed tampering or coaching of witnesses, and where testimony of two prosecuting witnesses respecting acts charged was in some respects extremely improbable.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

William Haskell Hudson was convicted of violating Penal Code, §§ 288 and 288a, relating to lewd and lascivious acts on bodies of children and sex perversions, and he appeals.

Reversed and remanded.

Jesse R. Shafer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, Justice.

The defendant and appellant was tried upon an information filed by the district attorney in three counts; count I charging violation of section 288a of the Penal Code, and counts II and III charging violations of section 288 of the Penal Code. Upon the trial and after the evidence had been closed, and before the cause was given to the jury, the court upon its own motion dismissed the information against the defendant as to count II. Upon submission of the cause to the jury upon counts I and III of said information, the defendant was found guilty as charged on each of said counts. Thereafter, and within the time fixed by law, the defendant duly gave notice of motion for a new trial, which said motion was by the court denied. This appeal is "from the court's order denying defendant's motion for a new trial, from the judgment pronounced herein and the whole hereof."

If the affidavits that were presented upon motion for new trial are true—and they were uncontradicted—they show a tampering with the witnesses; that is, at least a coaching of the witnesses at a time when they were awaiting their opportunity to be called, after they had been excluded from the courtroom and had been instructed by the court not to discuss the cause among themselves or discuss their evidence. The facts, as set out in these affidavits, were not known to the defendant or to his attorney until after the cause had been submitted to the jury. The testimony of the two prosecuting witnesses, as to the acts charged, was in some respects extremely improbable. In view of these circumstances, we believe that it was an abuse of discretion on the part of the trial court to refuse to grant defendant's motion for a new trial.

The judgment is reversed. The order denying defendant's motion for a new trial is reversed, and the cause is remanded for a new trial.

We concur: CONREY, P. J.; HOUSER, J.

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137 Cal.App. 725

PEOPLE v. HANSEN.

Cr. 2486.

District Court of Appeal, Second District, Division 1, California.
April 6, 1934.

Receiving stolen goods 🔑**8(3).**
Evidence *held* sufficient to sustain conviction for receiving stolen property.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Marie Hansen was convicted of receiving stolen property, and she appeals.
Affirmed.

John M. Dvorin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

YORK, Justice.

Appellant was charged, in an information filed by the district attorney of Los Angeles county, with the crime of receiving stolen property. Trial by jury having been waived, appellant was found guilty by the court as charged in the information. From the judgment entered pursuant thereto, this appeal is taken.

Appellant cites several specifications of error, but confines her discussion to the following points: (1) The evidence is insufficient to sustain or justify the judgment. (2) The judgment was and is contrary to law, contrary to evidence, and contrary to law and evidence.

It appears from the record before us that early in July, 1933, a teakwood coffee table was stolen from the home of Jotham Bixby in Long Beach, and that the value of this table was the sum of $300. It further appears that appellant's son, Joseph Hansen, and one William Fischer were arrested and charged with burglarizing the Bixby home. Upon the premises where appellant makes her home there are two dwellings, one at the rear occupied by appellant, and one at the front occupied by the Nobles, tenants of appellant, and in addition to these, there is a garage in which the Nobles had stored some furniture. In the latter part of July, 1933, appellant told the Nobles that William Fischer wanted to sell her a table belonging to said Fischer and his wife for the sum of $10, and that she would buy it, if the Nobles would allow her to keep it in their house, she stating at the time that the table was worth $100. The table remained in the Nobles' house for several weeks and was then removed by appellant to the garage, where it was found by police officers. It appears from the record that the police officers made several searches of the premises before the table was found by them in the garage, and that the appellant made no objection to the searches being made, although she stated to them that she knew nothing about the table. Both appellant's son and William Fischer testified that appellant had paid Fischer $10 for the table.

After a careful reading of the testimony adduced before the trial court, we feel that the evidence amply supports the judgment of conviction, and that the judgment is in accord with the evidence and the law of the case.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

137 Cal.App. 709

FIREBAUGH v. THOMAS et al.

Civ. 1230.

District Court of Appeal, Fourth District, California.

April 4, 1934.

1. Sales ⚿181(11).

In action on contract to sell growing grapes, finding that seller did not breach contract by failing to pick grapes *held* supported by evidence.

2. Sales ⚿89.

In action on contract to sell growing grapes, evidence supported finding that provision in contract that buyer would not be liable if grapes were not matured for picking by November 5th was waived.

3. Sales ⚿181(11).

In action on contract to sell growing grapes, evidence supported finding that grapes left on vines and destroyed by frost were matured and of quality required in contract and were destroyed because of buyer's delay in picking grapes.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Ruth E. Firebaugh against R. S. Thomas and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Farnsworth, Burke & Maddox, of Visalia, for appellants.

Walter C. Haight and Wilko G. Machetanz, both of Visalia, for respondent.

BARNARD, Presiding Justice.

On October 17, 1930, the respondent, as seller, and the appellants as buyer, entered into a written contract of sale of a crop of Emperor grapes then growing on respondent's vineyard near Exeter. Among other things, the contract provided that the buyer was to pay for picking and hauling the crop; that the entire crop was to be picked not later than November 5; that all grapes picked "shall meet the requirements of Growers Service Company and No. 1 Juice for Juice Grapes"; and that the buyer should not be liable under the contract if the fruit was not matured so as to permit picking on the dates named. The appellants began picking the grapes on November 12, and continued until November 19. On the night of that day a frost destroyed the grapes remaining on the vines, and this action was brought for the purpose of recovering the contract price for the same. The court found in all respects in favor of the respondent, and, from a judgment which followed, this appeal was taken.

[1, 2] Most of the points raised are based upon the contention that, under the contract, the appellants were not obligated to pick the crop but that the duty rested upon the respondent to pick and deliver the same. The complaint alleged an agreement on the part of the appellants to pick the crop and a failure to perform in that regard. The appellants answered that they had picked and paid for all of said crop which met the requirement as to grade and quality, that in that regard they had fully complied with and performed all the covenants specified in the agreement to be performed by them, and further alleged that they had picked a certain quantity of grapes and that the sole and only reason why the remainder of the grapes were not picked by them was that the remainder of the crop was not of the grade or quality specified in the agreement, within the time named therein. There was evidence that the appellants at that time maintained ten picking crews for the purpose of picking grapes purchased by them in the Exeter district; that immediately after the contract was signed the appellant Sisler, who was the representative of the appellants in that district, asked the respondent to disc the vineyard to make it ready for picking and said that they would come and pick the crop on the next Monday or Tuesday; that the respondent's husband later endeavored to find the appellant Sisler for the purpose of getting him to come and pick the crop; that he finally saw him and asked him if he did not want the grapes, telling him that he could sell them elsewhere, and Sisler replied, "Sure I want them;" that after trying many times to see Sisler the respondent's husband was arranging to sell the grapes elsewhere when Sisler brought in a picking crew and commenced to pick on November 12; and that the appellants then picked until November 19, when the remainder of the crop was destroyed by frost. The terms of the contract are not clear with regard to which party was to do the picking, and the best interpretation thereof, and of the agreement and understanding of the parties, is furnished by their subsequent action. The pleadings and evidence fully support the court's findings, and there is no merit to any of the contentions made

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

that the appellants were not to pick the crop or that the respondent breached the contract by failing to pick and deliver the same. Likewise all claims that the liability of appellants was limited by the final date for picking named in the contract, to wit, November 5, are untenable not only because the appellants waived any reliance on that limitation, but because of their own failure to begin picking at an earlier date.

[3] The appellants contend that the court's findings to the effect that the remaining grapes were properly matured and of a quality conforming to the required standard are not supported by the evidence. It is contended that the contract provided not only that the grapes should be up to the standard known as "U. S. No. 1," but that they should meet the requirements of the appellants. The appellant Sisler testified in regard to the latter requirement. His testimony is vague and indefinite and rather evasive as to what were the requirements of the appellants, and the same fails to show that those requirements were any higher or different than those required for "U. S. No. 1." The elements he attempted to name, such as "keeping qualities" and "fitness for shipping," are fully covered by the provisions governing "U. S. No. 1." There was some evidence that the grapes remaining in the field were up to the standard set by "U. S. No. 1," and the appellants virtually admit this fact, but claim that none of the grapes met this standard until November 12, and that they are not liable because the contract named November 5 as the last day for picking this crop. This contention has already been disposed of. Not only was there some evidence that the grapes were of the quality named in the contract, and that they had been of that quality at all times after October 17, but the essential findings in this regard are supported by another line of evidence. The appellants introduced some testimony to the effect that only part of the grapes were ready to pick even after November 12, and that by November 19, they had picked over practically the entire vineyard, taking all of the grapes that were then ready. There was other evidence that, up to the time of the frost on the night of November 19 they had picked over only about one-half of the vineyard, and there was evidence that the grapes on the remaining part of the vineyard were of similar quality and maturity to those picked and paid for; this evidence applying to a quantity sufficient to cover the judgment rendered. While a conflict appears, the entire evidence, with the reasonable inferences therefrom, fully sustains the findings and justifies the conclusion that the loss of these grapes through frost occurred only because of an unwarranted delay on the part of the appellants in picking the crop.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

137 Cal.App. 647

STACK v. WELDER et al.

Civ. 1446.

District Court of Appeal, Fourth District, California.

April 2, 1934.

1. Corporations 🔑316(1).

Officer or director of corporation is not absolutely precluded from dealing directly with corporation, though any such transaction is subject to rigid scrutiny and voidable at instance of beneficiary for any violation of officer's duty as trustee (Civ. Code, §§ 2228-2230).

2. Appeal and error 🔑1010(1).

Reviewing court cannot interfere with trial court's finding on fact question where any evidence sustains such finding.

3. Corporations 🔑313.

In foreclosure action, evidence *held* to support finding that purchase of notes and mortgage by president of corporation was not violation of trust imposed on him as officer and director of the corporation (Civ. Code, §§ 2228–2230).

Evidence disclosed that defendants and other owners of mortgaged premises sold property to corporation to be formed, receiving stock in return, and that mortgage was then of record, that sole assets of corporation consisted of mortgaged premises, and that plaintiff purchased all capital stock of corporation not owned by defendants and co-owners, and shortly thereafter was elected president. Evidence also showed that plaintiff purchased mortgage with his own money, paying full amount due thereon, and then advised defendants of fact of purchase and did not press claim on mortgage for more than two years, during which time he advanced large sums to corporation. It was also shown that corporation was unable to pay mortgage.

4. Mortgages ⚷461.

Value of mortgaged premises is not material in foreclosure action.

5. Corporations ⚷313.

In foreclosure action in which defendants objected that trial court failed to make finding as to value of premises, claiming that such fact was material on question of plaintiff's good faith in dealing with property of corporation of which he was president, evidence supported inference that defendants' estimate of market value was gross exaggeration.

Defendant testified that value of property was $200,000, but amended answer alleged property had reasonable market value of $100,000, and defendant also testified he had purchased property seven years before trial for $63,000, and that he had been in possession for approximately two years prior to trial; and had derived no financial profit from its operation.

6. Appeal and error ⚷843(4).

Question of error in failing to rule on demurrer to supplemental complaint *held* moot, and would not be considered, where sole object of supplemental complaint related to applications of surplus on foreclosure sale, and record showed sale was had and no surplus remained.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to foreclose a mortgage brought by H. D. Stack against Joseph Welder and another. From an adverse judgment, defendants appeal.

Affirmed.

Sarau & Thompson, of Riverside, and H. B. Pool and Irvin C. Louis, both of Los Angeles, for appellants.

Goodman, Bachrack & Brownstone, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for respondent.

WARMER, Justice pro tem.

This is an appeal by the defendants, Joseph Welder and Maria Welder, from a judgment in favor of plaintiff in an action for the foreclosure of a mortgage. The judgment decreed that the mortgaged premises be sold and that the proceeds derived from such sale be applied to the payment of the indebtedness secured by the mortgage. Intelligent consideration of the contentions advanced by appellants necessitates a statement of the facts which are disclosed by the record on appeal.

On February 26, 1926, appellants executed three promissory notes which were made payable to Virginia L. Armstrong. Each note was in the amount of $10,000. One note was payable on December 1, 1927, another on December 1, 1929, and the third on December 1, 1931. Payment of the principal amount of the notes and interest at the rate of 7 per cent. per annum was secured by a mortgage on certain real property located in Riverside county, which was likewise executed by appellants on the above-mentioned date. On June 7, 1929, the payee named in said notes instituted an action to recover the indebtedness represented by said notes and to foreclose the mortgage. With the exception of appellants, all persons who were named as defendants in the action, and who were served with process, defaulted, and their defaults were regularly entered. The action was set for trial on June 3, 1932, and the trial was commenced on this date. At this time the notes and the mortgage were admitted in evidence. An assignment of the mortgage executed by the mortgagee to respondent on January 16, 1930, was also admitted in evidence, and the plaintiff in said action thereupon moved the court that respondent be substituted as party plaintiff in the action in her place. This motion was granted, and the court made its order of substitution. Appellants thereupon moved the court for a continuance of the trial for the purpose of amending their answer. The motion was granted, and the court ordered that trial of the action be continued to June 24, 1932. On said date appellants filed an amended answer which contained a general denial of the material allegations of the complaint and two separate and further defenses to the action. The first of said special defenses alleged payment in full of the principal and interest of the notes. The second of such special defenses alleged that on July 10, 1929, appellants and two other persons were the owners of the mortgaged premises, and that on said date they contracted with two individuals to sell the property to a corporation which was to be formed and controlled by said persons, which corporation should have an authorized capital stock of 5,000 shares of no par value, and that the owners of said property should receive 1,000 shares of stock in said corporation in return for their conveyance of the property to said corporation; that the corporation was later organized and bore the name of "Eden Hot Springs, Inc."; that thereupon appellants and their co-owners conveyed the land to the corporation and received therefor 1,000 shares of stock of said

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

corporation; that the mortgage executed on February 25, 1926, was then of record, and the amount of indebtedness secured thereby had been reduced to $25,000; that the sole asset of the corporation consisted of the mortgaged premises, which had a reasonable market value of $100,000; that on December 15, 1929, respondent purchased all the capital stock of the corporation which was not owned by appellants and their co-owners of the land, and thereupon became the owner of approximately three-quarters of the capital stock, and shortly thereafter was elected president of said corporation, and that thenceforth the corporation was controlled by a board of directors of five members, one of whom was respondent and three others were persons selected by respondent; that, during the spring of 1930, respondent and the payee named in said promissory notes informed appellants that the mortgage had been paid; that in the autumn of 1930 appellants learned for the first time that respondent had paid the mortgage in full and had taken an assignment of the mortgage; that at no time subsequent to December 15, 1929, had respondent, as president of the corporation, called a meeting of the board of directors of the corporation for the purpose of satisfying the mortgage or suggested to said directors or officers of the corporation that means be provided for satisfying the mortgage, although the corporation at all times had the ability to pay the mortgage by refinancing said mortgage, or by the issuance and sale of additional capital stock or by the levy of an assessment upon stock already issued; that, by reason of respondent's failure as president of the corporation to satisfy the mortgage, appellants and their co-owners of the property will lose all interest they have in the mortgaged property, and the foreclosure of the mortgage will cause respondent to become sole owner of the mortgaged premises. The prayer of the pleading was that respondent take nothing by reason of the complaint and that appellants recover judgment for their costs.

The action proceeded to trial on July 1, 1932, and was concluded and submitted on said date. On November 2, 1932, and before the case was decided, respondent gave notice to appellants that he would make application to the court for permission to file a supplemental complaint in the action. The application was granted and the supplemental complaint was filed on November 10, 1932. This pleading alleged that on June 30, 1929, appellants had conveyed whatever interest they had in the mortgaged premises to the corporation known as "Eden Hot Springs, Inc.," and that on May 26, 1931, this corporation had executed a promissory note in the amount of $13,714.96, made payable to respondent on demand and a deed of trust of the mortgaged premises to secure payment of said note, that nothing had been paid either on account of the principal or interest of said note. The pleading concluded with a prayer that any surplus of the proceeds that should be realized from the sale on foreclosure of the mortgage should be paid to respondent as the holder of the last-mentioned note and trust deed. Appellants filed a demurrer to the supplemental complaint setting forth various grounds on November 10, 1932. So far as the record shows, the court took no action on the demurrer, and on November 19, 1932, signed findings of fact and conclusions of law, and on November 21, 1932, rendered judgment which decreed that the mortgaged premises should be sold to satisfy the indebtedness secured by the mortgage, and that, if there should be any surplus remaining from the proceeds of the sale after satisfying such indebtedness, it should be applied on the note executed in respondent's favor by Eden Springs, Inc., on May 26, 1931.

[1-3] The chief contention advanced by appellants is that the purchase of the notes and mortgage by respondent after he had become president of Eden Springs, Inc., was a violation of the trust imposed upon him as an officer and director of the corporation, and that he was therefore without right to enforce the obligation and seek foreclosure of the mortgage. It is a fundamental principle of equity, and so declared by statute (section 2228, Civ. Code), that a trustee is bound to act in the highest good faith towards his beneficiary in all matters connected with his trust. A trustee is also expressly forbidden to deal with trust property for his own profit (section 2229, Civ. Code), and is inhibited from taking part in any transaction concerning the trust in which he has an interest, present or contingent, adverse to that of his beneficiary. Section 2230, Civ. Code. However, it has been expressly decided that officers of corporations are not trustees of corporate property to the extent that they are disabled from purchasing and enforcing corporate indebtedness, unless the circumstances of the transaction make it inequitable for them to do so. Todd v. Temple Hospital Association, Inc., 96 Cal. App. 42, 273 P. 595. Although an officer or director of a corporation, like any other trustee, is bound by the obligations declared in the above-cited sections of the Code, he is not

absolutely precluded from dealing directly with the corporation of which he is an officer or director. While it is true that any transaction between the officer and the corporation is subject to rigid scrutiny and is voidable at the instance of the beneficiary for any violation of the officer's duty as trustee, the transaction is not ipso facto void. Schnittger v. Old Home, etc., Min. Co., 144 Cal. 603, 78 P. 9. If the circumstances surrounding the transaction show that it would be inequitable to carry it into effect, a court of equity will not hesitate to declare the transaction void.

It is immediately apparent that an examination of the circumstances surrounding a transaction of the character which was presented to the trial court in the instant case involves a pure question of fact, and that a reviewing court is powerless to interfere with the finding of the trial court that no fraud existed and that the circumstances do not indicate that it would be inequitable to carry the transaction into effect if there is any evidence to sustain such a finding.

The record herein discloses that the following facts were established by evidence produced during the trial: Respondent, who had become president of "Eden Springs Inc.," on January 7, 1930, purchased the mortgage on January 16, 1930, with his own money paying therefor the full amount due thereon, and then advised appellants of the fact of purchase; he did not press his claim on the mortgage for more than two years, during which time he advanced large sums of money to the corporation. The court made a finding which is supported by the evidence that the aforesaid corporation "is and at all times has been unable to pay said mortgage." The establishment of these facts impels the conclusion that appellants' contention is lacking in merit.

[4, 5] Appellants object that the trial court failed to make a finding as to the value of the mortgaged premises, and it is declared that there was evidence indicating that the market value of the property was $200,000. It must be remembered that this action was for the foreclosure of a mortgage and that it is elementary that the value of the mortgaged premises is not material in such an action. It is said that it is material here as bearing on the question of respondent's good faith in dealing with corporate property and as tending to show that under the circumstances it would be inequitable to decree foreclosure of a mortgage of approximately $30,000 upon property having a value of $200,000. It is perhaps only necessary to point out that the value of the property, conceding its materiality, was merely a probative fact, and that the ultimate fact was respondent's good faith. It may, however, properly be further noted that the evidence that the value of the property was $200,000 consisted of the testimony of the appellant Joseph Welder, and that the amended answer of this appellant filed on June 24, 1932, alleged that the property was of a reasonable market value of $100,000, and further that this witness testified that he had purchased the property seven years prior to the trial of the action for $63,000, that he had been in possession of the property for approximately two years prior to the trial and had derived no financial profit from its operation. These facts were ample to warrant the court in drawing an inference that the bald statement that the property had a market value of $200,000 at the time of the trial was a gross exaggeration.

[6] Appellants further complain that the record discloses that the cause was not at issue, since it appears that the trial court failed to rule on the demurrer interposed by appellants to the supplemental complaint. However, it clearly appears that the supplemental complaint was in the nature of a pleading permitted to be filed to conform to the proof adduced during the trial of the action and that it was filed upon notice and hearing. The sole object of the supplemental complaint was to show the existence of an indebtedness due to respondent from Eden Springs, Inc., and to have whatever surplus should remain upon the foreclosure sale applied to this indebtedness. The record shows that the sale was had and that no surplus remained. This question is therefore moot, and deserves no further consideration on this appeal.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

137 Cal.App. 636

C. I. T. CORPORATION v. GLENNAN.

Civ. 4993.

District Court of Appeal, Third District, California.
March 31, 1934.

Hearing Denied by Supreme Court
May 31, 1934.

1. **Assignments** ⚿57.

Notice of intended assignment is not notice of subsequent assignment.

2. **Assignments** ⚿57.

Assignee of nonnegotiable instrument may acquire title without notice to debtor of assignment, but to protect his rights, he must notify debtor of assignment, since debtor is entitled to all set-offs and defenses he may have or acquire against assignor until notified (Civ. Code, § 1459).

3. **Alteration of Instruments** ⚿12.

Where instrument is executed in blank with agreement as to amount of money involved, holder has no authority to fill in amount in excess of that stipulated.

4. **Sales** ⚿475.

Evidence *held* to justify judgment against assignee for amount due on contract for purchase of automobile truck, where debtor had no notice of assignment until after redelivery of truck to assignor and rescission of contract, and blanks in contract had been filled in, after signing, in amount exceeding that agreed upon (Civ. Code, § 1459).

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Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by C. I. T. Corporation against P. J. Glennan for money due. From an adverse judgment, plaintiff appeals.

Affirmed.

Fred M. Harter, of Marysville, for appellant.

Harry M. McKee, of Nevada City, and Nilon, Hennessy & Kelly, of Grass Valley, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court:

Judgment went for the defendant in an action instituted by the plaintiff to recover the sum of $418.29, alleged to be due for and on account of the purchase of a certain automobile truck. From this judgment the plaintiff appeals.

The record shows that on or about the 15th day of June, 1929, the defendant, then a resident of Salmon City, Idaho, entered into an agreement of purchase with the Foerschler Motor Company, of Butte, Mont., for a certain motortruck. The purchase price, as found by the court, was the sum of $1,750, upon which there had been paid the sum of $1,541.65, $375 of said sum having been received by the plaintiff from a resale of the truck involved in this action. At the time of the purchase the defendant paid the sum of $600, partly in cash and partly the value of an automobile taken in trade, and thereafter paid the sum of about $300. Additional payments were made, apparently by the motor company, to the plaintiff.

The testimony of several witnesses is to the effect that the purchase price, as found by the court, was the sum of $1,750, to be paid for in weekly installments of $35. After the oral negotiations had been concluded, the record shows that the defendant signed a conditional contract of purchase and sale in blank. After the contract was signed, the blanks appear to have been filled in, stating the purchase price at $1,959.94, with monthly payments on the 15th day of every month thereafter in the sum of $113.33. The conditional contract of sale, after the blanks were filled in, was assigned by the Foerschler Motor Company to the plaintiff in this action. The last paragraph in the conditional contract of sale is in these words: "I, or we, acknowledge, this day, receipt of a duplicate of this contract and admit notice of the intended assignment of this contract to C. I. T. Corporation."

The court found, and there is no testimony to the contrary, that no duplicate of the contract was ever delivered to the defendant in this action, or any notice given to the defendant in this action of any actual assignment of the conditional contract of sale to the plaintiff in this action, until long after the truck had been redelivered by the defendant to the Foerschler Motor Company, and rescission of the contract effected. The court found, and the record shows, that on or about the 5th day of August, 1929, the defendant, Glennan, pursuant to the agreement had with the Foerschler Motor Company, returned the truck to the motor company, all payments theretofore made by the defendant to the Foerschler Motor Company being retained by the motor company, and the defendant released from further liability for and on account of the purchase of the truck. The record shows, and the court so found, that after the delivery of the truck by the Foerschler Motor Company to the defendant, weekly payments were made by the defendant to the

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Foerschler Motor Company up to the time of the redelivery of the truck by the defendant to the motor company.

On the part of the appellant it is contended that the defendant is bound by the conditions of the conditional contract of sale; that all payments made on the purchase price of the truck after the 15th day of June, 1929, by the defendant to the Foerschler Motor Company were made at his peril; that the portion of the contract which we have set forth herein was sufficient to place the defendant upon notice of the assignment thereafter made; and that he should have made inquiries as to who was the holder of the contract. On the other hand, the respondent relies upon the provisions of section 1459 of the Civil Code, which provides that the assignee of a nonnegotiable instrument takes it subject to all equities and defenses existing in favor of the maker at the time of the indorsement.

[1, 2] A notice of intended assignment is not notice of a subsequent assignment. This is specifically held in the case of Doub v. Rawson, 142 Wash. 190, 252 P. 920, and the cases there cited.

The duty to protect one's interest does not alone devolve upon the maker of a nonnegotiable instrument, but an assignee, in order to protect himself, cannot remain silent. His duty is expressly stated in 3 California Jurisprudence, p. 269, as follows: "Upon the assignment of a chose in action, title thereto is vested in the assignee, and notice to the debtor of the assignment is not necessary to the acquisition or perfection of the right or title of the assignee. But in order to protect his rights, the assignee must notify the debtor of the assignment, since the latter is entitled to all setoffs and defenses he may have or may acquire against the assignor, until he is notified of the assignment." This statement of the law is supported by numerous decisions cited in the footnotes. See, also, 5 C. J. p. 960.

[3] While the law is well settled that an instrument executed in blank, where there has been an agreement as to the amount of money involved, the holder of the instrument may fill in the blank as to that amount, but there is no authority, either express or implied, to fill in an amount in excess of the stipulated purchase price. Under such circumstances a material change is held to have been made in the conditions of the instrument. In some cases it has been held a forgery to insert a larger sum than is authorized by the agreement, which would mean the oral agreement preceding the signing of the instrument in blank. 8 C. J. pp. 185, 186, and cases cited in the footnotes.

[4] In the instant case the testimony is sufficient to show, and the court found, that the purchase price of the truck was the sum of $1,750, whereas the purchase price in the conditional agreement appears in the sum of $1,959.94. There is also a difference in the amount of the installment payments. Without the change in the amount of the purchase price, from that actually agreed upon, as shown by the testimony, the superior court in this case would have had no jurisdiction, as the sum remaining due, as found by the court, if the defendant were liable, would have been only the sum of $209.94. Thus, the change in the instrument different from that shown by the testimony as to the purchase price apparently gave the superior court jurisdiction where in fact it should have been shown not to exist.

As to the duty of an assignee of a nonnegotiable instrument to give notice and make inquiries, we may also cite the case of Briggs v. Crawford, 162 Cal. 124, 121 P. 381.

Supported by the testimony in the record, the findings of the court to which we have referred are conclusive upon this appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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137 Cal.App. 675

KENTFIELD et al. v. RECLAMATION BOARD.

Civ. 5060.

District Court of Appeal, Third District, California.
April 3, 1934.

1. Mandamus 🔑10.
Duty to be enforced by mandamus must exist when application for writ is made.

2. Waters and water courses 🔑230(4).
Law existing at date of issuance of reclamation districts' warrants, bonds, and contracts is written into them.

3. Waters and water courses 🔑231.
Repeal of act, directing state reclamation board to call for installment payments of cer-

tain percentage of assessments on lands in reclamation district, did not affect rights of holders of district warrants to payment thereof, nor lessen board's duty to make such calls (St. 1913, pp. 271, 272, §§ 14, 15; St. 1927, p. 1503; St. 1929, p. 707).

4. Waters and water courses ⚷231.

Act directing state reclamation board to call for installment payments of reclamation district assessments at times and in amounts within its "discretion" requires seasonable exercise of discretion so that creditors may receive payment on district's obligations (St. 1913, p. 271, § 14).

Word "discretion" in St. 1913, p. 271, § 14, is not unlimited in meaning and does not mean that reclamation board may indefinitely postpone calling of installments for payment of outstanding warrants, nor that they shall be paid only on board's uncontrolled discretion or caprice, but means that discretion must be exercised in view of all conditions existing when demand is made for its exercise and seasonably in order that creditors may receive payment on district's obligations owned by them.

[Ed. Note.—For other definitions of "Discretion," see Words & Phrases.]

5. Mandamus ⚷10.

To enforce ministerial duty by mandamus, obligation must be peremptory and plainly defined, and law must not only authorize, but require, act to be done.

6. Mandamus ⚷72.

Mandamus may issue to compel officer to perform duty imposed by statute using word "may" as mandatory, not merely permissive, term.

7. Mandamus ⚷119.

Court cannot direct state reclamation board to call installment payment of any particular amount on reclamation district assessment by writ of mandamus, but can only issue writ directing board to call for payment of installment in such reasonable amount and at such reasonable time as board may determine in proceeding instituted within time fixed by court, if right to such writ existed when petition was filed (St. 1913, p. 271, § 14; St. 1927, p. 1503).

8. Waters and water courses ⚷231.

Provisions of reclamation district bond acts as to calling for installment payments on assessments to discharge interest and accruing principal on bonds *held* inapplicable to calling of installments by state reclamation board to pay district warrants (St. 1913, pp. 271, 272, §§ 14, 15; St. 1927, p. 1503).

9. Mandamus ⚷187(9).

Court will express no opinion on question whether issuance of its writ of mandate, directing state reclamation board to call installment payments of reclamation district assessments to pay district warrants, would work hardship on property owners, or whether such matters can be considered on appeal from judgment denying writ, as such opinion would only be dicta (St. 1913, pp. 271, 272, §§ 14, 15; St. 1927, p. 1503).

10. Mandamus ⚷119.

State reclamation board's failure to resume calls for installment payments on reclamation district assessments after federal and state governments made appropriations to retire district warrants *held* not abuse of discretion authorizing issuance of mandamus requiring further calls, where board's financing project was far from complete and large amount of delinquent assessments uncollected when mandamus petition was filed (St. 1913, pp. 271, 272, §§ 14, 15; St. 1927, p. 1503).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Howard E. Kentfield and another, as trustees, for a writ of mandate to the Reclamation Board of the State of California. From a judgment denying the writ, petitioners appeal.

Affirmed.

Reginald S. Laughlin and Earl F. Treadwell, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Emmett J. Peterson, of Sacramento, for respondent.

Mr. Justice PLUMMER, delivered the opinion of the court.

On the 10th day of March, 1932, the appellants filed a petition in the superior court of the county of Sacramento, praying for a writ of mandate directing the reclamation board of the state of California to fix the amount of installments that should be called upon assessment No. 6, based upon an assessment levied upon the lands lying within the boundaries of the Sacramento and San Joaquin drainage district; also to fix the time at which such installments should be paid. The petition also prayed that the call for the payment of installments upon said assessment should be made in accordance with the act of the Legislature, of date May 26, 1927. St. 1927, p. 1503. The writ being denied, the cause has been brought to this court for hearing and determination.

By an act of the Legislature approved May

26, 1913 (St. 1913, p. 252), the premises involved in this action were included within a reclamation district created and organized under the provisions of said act. Section 14 of the act, after providing that the assessment be certified and deposited in the office of the county treasurer of the different counties, contains the following: "All unpaid assessments shall bear interest at the rate of seven per cent per annum, and shall be paid to the county treasurer in separate installments of such amounts, and at such times, respectively, as the board, from time to time, in its discretion, may, by order entered in its minutes, direct; if any such installment shall remain unpaid at the expiration of thirty days from the date of the order, then said installment shall become delinquent, together with the accrued interest thereon. * * * Immediately after the said installment has become delinquent, the board must publish a notice at least once a week for three weeks in some newspaper of general circulation." The section requires this notice to describe the property, state that it will be sold on a certain date, and the place of sale. The section then further provides that on the date of sale the property on which the installment is delinquent must be sold to the highest bidder for cash.

Section 15 of the act provides that all money collected upon assessments shall be paid out upon warrants; also that, if sufficient funds are not in the hands of the treasurer, the state treasurer shall indorse upon such warrants the date of presentation, and thereafter the warrant shall bear interest at the rate of 7 per cent. per annum, and be paid in the order of its registration. The section further specifies that such warrants shall be considered as contracts in writing for the payment of money by the district, and that an action upon a warrant might be commenced within four years from the date thereof.

It is further provided that the warrants might be received in payment of any assessment. The reclamation board was given power to extend the period of payment of any warrant for an additional four years upon application of the holder thereof. The board is also authorized by this section, whenever there is sufficient money on hand to redeem any of the warrants, to publish notice of such fact.

The reclamation board created by the act of May 26, 1913, proceeded with the reclamation of the district, as contemplated by the act, adopted a plan of reclamation and flood control generally known as "Sutter-Butte By-Pass Project No. 6," and on or about September 7, 1920, levied an assessment in the sum of $8,155,798.70. Considerable litigation followed until in September, 1923, the assessment just mentioned was finally confirmed by the Supreme Court. Subsequent to the proceedings just mentioned, the reclamation board determined that it would be to the best interests of the district to issue bonds in accordance with the provisions of the Bond Act of 1919. The bonds issued in accordance with such proceedings were deposited with the state treasurer in January, 1923, and thereafter offered for sale. However, no legal bids were ever received for such bonds, and thereafter, in pursuance of an authorization of the Legislature, the bonds were canceled.

In 1927 (St. 1927, p. 1503), the Legislature authorized the reclamation board to call for installment payments on assessment No. 6 of not less than 3½ per cent. of the principal thereof. Under this act the reclamation board issued four calls, to wit: An installment was called on June 1, 1928; one on November 1, 1928; one on June 1, 1929; one on November 1, 1929. An act of the Legislature approved May 21, 1929 (St. 1929, p. 707), authorized the discontinuance of installment calls by the reclamation board, since which date no installment calls have been made.

On the date of the filing of the petition herein, there was delinquent on the calls referred to the sum of $109,721.62. No lands within the district have been sold on account of nonpayment of any installments.

The record shows that in the prosecution of the reclamation of the lands lying within the drainage district created by the act of 1913, the reclamation board of the state incurred an indebtedness of $17,215,126.17, upon which, at the date of the hearing of this cause, there still remained unpaid on account of project No. 6 the sum of $593,274.20. The manner in which the indebtedness of the district has been reduced from its original cost to the sum just mentioned constitutes an epic in finance unequaled in the history of reclamation districts. The expenses of reclamation were more than twice the amount of the assessment. To double the assessment by supplemental proceedings would have imposed a burden upon the lands included within the district beyond their power to sustain. The record shows that not only were the lands and premises reclaimed and rendered immune from floods, but other property interests in the state of California were protected, and navigation of the Sacramento river and its tributaries greatly benefited.

Both the general and state governments made appropriations for the retirement of warrants issued on account of the cost of the project, and between May, 1930, and September 30, 1932, warrants were retired by the use of funds so provided, and in the payment of assessments to the extent of $16,468,679.72, since which date the total outstanding warrants have been reduced to the figures hereinbefore stated, the owners of the land within the district paying either in cash or in warrants the sum of approximately four millions of dollars.

Upon provision being made by the general and state governments for the redemption of warrants, the reclamation board discontinued the further calling of installments. As shown by what we have just stated, the financing of the district and the discharge of the indebtedness incurred in the reclamation works covered a period of years and was not completed to the extent which we have stated until some months after the filing of the petition for a writ of mandate herein.

[1] As stated in 38 C. J. p. 602: "The duty to be enforced by mandamus must be a duty which exists at the time when the application for the writ is made." See, also, cases cited in note 91.

The warrants issued in the prosecution of the reclamation works involved in project No. 6 bore no due date. The record shows that it was not contemplated that the warrants should be paid in cash at any particular date, but should be redeemed only when there were sufficient funds in the hands of the state treasurer, available for such purpose. It likewise appears that the intention to redeem the warrants should be made by the issuance and sale of bonds. There being no market for the bonds, the time consumed and the proceedings taken in the issuance, validation of the bonds and offering for sale availed neither the landowners nor the warrant holders anything. It then becoming apparent that aid outside of the district must be had, or the costs of reclamation could never be paid, efforts were put forth to induce the general and state governments to come to the rescue. These proceedings necessarily covered several years. Investigations had to be made, reports of the investigations returned and considered, and appropriation bills carried through the legislative branches of the federal and also through the legislative branches of the state government, requiring much additional time. In view of the immense sum of money involved in the transaction, the time consumed, however, cannot, as a matter of law, be declared excessive or imposing any additional duties or obligations upon the members of the reclamation board of the state.

Until after the cancellation of the bonds sought to be issued under the Bond Act of 1919, and which bonds were canceled in 1927, the reclamation board had no right to make any calls. Subsequent to that date, however, the board did issue calls for the payment of four installments. These installments were partly paid in warrants and partly paid in cash, save and except that at the time of the institution of this proceeding there still remained unpaid and delinquent the sum of $109,721.62. Whatever duty the legislative acts referred to devolved upon the reclamation board of the state, relative to advertising the lands within the district upon which installments have become delinquent, whether such duties are mandatory, permissive, or discretionary, does not appear to be involved in this action. It may be questioned, nevertheless, that such proceedings should be had, and the lands advertised for sale, sold, and the proceeds derived therefrom applied toward the payment of outstanding warrants before any additional installment calls are made.

[2] The law is well settled that warrants, bonds, and contracts of reclamation districts have written into them the law existing at the date of the issuance of such warrants, bonds, or contracts. This court had occasion to consider this question, and went into the subject quite extensively in the case of Hershey v. Cole, 130 Cal. App. 683, 20 P.(2d) 972, and need only call attention to the cases there cited.

[3] It necessarily follows that the repeal of the act of 1927 directing the issuance of installment calls in the sum of 3½ per cent. did not in any wise affect the rights of warrant holders. When the Legislature directed the reclamation board to make calls in the amounts stated, it gave an additional remedy to the warrant holders, which constituted no part of their contract, and, not being a part of the contract, the direction to the reclamation board of the state might be withdrawn at any time. The repeal by the Legislature of the act directing the percentage in which installment calls should be made did not, however, affect the obligation of the district to pay the outstanding warrants, nor did it lessen the duty of the reclamation board to make calls for their payment.

[4] As herein stated, the right of the petitioner to a writ of mandate depends upon

the conditions existing on the 10th day of March, 1932. Section 14 of the act approved May 26, 1913, supra, directs the reclamation board of the state to call for installment payments upon assessments, at such time and in such amounts, in its discretion, and may order the same to be entered upon the minutes of the board. The question revolves around the interpretation of the word "discretion." The word "discretion," however, is not unlimited in its meaning. It must be exercised in view of all the conditions existing at the time the demand is made for its exercise. It does not mean, and we do not need to cite authorities to support this statement, that the reclamation board may indefinitely postpone the calling of installments for the payment of outstanding warrants, or that warrants are to be paid only upon the uncontrolled discretion or caprice of the reclamation board. It means, and it must mean, that the discretion as to the time when the installment may be made, and the amount of the calls to be made, shall be seasonably exercised in order that creditors may receive payment on the obligations of the district owned by them.

In 16 California Jurisprudence, p. 809, the text reads: "It is a familiar rule governing the issuance of the writ of mandate that an officer in whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Mandamus may not compel the exercise of such discretion in any particular manner. It may only direct that the officer act, and must leave the matter as to what action he will take, to his determination. Where official discretion has been exercised, the statute not having set any definite limits thereto, the courts can neither require the officer to act again, nor set a limit within which he must act. And if the discretion exercised by an inferior tribunal, officer or board, is intended to be final, or if there is any other plain, speedy and adequate remedy, mandamus does not lie. An abuse of discretion, however, is not the exercise of discretion, but is action beyond the limits of discretion; and it is settled that the writ will issue to correct such abuse if the facts otherwise justify its issuance."

Likewise, as to the discretion to be exercised by the court the text in 16 California Jurisprudence, p. 768, reads: "The issuance of the writ is not altogether a matter of right, but involves consideration of its effect in promoting justice. The granting or refusing of the writ lies, therefore, to a considerable extent, within the sound judicial discretion of the court where the application is made. Cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief. By this, however, it is not meant that the court may arbitrarily grant or refuse the writ; the discretion is to be exercised in accordance with established rules, in order to prevent a failure of justice. Where one has a substantial right which cannot otherwise be enforced, he is entitled to the writ as a matter of right, and it is an abuse of discretion to refuse it."

[5, 6] Again, as stated in 18 Ruling Case Law, p. 119: "In order to enforce by mandamus a ministerial duty, the obligation must be both peremptory and plainly defined; the law must not only authorize the act but it must require the act to be done. So where the statute imposing upon the officer the duty sought to be coerced is couched in permissive terms, this has been held to confer upon him a discretionary power as to the performance of the act and not to impose upon him a clear legal duty to act, and that therefore mandamus will not issue to control his discretion. * * * Frequently, however, the word 'may' or the like as used in statutes relating to the duty of public officers is construed as mandatory, and not merely permissive, and of course when such is the case mandamus may issue to compel the officer to perform the duty so imposed."

In Fawkes v. Burbank City, 188 Cal. 399, 205 P. 675, 676, the court, in considering this question, quotes with approval the following language from "High on Extraordinary Legal Remedies," section 9: " 'The exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court'; and that 'cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief.' "

In American Securities Co. v. Forward (Cal. Sup.) 24 P.(2d) 810, 814, the court, in considering the right of a petitioner to a writ of mandate, quotes from other cases as follows: " 'When it is applied for, there must be a clear case to "compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." ' Perrin v. Honeycutt, 144 Cal. 87, 77 P. 776, 777; section 1085, Code Civ. Proc. In order to invoke it there must be a specific legal right. The party sought to be coerced must be bound to act. If the existence of the right is doubtful, the writ will be denied. 16 Cal. Jur. p. 768, and cases there cited. Furthermore, even when the technical rules of law authorize it, the issuance of the writ is, in large measure, discretionary with the court. Fawkes v. City of Burbank, 188 Cal. 399, 205 P. 675, 676. In the case just cited it is said (quoting with special approval from Wiedwald v. Dodson, 95 Cal. 453, 30 P. 580): 'We think that the correct doctrine is expressed in High on Extraordinary Legal Remedies, § 9, where, speaking of mandamus, it is said that, "The exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court"; and that "cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief." ' " A rehearing was granted in this case, and we do not cite the same as supporting any other of the conclusions arrived at concerning the issues presented to us for determination.

Again, while a portion of section 14 of the Sacramento and San Joaquin Reclamation Act appears to be permissive in giving to the reclamation board of the state discretion as to the amount of an installment that may be called, and also the time of fixing the payment, that portion of the section which relates to the advertising and selling of lands upon which installment payments have become delinquent is mandatory in form. That portion of the section requires that immediately upon an installment becoming delinquent, the board must proceed in the manner therein stated to secure, if possible, payment of the installment by advertising and selling the land. Under such circumstances we think, as to that portion of the section, the following cases decided by this court are decisive: County of Los Angeles v. State of California, 64 Cal. App. 290, 222 P. 153; Stockton Plumbing & Supply Co., a Corporation, v. Wheeler, 68 Cal. App. 592, 229 P. 1020, where the word "may" is held to be mandatory in imposing a duty upon a public officer where the rights of third parties are involved.

In the case of Kinlein v. Mayor, etc., of the City of Baltimore, 118 Md. 576, 85 A. 679, 681, we find a statement as to when the writ of mandate may be issued or denied, as follows: "The remedy by mandamus is not one which is accorded as of legal right. The granting or withholding of the writ rests largely within the discretion of the court; but this discretion is not a purely arbitrary one, and cannot be capriciously exercised, but it will not be granted where it is altogether unnecessary, or would work injustice, or would be unavailing or nugatory, or would introduce into municipal administration great confusion or disorder"—citing Brooke v. Widdicombe, 39 Md. 386; 19 Am. & Eng. Ency. of Law, 751, and other cases. To the same effect is the case of Crow v. Board of Supervisors of the County of Stanislaus (Cal. App.) 27 P.(2d) 655. Other cases may be cited to the effect that, where the issuance of the writ is unavailing, the court will decline to issue such a writ, even though a clear legal right does exist. See Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158.

[7] We find no basis in the record upon which the court could direct the reclamation board of the state of California to call an installment of any particular amount if the circumstances were such as to show beyond controversy that at the date of the filing of the petition herein the right to such writ existed. All that the court could do would be to issue its writ directing the board to proceed and make a call for the payment of an installment in such reasonable amount, and at such reasonable time as the board might determine, with the additional direction that such preceedings should be instituted on or before a date fixed in the order of the court.

[8] While the provisions of the various bond acts pertaining to reclamation districts have been called to our attention, and arguments based thereon as indicating the duty of the reclamation board to call installments according to the percentages fixed in calling for installment payments to discharge interest and accruing principal on bonds, we do not see their applicability, as the rights of the parties in this case we think rest solely upon the provisions of the act of May 26, 1913, supra. Nor do we deem it necessary to list herein the cases construing the meaning of the word "discretion," as it appears to be conceded that, whenever a discretion is reposed in a body as to when it shall act, that act shall be seasonably taken, and, if the discretion is unduly prolonged, the court will compel action to be taken.

[9] The only remaining issue tendered to us is whether, upon the date of the filing of the petition herein, it appeared to the trial court that the discretion of the reclamation board of the state had been abused. Questions as to whether it would or would not now be a hardship upon the property owners for the

court to issue its mandate, and whether those matters can be considered, would only be dicta, and therefore we express no opinion thereon.

[10] As we have set forth herein, the financing project carried on by the reclamation board was not completed to the extent stated until about the 1st of October, 1932. Over $100,000 in delinquencies had not yet been collected. In view of these circumstances, we think the trial court was justified in holding that the discretion of the board as to the time of resuming the calling of additional assessments had not been abused, irrespective of the other reasons urged by counsel involving the inability of the landholders to pay assessments, the number of additional assessments already imposed upon lands within the district by underlying reclamation and irrigation districts, and delinquencies in county and state taxes.

As the record confines our consideration to the transactions preceding, and conditions existing on the 10th day of March, 1932, no opinion is expressed as to whether there has been any abuse of discretion by the respondent in failing to call installment payments since the completion of the financing of the district, as herein referred to, if such be the case, and nothing contained herein is intended to limit the right of the petitioners to institute further mandatory proceedings.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. PIERSON.*

Civ. 1239.

District Court of Appeal, Fourth District, California.

April 13, 1934.

Hearing Granted by Supreme Court

June 12, 1934.

1. Exemption 🔑59.

Possession, coupled with right to use, is not sufficient to enable debtor to claim exemption without additional right of property in article exempted (Code Civ. Proc. § 690, subd. 3).

2. Exemption 🔑59.

In action to foreclose chattel mortgage, order releasing property from levy of execution on theory that it was exempt property was erroneous, where there was no showing that debtor had property interest in such property at time of levy of execution or thereafter (Code Civ. Proc. § 690, subd. 3).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action to foreclose chattel mortgage by the Security-First National Bank of Los Angeles against George W. Pierson, in which Gene Southard and others filed third party claims. From an order releasing property from the levy of an execution, plaintiff appeals.

Order reversed.

Barbour, Kellas & Backlund, of Fresno, for appellant.

N. Lindsay South, of Fresno, for respondent.

MARKS, Justice.

Respondent was the mortgagor and appellant the mortgagee in a chattel mortgage on certain cattle. The mortgage was foreclosed, the security exhausted, and a deficiency judgment entered against the mortgagor. An execution was issued and a levy made by the sheriff of Fresno county on seventeen saddles, twenty-two bridles, eighteen saddle blankets, three hackamores, and packing equipment.

Gene Southard filed a third party claim in which he asserted title to the above-described personal property. A hearing was had on petition of appellant to determine title, and the trial court found "that the claimant Gene Southard, purchased the personal property hereinafter described from George W. Pierson, * * * on or about the 24th day of December, 1931; that at said time the said George W. Pierson had the possession and control of said personal property; the Court further finds that at the time of said sale the said George W. Pierson did not deliver said personal property to said claimant Gene Southard, and that there was no actual and/or continued change of possession of said property made from the said George W. Pierson to the said Gene Southard; and the Court further finds that the petitioner herein, Security First National Bank of Los Angeles, a National Banking Corporation, was, ever since has been, and is now, a creditor of said

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*For subsequent opinion see 38 P.2d 784.

George W. Pierson," and held that the property was subject to the levy of the execution.

Subsequently other third party claims were filed for three each of the saddles, bridles, and saddle blankets, and they were released from the levy upon stipulation.

Respondent then made a motion to release the remaining property from the levy on the ground that it was exempt property under the provisions of subdivision 3 of section 690 of the Code of Civil Procedure. This motion was heard on affidavits. The trial court held that the fourteen saddles, nineteen bridles, and fifteen saddle blankets were exempt personal property, and ordered them released from the levy. This appeal is taken from that order.

The major portions of the briefs filed here are devoted to discussions of the question of whether or not the saddles, bridles, and saddle blankets were "implements of husbandry of the judgment debtor" (subdivision 3, § 690, Code Civ. Proc.); it being admitted that their value was less than $1,000. Respondent confidently asserts that he was a farmer engaged in growing fruit, grapes, hay, and grain, producing milk, and in raising horses and cattle on a large range; that the personal property was necessary for use in his vocation; that it composed, therefore, implements of husbandry and was exempt from execution. In our consideration of the question before us, we will first assume this contention to be founded in fact.

If the property was exempt from execution, the order of the trial court on the hearing to determine title to the property upon the filing of the Gene Southard third party claim was erroneous. The order was made on the theory that there was no sufficient delivery of possession of the property from Pierson to Southard to satisfy the provisions of section 3440 of the Civil Code. The last clause of the section provides that it shall not apply "to any sale, transfer, assignment or mortgage of any property exempt from execution." It has been held that, where exempt personal property has been sold by a vendor in possession without "an immediate delivery, and followed by an actual and continued change of possession," title passes to the vendee enabling him to maintain an action against the sheriff for conversion, accomplished by taking the property on an execution issued under a judgment against the vendor. In Williamson v. Monroe, 174 Cal. 462, 163 P. 662, 663, it was said: "The plaintiff contends that, under these provisions, the farming utensils and property used on the farm as above stated are not subject to the provisions of the section, that a sale thereof in good faith, although not accompanied by an immediate delivery to the vendee or followed by an actual and continued change of possession, is not fraudulent or void, as there declared. We can see no escape from this conclusion. The language of the proviso is clear. In the absence of the restrictions placed upon sales of personal property by the opening clause of the section, a valid sale thereof could be made which would pass the title without delivery. Civ. Code, §§ 1140, 1141, 1721, 1739. A bill of sale was duly executed by Fonnesbeck to Williamson on November 14th, and the title passed to Williamson thereby, unless these restrictions applied to prevent it. As the proviso declares that these restrictions do not apply to property exempt from execution against the vendor, it necessarily follows that Williamson's title was perfect to all the property of that class included in the sale, even if there was no immediate actual delivery or change of possession. The sheriff had no right to levy upon this property, even if Fonnesbeck had been openly in possession thereof, if it then belonged to Williamson."

If the property was exempt from execution, the order made on the third party claim of Gene Southard was erroneous, but the question of the property being exempt does not seem to have been raised at that time. The order was allowed to become final.

[1, 2] The provisions of subdivision 3 of section 690 of the Code of Civil Procedure providing exemptions to various classes of property to debtors create a privilege in favor of a debtor who is the owner of the exempt property. Possession, coupled with the right of use, is not sufficient to enable the debtor to claim the exemption without there being the additional right of property in the article exempted. Stanton v. French, 83 Cal. 194, 23 P. 355; Stanton v. French, 91 Cal. 274, 27 P. 657, 25 Am. St. Rep. 174. In no affidavit filed by or on behalf of respondent is it asserted that Pierson had any property interest in any of the saddles, saddle blankets, or bridles at the time of the levy of the execution or at any time thereafter. The trial court did not find that Pierson had any such interest in the property. The whole record would support a contrary conclusion. The order cannot be sustained without some showing that Pierson had an interest in the prop-

erty. There being no such showing, the claim of exemption cannot be supported.

Order reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

137 Cal.App. 582

PEOPLE v. LAVENDER.

Cr. 2498.

District Court of Appeal, Second District, Division 1, California.
March 29, 1934.

Rehearing Denied April 13, 1934.

1. Criminal law 🔑1036(8).

In absence of demurrer, defendant could not on appeal attack sufficiency of evidence to sustain robbery conviction by differentiating between robbery from person and from immediate presence (Pen. Code, § 211).

2. Robbery 🔑9.

Defendant who, having induced hotel clerk to exhibit room, tied clerk to bed therein and by threats obtained combination to cash drawer in office, and took money therefrom within clerk's hearing, could not contend that robbery was not in clerk's "immediate presence" (Pen. Code, § 211).

"Presence" is word of flexible meaning, and word "immediate" is also used relatively, having been defined as meaning not far apart or distant.

[Ed. Note.—For other definitions of "Presence," see Words & Phrases.]

3. Criminal law 🔑811(5).

In instructing jury on question of determining credibility, court should not direct special attention to testimony of particular witness or witnesses.

4. Criminal law 🔑1169(5).

In robbery prosecution, judge's erroneously eliciting, without objection, testimony that prosecuting witness at police station had identified defendant, *held* harmless; jury being promptly instructed to disregard such testimony.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Eugene Lavender was convicted of robbery, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which followed his conviction of the crime of robbery; also from an order by which his motion for a new trial was denied.

From the evidence adduced on the trial of the action, it appears that, in the nighttime, defendant, accompanied by another, induced a clerk in a hotel to show them a room therein, and that, while so engaged, defendant and his companion "held up" the said clerk, bound his hands at his back, gagged him, placed him on a bed in the room that he was "showing" to defendant, and tied the clerk's feet to one of the bedposts; whereupon defendant and his companion then and there temporarily left the clerk in such condition and situation. Immediately thereafter the clerk heard the ringing of a bell that was connected with a cash drawer in which some money that belonged to the hotel was kept in its office, which ringing was the usual result when the cash drawer was attempted to be opened by one who was unacquainted with the operation of the combination necessary to its successful opening. Shortly thereafter, defendant returned to the room where he had left the clerk, and, by means of threats exerted by defendant, induced the clerk to give him the combination for the opening of the cash drawer. Later, when the clerk had succeeded in freeing himself from the bedpost and had secured assistance, by means of which his hands were unbound and the gag removed, he discovered that the cash drawer had been rifled of the sum of $13.15.

It is first urged by the appellant that the evidence was insufficient to support the judgment of conviction of the crime of robbery, in that such evidence did not show, as required by the terms of section 211 of the Penal Code, that, "accomplished by means of force or fear," personal property was feloniously taken from the person or the immediate presence of another, against his will, etc. More specifically, it is contended by appellant that, since at the time the money was taken the clerk was not in the hotel office where the said money was located, but, to the contrary, was in a room in another part of the hotel, the property was neither taken from the person of the clerk, nor from his immediate presence.

[1, 2] Particularly in view of the fact that no demurrer was interposed to the information by which defendant was charged with the commission of the offense of robbery, he is in no position now to urge any distinction or differentiation between the crime of robbery from the person and that of robbery from the immediate presence of another. People v. Matuszewski, 138 Cal. 533, 71 P. 701; People v. Bryon, 103 Cal. 675, 37 P. 754; People v. Dean, 66 Cal. App. 602, 226 P. 943. So that, if it may be said that the crime was committed in the existence of either of such situations, a sufficient compliance has been made with the demands of the statute. State v. Williams, (Mo. Sup.) 183 S. W. 308.

In robbery cases, with reference to what circumstances will constitute a taking from the person, in sections 1177 and 1178 of Bishop's New Criminal Law, where authorities in support of each of the several statements are cited, it is said: "The meaning is, not that the taking must necessarily be from the actual contact of the body, but it suffices when only from under the personal protection;" and that the latter expression "is interpreted to cover all one's personal effects within a not easily defined distance over which his presence may be deemed to have sway; as, says Hale, 'if a thief come into the presence of A, and with violence and putting A in fear drives away his horse, cattle, or sheep,' he commits robbery. The better expression is that, employing this word in the meaning just explained, a taking in the presence of an individual put in fear is in law a taking from his person. Thus, one who binds another in one room of his house, and compels him to tell where valuables may be found in another room; or confines another to his smoke-house fifteen steps from the dwelling-house,—commits robbery by feloniously taking the sought-for things from the other room or building." See, also, Rice v. State, 204 Ala. 104, 85 So. 437; Hill v. State, 145 Ala. 58, 40 So. 654.

In essential particulars, the facts in the case of People v. Dean, 66 Cal. App. 602, 226 P. 943, closely resemble those in the instant case. It was there held that the crime of robbery had been committed.

What significance is to be attached to the word "presence" has been the subject of inquiry by the courts of many different jurisdictions. Some indication regarding the indefiniteness, or what may be termed the flexibility, of the word is contained in the opinion in the case of Nock v. Nock's Ex'rs, 10 Grat. (51 Va.) 106, 117, where, in part, it was said the meaning of the word "presence" "depends upon the circumstances of each particular case. * * * It is a word of which every man has something like a just idea, but which no man can accurately define. In fact, it implies an area which has no metes and bounds; but is contracted or enlarged according as the attestation (of a will) occurs, as it certainly may, 'in a small chamber, or a spacious hall, a public street or an open field.' * * * The four walls of a room, whatever may be its size, so completely enclose its area and exclude all improper interference from without, that whatever may be done within them may generally be said to be done in the presence of all who may be therein. * * * Where it exists, sight is unnecessary. * * * Though a thing cannot be done in the sight, it may be done in the presence, of a blind man. * * * Proximity and consciousness may create presence. A room ex vi termini denotes such proximity as is required to constitute presence; but there may be such proximity as well without as within a room. And wherever that proximity exists and presence is created, it has the same effect as if the transaction occurred in the same room, and sight becomes unnecessary."

In the case of Carlton v. State, 63 Fla. 1, 58 So. 486, it was ruled that: "Where a person fires a pistol in a village, behind a cold drink stand within 100 yards of an officer's residence, it may fairly be said that the pistol was fired in the 'presence' of the officer. * * *"

In the case of State v. Blackwelder, 182 N. C. 899, 109 S. E. 644, it was held that (syllabus): "Where one heard hinge of his garage door creak, and, on going out, found the door open, he was warranted in arresting one in the vicinity for an attempt to steal a car therein, and that without a warrant; the crime being committed in his 'presence.' * * *"

And in each of the following cases it was ruled that within hearing distance of a person is within his presence: Miles v. State, 31 Okl. 4, 236 P. 907; State v. Koil, 103 W. Va. 19, 136 S. E. 510; State v. Lutz, 85 W. Va. 330, 101 S. E. 434; Simmons v. Commonwealth, 203 Ky. 621, 262 S. W. 972.

And even where the person affected could neither hear nor see the commission of the act in question, if by his sense of smell he became aware of the commission of such act, it was held that it was committed in his presence. State v. District Court, 72 Mont. 77, 231 P. 1107.

Referring to the case of Clements v. State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385, the following is a copy of the syllabus thereof: "While B. was in his smoke-house, about 15 paces from his house, defendant came up and said that, if B. put his head out, he would 'shoot it off.' While B. was thus detained, co-defendant entered the house, and carried off valuables belonging to B., who did not know for what purpose he was being detained until defendants had left. Held a sufficient taking in the presence of B. to constitute robbery."

In State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 195, 2 Am. St. Rep. 252, the following instruction given by the trial court (and approved by the Supreme Court) sufficiently sets forth the facts and the law applicable thereto: "It is not necessary, in order to constitute a stealing and carrying away 'in the immediate presence of said Nellie Baldwin,' that it should have been done (if done) in her immediate view, or where she could see it done. And if you find from the evidence, beyond a reasonable doubt, that the defendant made a violent assault upon said Nellie Baldwin, by choking her and causing her to fall upon the floor of one of the rooms or apartments of her house, and then tied her hands and feet for the purpose and with the intention of stealing some money or property in the house; and you further so find that she, through fear of personal violence, told defendant where her money or watch was in an adjoining room or rooms; and you further so find that thereupon defendant passed through a door or doors into such room or rooms, and did there, within hearing of said Nellie Baldwin, take and carry away from said room or rooms the property described in the indictment, or some part thereof; and you further so find that such property was under her immediate control, and that such taking, if any, was against the will of the said Nellie Baldwin, and was without any right, or claim of right, of defendant in said property, and with the intent to permanently deprive her thereof,—then and in such case there would be a sufficient stealing and taking from the 'immediate presence' of the said Nellie Baldwin within the meaning of the law."

In State v. Kennedy, 154 Mo. 268, 55 S. W. 293, wherein the evidence disclosed that the facts were that the defendants therein had forcibly entered an express car on a railway train and by violence had ejected therefrom the express agent thereof, and thereafter, after having divided the train, had taken the engine and the express car about one-quarter of a mile away from the remainder of the train, at which point the defendants blew open and rifled the safe contained within the express car, it was held that, although the express agent was not physically present at the time the safe was thus robbed of its contents, nevertheless he was constructively present at such time.

The facts in the case of State v. Williams (Mo. Sup.) 183 S. W. 308, were similar to those in the instant case. It appears that the night operator and agent for a railroad company went from the ticket office around into the ladies' waiting room, there being no door connecting the two, and while therein was shot by some one on the outside of the waiting room. Shortly thereafter, he heard some one endeavoring to open the cash drawer in the ticket office. If an attempt was made to open this drawer without knowing the combination, a bell would ring. Later, it was found that the cash drawer, which had contained about $11, had been broken open and the money taken therefrom. In connection with the case on appeal, the defendant complained of an instruction which defined the words "in the presence of," as used in the statute, and by which instruction the jury was informed that, if it found that the defendant committed an assault upon the agent and then took the money in question from the ticket office while the agent was in a different room, the money was then and there in the immediate charge of said agent within the meaning of the statute, and that the same was taken in his presence. It was held that the instruction was not erroneous. For another case, that involves similar facts, see People v. Sicks, 299 Ill. 282, 132 N. E. 573.

But notwithstanding the practical universality of the rule that a robbery may be committed "in the presence" of the victim thereof, although in fact such victim is comparatively distant from the place where the actual taking of his property occurs, the attention of this court has been directed to no authority wherein the question of the significance to be attached to the words "immediate presence" of the victim is considered. The question here presented depends for its determination upon the meaning that should be ascribed to the word "immediate." An examination of Webster's New International Dictionary discloses the fact that the word is properly used in many different senses, and that in connection with location, the following statement is included: "* * * Often, Colloq., not far apart or distant; as, hidden in the immediate neighborhood; living in the immediate vicinity of one another. * * *"

It may thus be noted that, not unlike the word "presence," the word "immediate" is used relatively. In the case of a robbery, dependent upon circumstances or conditions present, the distance which properly might intervene between the victim thereof and the property taken from him might vary considerably. For example, if the employees in a bank had been "held up," and before any money was taken therefrom the employees were locked in a vault in which the books and records of the bank ordinarily were stored, but from which position the employees could hear the movements and operations of the robbers, could it be doubted that the taking was in the "immediate presence" of such employees? Or if a watchman in a warehouse should have been the victim of a "holdup," and after having been bound and gagged, should have been left at one end of the warehouse while the robbers thereafter proceeded to open and to rifle a safe located at the other end of the warehouse, but within the hearing of the watchman, would it be seriously questioned that the robbery had occurred in the "immediate presence" of the watchman? If a large herd of cattle that was scattered for a mile or more on a plain was in charge of a cowboy, who was located on a hill or knoll where he might watch the cattle, was the subject of a felonious asportation by thieves, who preparatory to their nefarious work, had "held up" the cowboy, would it be contended that the crime was not committed in the "immediate presence" of the cowboy, and consequently that it did not constitute a robbery?

Now since, as hereinbefore has appeared, from the fact that the victim may be able to see, or to hear, or to smell things that clearly indicate the commission of a robbery, his actual physical presence is not necessary to a compliance with the requirements of a statute that, in order to constitute the crime of robbery, "presence" of the victim at the scene of the crime must be shown, no good reason is apparent why his "immediate" presence thereat should not likewise be deduced. In other words, if in those jurisdictions where by statute mere "presence" of the victim is required, although the victim be comparatively distant from the place where the asportation of his property actually occurs, it is properly held he may be constructively present, and consequently that the requirements of the statute in that regard thus may be complied with, we are constrained to rule that, in view of the elasticity of the word "immediate," the facts of the instant case bring it within the meaning and intent of our statute, and consequently that, although the clerk of the hotel was not actually physically present in the office thereof at the time when the money in the cash drawer was taken therefrom by defendant, nevertheless, considering the other facts hereinbefore set forth, the clerk was constructively "immediately" present. At any rate, especially in view of the fact that the clerk could hear the operations of the robbers, if, as other facts of the case indicate, because of the felonious acts of defendant the clerk was prevented from being physically present at the scene of the robbery at the time of its actual completion, when otherwise the clerk would have been there, defendant should not be heard to raise the question as to whether the clerk was or was not "immediately" present. At least as early as the time when the clerk was induced to leave the hotel office for the purpose of "showing" the room to defendant and his companion the crime of robbery was commenced; it was an overt act connected with the commission of the offense, at which time the clerk was "immediately" present. The trick or device by which the physical presence of the clerk was detached from the property under his protection and control should not avail defendant in his claim that the property was not taken from the "immediate presence" of the victim.

[3] Appellant also suggests prejudicial error on the part of the trial court in its refusal to give to the jury, at the request of defendant, a specified instruction which related to the credibility that should attach to the testimony given by defendant, particularly in view of the fact that he had admitted that theretofore he had been convicted of a felony.

Since it appears that in determining the question of credibility of all the witnesses, the trial court fully instructed the jury regarding its power and its duty to consider all facts pertinent thereto, it is manifest that defendant has no just cause for complaint. It is a well-established rule that, in instructing a jury on this subject, the trial court should not direct special attention to the testimony given by any one witness, or set of witnesses. People v. Winters, 125 Cal. 325, 57 P. 1067; People v. Ross, 134 Cal. 256, 66 P. 229; People v. Quon Foo, 57 Cal. App. 237, 206 P. 1028.

[4] Complaint is also made by appellant of alleged error which consisted in the fact that, in answer to questions propounded by the judge of the trial court, the prosecuting wit-

ness testified in substance that before the trial, but after defendant was arrested, the witness had identified defendant at the police station as the man by whom the witness had been "held up." However, the record shows that, as to the main facts connected with such testimony, no objection to either of several questions which elicited the testimony in question was made by defendant; nor did defendant present any motion to strike the answers, or any of them, given by the witness to said questions. In addition thereto, immediately following the reception of such evidence, at the request of the attorney who then and there represented defendant, the trial court instructed the jury "that they are entirely to disregard the questions of the court, and all other evidence relative to the identification of this defendant by any testimony given as to identifying him at the Georgia Street police station or any other place. Those questions are entirely irrelevant, incompetent, immaterial, and the jury will disregard it entirely."

Although as ruled in the case of People v. Cotton, 117 Cal. App. 469, 4 P.(2d) 247, the testimony in question was not properly admissible in evidence, considering the entire circumstances connected with the incident, it cannot be held that thereby defendant was prejudicially affected in his substantial rights in the premises.

The judgment and order are affirmed.

We concur: CONREY, P. J.; YORK, J.

137 Cal.App. 577

TOM v. EDDY.

Civ. No. 7872.

District Court of Appeal, Second District, Division 1, California.
March 29, 1934.

Rehearing Denied April 17, 1934.

Hearing Denied by Supreme Court May 29, 1934.

1. Eminent domain 🔑153.

Where landowners, prior to interlocutory judgment making award in their favor, conveyed lands involved in condemnation proceedings and subsequently assigned award to assignee to whom condemnor made payment, remote grantee under conveyance postdating such interlocutory judgment, not being owner when right to award accrued, could not recover from assignee.

2. Money received 🔑12.

That plaintiff claiming right to money allegedly paid erroneously to defendant by third person fails to establish cause of action is sufficient defense, though defendant shows no right to such money.

3. Eminent domain 🔑152(1).

Condemnation statute *held* to regulate only procedure, including rule fixing time with reference to which value is determinable, and does not govern substantive right to fund created by award (St. 1903, p. 379, § 10, as amended by St. 1925, p. 242, § 4).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Alfred P. Tom against F. J. Eddy. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Prior opinion, 29 P.(2d) 803.

Fred N. Arnoldy, of Los Angeles, for appellant.

CONREY, Presiding Justice.

An action was pending (City of Los Angeles v. Wernott et al.) for condemnation of real property under the Street Opening Act of 1903 (St. 1903, p. 376, as amended). Among the defendants therein were Kibbe, owner of parcel 6, and Johnson, owner of parcel 7. Prior to entry of the interlocutory decree, parcel 6 was conveyed by grant from Kibbe to Hellman Commercial Trust & Savings Bank. Also, prior to entry of the interlocutory decree, parcel 7 was conveyed by grant from Johnson to F. J. Eddy and by Eddy to said bank.

The interlocutory judgment, which was entered July 14, 1927, made its awards in favor of the original defendants, Kibbe and Johnson. On September 23, 1927, the Merchants' National Trust & Savings Bank (successor of said Hellman Bank) conveyed the two parcels to Alfred P. Tom. Thereafter, on March 26, 1928, the city of Los Angeles paid to Eddy (as the assignee of Kibbe and of Johnson under assignments made in November, 1927) the amount of said awards. Upon proof of these facts, in this action of the plaintiff Tom to recover said money from Eddy, the defendant

Eddy moved for a nonsuit upon the ground that plaintiff was not the owner of the parcels condemned at the time the right to compensation for the taking thereof accrued, and particularly upon the ground that under the provisions of section 10 of the Street Opening Act of 1903 (St. 1903, p. 379, as amended by St. 1925, p. 242, § 4), the right to such compensation accrues at the date of the order appointing referees or of the order setting the condemnation suit for trial. The motion was granted, and judgment of nonsuit entered. From this judgment the plaintiff appeals.

In Security Co. v. Rice, 215 Cal. 263, 9 P.(2d) 817, 82 A. L. R. 1059, it appeared that while an action for condemnation of real property for street purposes was pending, and prior to the entry of the interlocutory decree, the owner (defendant in the condemnation case) conveyed the land by deed of grant which was silent as to the award money to be paid in that action. It was held by the Supreme Court that the money belonged to and was payable to the purchaser. In McDaniels v. Dickey (Cal. Sup.) 25 P.(2d) 404, the defendant owners in like manner conveyed land which was included in a pending action to condemn for street purposes, but the conveyance was not executed until a time subsequent to the entry of the interlocutory judgment. Here the Supreme Court held that by virtue of such interlocutory judgment the right to compensation accrued to the owners prior to their sale and conveyance of the land. For that reason the claim of the grantee to recover the money from the defendant grantors, to whom it had been paid by the condemnor, was defeated.

[1-3] In accordance with the foregoing decisions, we find that the court below properly dismissed this action upon the ground that plaintiff was not the owner of the parcels condemned at the time the right to compensation accrued. On the record herein, it may be that neither one of the parties to this action owns the fund in question. But for the purposes of the present action, it is a sufficient defense that the plaintiff failed to establish his own cause of action. In arriving at this conclusion we do not rely at all upon the provisions of section 10 of the Street Opening Act of 1903, referred to by respondent in his motion for nonsuit. The provisions of that section apparently were intended only to regulate matters of procedure, including a rule which fixes the time with reference to which the question of value shall be determined. This is wholly apart from the merits of a controversy concerning the substantive right of ownership of the fund created by the award.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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137 Cal.App. 727

PEOPLE v. JENSEN.

Cr. 2496.

District Court of Appeal, Second District, Division 1, California.

April 6, 1934.

1. Criminal law 🔑1134(2).

On appeal from judgment of conviction, reviewing court could only consider evidence as to appealing defendant, not as to defendant in separate action tried simultaneously.

2. Criminal law 🔑61½.

Where there was sufficient evidence to show guilt of appealing defendant upon counts charging manslaughter and violation of Motor Vehicle Act, fact that another party was found guilty of same crimes did not require reversal (St. 1929, p. 544, § 141).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Floyd Lester Jensen was convicted of manslaughter and of violation of section 141 of the Motor Vehicle Act (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544), and he appeals.

Affirmed.

John Beardsley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

YORK, Justice.

This is an appeal from a judgment of conviction of the crimes of manslaughter and violation of section 141 of the California Vehicle Act (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544) and from an order denying defendant's motion for a new trial.

We find nothing whatever in the appeal

which merits discussion in any way, unless it is the question raised as to the misdirection of the jury in matters of law.

[1] Appellant attempts to raise the objection that he was wrongfully convicted because in two separate actions (tried together at the same time before the same jury), wherein each information concerned one defendant only, this appealing defendant was convicted in the one case of the same crimes as those of which the defendant in the other action was convicted. The only thing that we can consider upon this appeal is the evidence in this case as to this appealing defendant. There is sufficient evidence here to show the guilt of the defendant and to justify the verdict of the jury as to him.

[2] Appellant states in his brief that: "Verdicts finding both guilty as principals necessarily find both guilty as driver; and there was no evidence that both were driving, nor any support for a claim that both could be guilty as driver, or guilty as aiders, abettors, advisers, or encouragers. One must have done the driving. That one might be held guilty on both counts. But the other defendant could not be guilty *as driver*. There is no evidence—no suggestion—that either aided the other in driving or in *failing* to stop and render aid. There is evidence from which the jury might have concluded that one or the other had 'protected' the driver by pretending to be the driver. But there is no way of knowing which of the defendants the jury believed was the actual driver, and which the accessory. In such case one or the other defendant was chargeable at most as an accessory, while the other was chargeable as principal. Consequently the judgments, as to the appellant, must be reversed. People v. Mitchell, 92 Cal. 590, 28 P. 597, 788; People v. Smith, 103 Cal. 563, 567, 37 P. 516."

There is nothing in either of these decisions, just quoted, which in any way weakens the statement which we have just made in this opinion, to the effect that where there is sufficient evidence adduced to show the guilt of the appealing defendant upon both counts, the fact that another party was found guilty of the same crimes would in no way affect that judgment or require its reversal.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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138 Cal.App. 53

CITY OF LONG BEACH v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9498.

District Court of Appeal, Second District, Division 1, California.
April 12, 1934.

Master and servant 🔑405(6).

Evidence *held* not to warrant extra compensation on ground of city's "serious or willful misconduct" to employee shocked while removing lamp from light circuit after being told there was no danger (St. 1917, p. 834, § 6 (b), as amended).

Facts showed that city had turned off current from certain circuit of ornamental lamp standards and disconnected automatic clock in transformer box and thereafter twice checked and found line dead, and that it had every reason to believe that it was safe to remove socket from such circuit.

[Ed. Note.—For other definitions of "Serious and Willful Misconduct," see Words & Phrases.]

◆

Proceeding under the Workmen's Compensation Act by Loyd De Fries, opposed by the City of Long Beach, employer. The Industrial Accident Commission awarded compensation and the City of Long Beach petitioned for certiorari to review the order.

Award annulled.

Nowland M. Reid and Edmund J. Callaway, both of Long Beach, for petitioner.

Everett A. Corten, of San Francisco, for respondent commission.

CONREY, Presiding Justice.

On petition of the city of Long Beach, the writ was issued herein for review of an award made by the Industrial Accident Commission in favor of respondent Loyd De Fries. It is admitted that on April 7, 1933, De Fries was in the employ of the city as an electrician, and as such employee sustained an injury arising out of and occurring in the course of his employment. No question is raised concerning the applicant's right to the ordinary compensation allowable for such injury or the amount thereof. The claim in controversy herein relates solely to a demand for extra compensation by reason of serious and willful misconduct of the employer. The commission originally found that the injury was not caused by such serious and willful misconduct. But a rehearing was granted, and thereupon the matter was again submitted without taking any further evidence. The commission then found that the injury was caused by the serious and willful misconduct of the city, and that the employee was entitled to have his compensation increased 50 per cent. as prescribed by the Compensation Act, and award was made accordingly. The present proceeding is a review of that award.

If the commission's finding that the injury "was caused by the serious and wilful misconduct" of the defendant city is supported by evidence of facts legally sufficient to justify the ultimate fact found, then the award must be affirmed; otherwise the award should be annulled.

It is the "position of the Commission," as stated by its counsel, that serious and willful misconduct of an employer is established in a case "where, regardless of violation of safety order or statute, the employer allows a palpably dangerous condition or instrumentality to exist on his premises, or at the place of employment, and then permits his employees to work exposed to such hazard. Under such conditions, the employer is presumed to have disregarded the safety of his employees and to have apparently been willing to inflict the injury suffered." The contention of respondents that the situation thus described applies to the case at bar is not accompanied by any claim that any safety order of the commission was violated or that any statute was violated by the employer.

Thus we are brought down to two facts, impliedly found by the commission, and on proof of which the validity of the award depends. These implied findings are that a palpably dangerous condition existed on the premises where the applicant was required to work; and that the employer allowed that condition to exist, and permitted the applicant to work exposed to the hazard thus created.

The city of Long Beach maintains a street lighting system, for which it obtains electrical energy from the Southern California Edison Company. During the period of time to which this case relates (and presumably until now), the street lighting system was operated by the "electrical division" of the city's department of public service and engineering. The electrical division was in charge of D. H. Alexander, city electrician. W. C. McMechem was an inspector, subordinate to Alexander. Paul Irwin was an assistant foreman, working under the directional authority of McMechem. On the day of the accident, De Fries was an electrician working under the direction of Paul Irwin.

Prior to the year 1933, the city had installed and operated a twelve-standard lamp circuit, which was part of a two-circuit outfit known as the Tenth street extension. In November, 1932, the city electrician gave to the Edison Company notice of discontinuance of the lights of the Tenth street extension, except two lamps thereof. On December 7th the company reported back that the Tenth street extension had been disconnected. In fact, two lamps were retained, but not on the circuit where De Fries was injured. The electricity for this extension came through an underground lighting system. According to the uncontradicted testimony of inspector McMechem, early in December he pulled out the lamps (not the sockets) of that circuit, and at that time found that the circuit was dead. George Irwin, an electrician working under direction of city electrician Alexander, disconnected the line on or about the first of December. About the 1st of February he rechecked and found that the circuit was still disconnected. The street lighting director of the city "made a check" on this line at a date not stated, but prior to March 10th, and found it dead. On March 10th, by reason of an earthquake which caused much damage in Long Beach, there appears to have been some confusion in the operation of the city affairs, including the street lighting department, and during the following weeks much emergency work had to be done. On April 7th there was need for a supply of lamp sockets for installation, and Paul Irwin was instructed by George E. Irwin, an "Electrician, Class A," to go out to the Tenth street extension and bring away the sockets there, from which the lamps had been removed. George Irwin told Paul that the line was dead. Under that order, Paul Irwin took De Fries with him to get the sockets. Paul told De Fries that the line was dead. So believing, they did not make any test, although the facilities for testing were there, and according to the accepted electrical practice they should have examined to see whether the circuit was energized. Because of some unauthorized interference, on the part of persons unknown, and at a time unknown, the circuit was now active. Thus the employee was exposed to the danger, with consequent injury to himself.

Interpretation of the phrase "serious and wilful misconduct", and also of the words "executive or managing officer" of a corporation, as those terms are used in the Workmen's Compensation, etc., Act of 1917, § 6 (b), St. 1917, p. 834, as amended, may be found in E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 188 et seq., 193 P. 105, 16 A. L. R. 611, and several later decisions following the lead of the Horst Company Case. Applying to this present case the measure prescribed by the statute as thus interpreted, we have reached the conclusion that there is no evidence of serious or willful misconduct of the city of Long Beach, or its responsible agents, whereby the employee De Fries was injured. We agree with the statement summarizing the case, by counsel for petitioner, wherein they say: "Your petitioner having turned off the electric current from this circuit of ornamental lamp standards, and disconnected the automatic clock in the transformer box of the Southern California Edison Company, and thereafter twice checked it and found the line dead, and with no evidence of any orders to ever turn on the same, had every reason to believe that in removing the socket from said circuit it was safe to do so; there was no reason or anything brought to its notice to believe otherwise—thus the failure to check was not 'serious and wilful misconduct.'"

The award is annulled.

We concur: HOUSER, J.; YORK, J.

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137 Cal.App. 748

COLE v. LADEVEZE et al.

Civ. 9308.

District Court of Appeal, First District, Division 2, California.
April 10, 1934.

1. Appeal and error 🔑907(3).

Defendant's appeal being taken on judgment roll alone, only question was whether, as matter of law, plaintiff was entitled to judgment on findings.

2. Notaries 🔑11.

Person advancing money in reliance on forged trust deed could recover from notary and surety damages sustained through negligent certification of false acknowledgment (Pol. Code, § 801).

3. Notaries 🔑11.

In action against notary and surety for false certification of acknowledgment of trust deed, findings supported judgment allowing plaintiff beneficiary 12 per cent. interest from time plaintiff paid money; plaintiff having borrowed such money and obligated himself to pay such interest.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Charles A. Cole against the National Surety Company and J. C. Ladeveze, for whom Daniel M. Kuter, administrator, was substituted as a party defendant. From a judgment for plaintiff, the first-named defendant appeals.

Affirmed.

Whitson & Sims, of Los Angeles, for appellant.

Louis, Quillian & Pool, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued the defendant Ladeveze, a duly qualified notary public, for damages caused through a false certification of acknowledgment of a deed of trust and joined the defendant surety company which stood surety on the notary's bond. Plaintiff had judgment, and the surety company alone has appealed on a typewritten judgment roll.

The trial court found that the notary affixed his name and notarial seal to a purported acknowledgment of a purported deed of trust which the plaintiff took as security for the payment of a certain promissory note bearing the purported signatures of the two persons whose names were attached to the deed of trust; that both signatures to the purported deed of trust and to the promissory note were forged and were attached thereto without the knowledge or consent of the real persons who were the owners of the property which the deed of trust purported to convey; that the notary affixed his signature and seal to said acknowledgment without knowing whether said persons had signed their names thereto and without procuring any evidence or information as to their identity; that, acting upon said transactions, the plaintiff paid to the Citizens' Title Company, Inc., the sum of $850 and delivered therewith escrow instructions to pay the same to the persons whose names were signed to said deed of trust and promissory note upon delivery of certification of title; that the title company, replying upon the deed of trust as so executed and recorded and without independent investigation, delivered to plaintiff a certificate of title which showed that the persons named therein were the owners of said property and thereupon paid the said sum of $850 to one who claimed to be an agent of the true owners. The trial court then found that the negligence of the notary was the proximate cause of the damage to plaintiff amounting to $850, with interest at the rate of 12 per cent. as provided in said promissory note and attorney's fees and trustee's fees. Upon these findings the trial court gave plaintiff judgment for the sum of $1,089, plus the interest which he had become obligated to pay upon the note in the sum of $399.50.

[1, 2] As the appeal is taken on the judgment roll alone, the only question involved is whether, as a matter of law, the plaintiff was entitled to judgment upon these findings. Having found that the negligence of the notary in affixing his name and seal to the acknowledgment was the proximate cause of the damage to plaintiff, judgment for the damages sustained by the plaintiff followed as matter of law under the settled rule of section 801, Political Code, which provides that for the official misconduct or neglect of a notary he and his surety are liable for all the damages sustained. This section is followed in Joost v. Craig, 131 Cal. 504, 509, 63 P. 840, 82 Am. St. Rep. 374, and Anderson v. Aronsohn, 181 Cal. 294, 297, 184 P. 12, 10 A. L. R. 866.

[3] It is argued that the judgment is against law because the trial court allowed plaintiff interest on the sum of $850 at 12 per cent. from the time plaintiff paid out that sum. This is not the common case for unliquidated damages with interest running from the date of the judgment. Plaintiff was entitled to recover the damages suffered through the negligence of the notary in certifying to a false acknowledgment. In estimating these damages the trial court took into consideration the fact that the plaintiff, acting upon the notary's certificate, borrowed the sum of $850 upon which he obligated himself to pay and did pay interest at the rate of 12 per cent. per year. These expenditures, together with attorney's fees and trustee's fees, made up the total monetary damage suffered by plaintiff. If any error occurred in the fixing of the damages sustained by the act complained of, it does not appear on the judgment roll.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

◆

137 Cal.App. 734

Ex parte HAZLETT.

Cr. 1796.

District Court of Appeal, First District, Division 2, California.

April 9, 1934.

Hearing Denied by Supreme Court May 7, 1934.

1. Criminal law 🔑1001.

Trial court has jurisdiction to extend term of probation during probation term.

2. Criminal law 🔑1001.

Where, as condition to granting probation, trial court imposed imprisonment in county jail for one and a half years, order made subsequent to expiration of original term imposing new term of imprisonment for additional five years *held* void (Pen. Code, § 1203).

Habeas corpus proceeding by George Hazlett directed to William J. Fitzgerald, sheriff of city and county of San Francisco.

Writ granted, and petitioner discharged.

Raine Ewell, of San Francisco, for petitioner.

John R. Golden, Asst. Dist. Atty., City and County of San Francisco, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an application for a writ of habeas corpus. After being served with process, William J. Fitzgerald, sheriff of the city and county of San Francisco, made a return on the writ in which he set forth the commitment under which he holds the petitioner. That commitment is in words and figures as follows:

"This cause came on regularly this day for judgment.

"The district attorney, Matthew Brady, by Harmon D. Skillen, assistant district attorney, with the defendant George Hazlett and his counsel Charles Taylor, came into court: The defendant George Hazlett was duly informed by the court of the information duly presented and filed against him on the 2nd day of October, 1930, by the district attorney of the city and county of San Francisco, charging said defendant with the crime of felony, to wit: burglary; of his arraignment on the 10th day of October, 1928, and plea of guilty on the 13th day of October, 1928, and the order of court finding the degree to be second degree; of the order of court on the 10th day of November, 1928, granting him probation for a period of five years on condition that he serve a term of one and one-half years in the county jail; of the order of court on this the 21st day of November, 1930, modifying said order granting him probation for a period of five years by extending the period of probation from this date on condition that he serve a term of five years in the county jail.

"The defendant George Hazlett was then asked if he had any legal cause to show why judgment should not be pronounced against him; to which defendant replied that he had none.

"And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment:

"That whereas, the said defendant George Hazlett having been duly convicted in this court of the crime of felony, towit: burglary, second degree,

"It is therefore ordered, adjudged and decreed that the said defendant George Hazlett be punished by imprisonment in the county jail of the city and county of San Francisco, state of California, for the term of five years, said sentence to run concurrently with the period of probation granted herein.

"The defendant George Hazlett was then remanded to the custody of the sheriff of the city and county of San Francisco, officer in charge of said county jail."

[1, 2] The petitioner claims that the order made on November 21, 1930, was in excess of the jurisdiction of the court. Turning back to the order, it will be noticed that during the probation term the trial court made an order extending the term. In doing so it did not exceed its jurisdiction. Ex parte Sizelove, 158 Cal. 493, 111 P. 527. As a condition for making the original order, the trial court imposed imprisonment in the county jail for one and one-half years. That term of imprisonment expired May 10, 1930. Nevertheless on November 21, 1930, the court so changed the order as to impose a new and second term of imprisonment for an additional term of five years commencing November 21, 1930. The case does not present an instance of an attempt to modify a condition contained in the probation order, but an attempt to add a new condition to said order. If the statute, Penal Code, § 1203, does not authorize such attempt, the order of November 21, 1930, is void and the writ should issue. Wilson v. Carr, 41 F.(2d) 704, 706, involved a set of facts parallel in all respects. The Circuit Court of Appeals for the Ninth District with great care set forth the provisions of our statute, and then it said: "By the original order granting probation, the appellant was committed to the county jail for the period of sixty days, and the statute confers no express authority upon the court to again commit him for a period of one year, or any other period. It would seem equally certain that no such authority can be implied."

The application is granted and the petitioner is discharged.

We concur: NOURSE, P. J.; SPENCE, J.

137 Cal.App. 753

PEOPLE v. LEACH.

Cr. 1290.

District Court of Appeal, Third District, California.

April 10, 1934.

Rehearing Denied April 25, 1934.

1. Automobiles 🔑355(13).

Evidence *held* to support conviction for manslaughter and for driving automobile while under influence of liquor, as against contention that defendant was not sufficiently identified as driver.

2. Automobiles 🔑356.

In prosecution for manslaughter and for driving automobile while intoxicated, whether physical facts and injuries to occupants precluded possibility that defendant was driving, and whether defendant was in driver's seat just prior to accident and yet had escaped fatal injury, *held* for jury.

3. Criminal law 🔑684.

In prosecution for manslaughter and for driving automobile while intoxicated, permitting state, after defendant rested, to introduce further testimony on question of defendant's identification as driver, *held* not error, where it did not appear belated witnesses were deliberately withheld.

4. Criminal law 🔑684.

Where people introduced some evidence that defendant was driving automobile causing death, additional testimony, introduced after defendant rested, to show defendant was driving was not inadmissible as rebuttal, but was part of people's case in chief.

5. Criminal law 🔑730(8).

District attorney's reference to truthfulness of witnesses for people, and stating he thought defendant was lying, and in stating he would not call certain witness because he thought he was lying, which latter remark was stricken, *held* not prejudicial misconduct.

6. Criminal law 🔑1037(1).

Defendant, if desiring to complain on appeal of district attorney's remarks, was required to assign alleged error at time of commission.

7. Criminal law 🔑730(1).

In prosecution for manslaughter and for driving automobile while intoxicated, prosecutor's attempt to tell of past events or of instances of defendant's use of liquor *held* not prejudicial error, where objections were sustained, and errors were cured by admonition.

8. Criminal law 🔑829(1).

Refusing proffered instructions covered by instructions given *held* not error.

9. Criminal law 🔑768(1).

In manslaughter prosecution, instruction that verdict must not be influenced by any feeling of sympathy towards survivors of deceased persons *held* properly refused.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Martin Leach was convicted of manslaughter and of having driven an automobile while under the influence of intoxicating liquor, and he appeals.

Affirmed.

Robert G. Partridge, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An information was filed against defendant, charging him with having committed two acts of manslaughter and with having driven an automobile while under the influence of intoxicating liquor. Upon the trial thereon a jury found defendant guilty on the three charges, recommending leniency on the two counts of manslaughter and a sentence to the county jail upon the charge of driving while intoxicated. Thereafter, upon a motion for new trial, the court granted the motion as to the third count, and denied the motion as to the two acts of manslaughter, and in due time sentenced the defendant to be imprisoned in the state prison, the terms thereof to run concurrently. This appeal is from the order denying the motion for new trial as to the charges of manslaughter and from the judgment as entered.

The record discloses that defendant went to the city of Stockton to transact certain business, which was concluded during the afternoon. In the evening defendant then met his friend Clark, one of the men killed in the accident hereinafter referred to, and they spent the night in social drinking. About 6:30 the next morning defendant and Clark, neither having been to bed, went to the garage to get defendant's car, their plans being to attend a shooting tournament near by. Each had a shotgun, and the record discloses that during the early morning there was some shooting from the hotel window, allegedly done by Clark, and also some shooting at the lights of the garage by defendant. At the garage these two met Coleman, the night man at the garage, and invited him to accompany them to the shooting range. Coleman had not been drinking, he having just come off his shift when Leach and Clark entered. Coleman, Clark, and Leach left the garage in the car of Leach, pursuing a course through the business district of Stockton until they reached a residential section of the city, where, in attempting to negotiate a turn at a high rate of speed, the car struck a pole, instantly killing Clark and Coleman.

[1] The first point urged by appellant for reversal is that the evidence is legally insufficient to support the finding of guilt. It is admitted by appellant at the time of the accident the car was being operated by some one in a manner that would support a conviction of manslaughter, but claims there is no proof sufficient to support the finding that Leach was driving at the time of the accident. In

view of the verdict by the jury, we are concerned merely with the evidence which would tend to support and justify that conclusion. Starting with the time the death car left the hotel garage on the morning in question with Leach, Coleman, and Clark as occupants, we have the testimony of Carl Barstow, the floor man in the garage, who testified the three men were all in the front seat of the Rockne sedan at the time the car left the garage, and Leach was driving. D. H. O'Malley, an employee of the same garage, testified he saw the three men in the car and heard the motor start; Leach was behind the steering wheel, but from the position of the witness he could not actually see the car as it drove out of the garage. Herbert G. Ayers, a personal acquaintance of defendant, testified he saw defendant driving an automobile with two others in the front seat, and within three or four minutes thereafter heard a crash, and upon going to the scene of the accident saw the defendant with his two companions lying upon the street. Reverend William Jensen, while not personally acquainted with the defendant, testified to seeing a car pass at about the time in question and identified defendant as the driver of the car. Also a group of boys awaiting transportation to a golf course saw the car and identified defendant as the driver thereof. Other witnesses saw the car in its progress through the streets traveling at a high rate of speed, connecting the various points of observation named by the witnesses. We believe this is a sufficient summarization of the testimony on the question of identification of the driver, and this testimony, if accepted and believed by the jury, as evidently it was, was entirely sufficient to establish the particular fact in issue.

[2] It is also strongly contended that the physical facts adduced at the trial as to the damage to the car and the injuries received by the occupants preclude the possibility of defendant having been in the driver's seat at the time of the impact, but that also is a question of fact. The car apparently careened and turned over more than once, so the position of the bodies when finally the car came to rest and the location of the injuries sustained cannot be conclusive of the position of the occupants just prior to the accident. It is true that, where it is physically or inherently impossible for testimony to be true, there is then no conflict for a jury to decide, but here there is no inherent impossibility in the defendant having been in the driver's seat just before the accident, nor is it incompatible with the physical facts that he might have been in the driver's seat just prior to the accident and yet have escaped a fatal injury. That also is purely a question of fact for the jury to determine.

[3, 4] Defendant next complains very vigorously of what he contends is a gross abuse of discretion in allowing the prosecution to reopen its case after the defendant had rested. In its case in chief the prosecution called some seventeen witnesses who testified as to the identity of the driver, the course and speed of the car, the question of intoxication, and other matters essential to the establishment of a cause of action. Thereupon the defendant called its witnesses, some testifying the defendant was not the driver of the car, others as to the occupants of the car and their seating arrangement. After defendant rested, the prosecution called a witness in rebuttal and asked him as to the identity of the driver of the automobile at a given time and place. To this line of testimony defendant objected on the ground that it was not proper rebuttal. After extended argument the trial court properly held that the proposed line of testimony was not rebuttal, but was part of the people's case in chief, and permitted the case to be reopened for the purpose of introducing further testimony upon behalf of the people. Thereupon the prosecution called a number of witnesses, all of whom testified as to the identity of the driver of the car. Appellant, by appropriate motion and objection, protected himself against the ruling of the court, and now insists that, not only was the court in error in permitting the case to be reopened, but it was an abuse of discretion so to do. We believe, however, that no abuse of discretion was shown, nor can we say as a matter of law that the district attorney acted unfairly in the premises. If we believed the belated witnesses were withheld deliberately, it would be our duty to promptly declare a new trial; but we cannot find in the record that to have been the fact, and particularly so after the trial court permitted, in the interest of justice, the case to be reopened.

[5, 6] Defendant also contends that the district attorney was guilty of prejudicial misconduct, in that he repeatedly referred to the truthfulness and veracity of the witnesses for the people, and, on the contrary, accused the witnesses for the defense of misstating the facts, and that he testified to facts within his knowledge while not under oath; and attempted to get before the jury the fact the defendant was a reckless driver and had in the past frequently indulged in the excessive use of intoxicating liquor. We have carefully examined the record and particularly as to those portions thereof cited by appellant

in support of his contention, but find nothing therein to justify a reversal upon these grounds. It is true that the district attorney, when challenged by the defense to produce a certain witness, stated he did not do so because he would not call a witness he thought was lying. This remark was stricken out by the court. In another instance the district attorney in his closing address to the jury stated a certain witness called by the prosecution had no reason to tell anything but the truth, that he was absolutely honest and his integrity had not been questioned. In referring to the testimony of the defendant, the district attorney in closing commented upon the weakness and improbability of the version of the accident as given by the defendant, and said that he did not believe it, and that the defendant was lying. He then dwelt upon the truthfulness of the witnesses called by the prosecution, and asked that full credit be given their version of the accident. Frequently, however, the district attorney told the jury in effect that it was for them to weigh the testimony. We find no prejudicial misconduct in the remarks of the district attorney, nor do we find any exception taken thereto by the defense at the time the statements were made to which objection is now urged. It was the duty of the defendant, if he felt the district attorney was exceeding his proper role, to assign such error at the time of its commission, so the court could, if proper, admonish the jury. That apparently was not done.

[7] As to the claim the district attorney testified to certain facts, he not being sworn as a witness, it appears the remarks were made in the course of argument addressed to the court or in colloquies between counsel, and the court frequently took occasion to admonish the jury that the statements of counsel did not constitute evidence in the case and should not be so considered by them. To the attempt of the district attorney to tell of past events or instances of the use of intoxicating liquor by the defendant, objections were made by the defense, which objections were sustained. We can see no misconduct on the part of the district attorney, nor any prejudicial error in the asking of the questions noted, particularly as the objections made by counsel were sustained and the errors cured by admonition.

[8] Defense also cites as error the refusal of the court to give certain instructions on circumstantial evidence. It would add nothing to quote these proffered instructions, we merely contenting ourselves by saying that the points seem to have been fully covered in instructions that were given, and those refused are open to the objection of being somewhat vague and argumentative and going beyond the rule as laid down in section 1096 of the Penal Code.

[9] Complaint is also made that the court refused to instruct the jury that their verdict must not be influenced by any feeling of sympathy towards the survivors of the deceased passengers. We must assume jurors selected to try the issues of a cause need not be instructed upon every contingency, remote or speculative, that might arise. As men and women of ordinary intelligence we must concede them a sufficient understanding of the responsibilities of their office to resist any influence of sympathy and decide the issue upon the facts. If they were not so inclined to separate their sympathy and their sense of justice, a mere admonition by the court would not correct that fundamental defect.

The other specifications of error in reference to certain instructions would seem to be answered and covered by the instructions given by the court. After a careful consideration of the entire cause, we believe the errors noted by appellant did not result in a miscarriage of justice, and the judgment and the order should be, and are, affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

137 Cal.App. 713

LOCKHART v. LOCKHART et al.

Civ. 8961.

District Court of Appeal, First District,
Division 1, California.
April 5, 1934.

1. Payment ⇨65(6).

Burden of proving payment of admitted debt rests upon debtor.

2. Accord and satisfaction ⇨10(1).
Compromise and settlement ⇨6(2).

In absence of dispute, there can be no settlement resulting in accord and satisfaction.

3. Chattel mortgages ⇨157(2).

Evidence showed that son's indebtedness of $3,000 to mother was omitted from assignment, absolute in form, of son's interest in trust as security for past and future advances.

4. Appeal and error ⚷1048(2).
Witnesses ⚷198(2).

Exclusion of testimony of mother's attorney that while acting as son's attorney he in son's absence telephoned trustee that son would make absolute assignment of interest in trust as security for advances by mother *held* error, but harmless, where absolute assignment was admitted in evidence.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by George J. Lockhart against Minnie A. Lockhart and another. From a judgment for plaintiff, the named defendant appeals.

Affirmed, with instructions to correct amount of judgment.

John C. Miles and S. L. Carpenter, both of Los Angeles, for appellant.

Amend & Amend, Arthur G. Baker, John W. Luter, and Schweitzer & Hutton, all of Los Angeles, for respondent George J. Lockhart.

John W. Luter, of Los Angeles, in pro. per.

GRAY, Justice pro tem.

On August 22, 1922, respondent executed and delivered to his mother, the appellant, a written assignment, absolute in form, transferring all his interest in a trust created by his father's will. His complaint alleged that such assignment was intended only as security for specified sums of money then and subsequently advanced. Her answer claimed that such assignment was intended as a sale of his interest and that she had advanced specified sums, exceeding in amount those alleged by him. The court determined that the assignment was given as security for several advances, totaling $15,500, which, with interest, amounted to $19,210.40. Appellant raises but two questions, which will be discussed in order.

[1-3] First. Appellant claims that, contrary to the evidence, the judgment fails to include a debt of $3,000 with interest. It is undisputed that at the date of the assignment the parties agreed that respondent was indebted to appellant in the sum of $3,000; that on July 26, 1927, he executed and delivered to her his promissory note for $8,620; that on July 27, 1929, he executed and delivered a second note for $4,000; and that, subsequently, she paid his creditor, at his instance and request, the sum of $2,950. Obviously the judgment intended to determine that the last three debts were secured by the assignment, but, through faulty addition, their total as stated is short $70 of the correct amount. Respondent's brief frankly calls attention to this error and requests the judgment's correction by adding this shortage to the amount secured. If, as appellant contends, the evidence, without conflict, shows that the debt of $3,000 was not merged into the note for $8,620, the judgment must be corrected by adding to the sum of $19,210.40, the sum of $3,000 plus interest; but if, as respondent argues, there is any evidence, though contradicted, which discloses that such debt was so included, the amount of indebtedness specified in the judgment must stand. It is conceded that respondent received $5,000 at the execution of the note for $8,620 and that the difference between the principal of such note and such amount so received consisted of existing debts due from respondent to appellant. Respondent testified that on March 25, 1925, his mother loaned him $2,250, and on December 14, 1925, $500, each loan being evidenced by his note, and on August 21, 1925, gave a check for $439.33 to his then attorney for his use and benefit. Since respondent does not claim that the original debt for $3,000 was ever paid, except by its inclusion in the note for $8,620, there is no dispute between the parties that the existing debts, at the time of the execution of the note for $8,620, amounted, exclusive of interest, to the total of $6,189.33. Appellant's attorney, who procured the execution of the note for $8,620, testified that respondent and he agreed upon its principal by adding to the sum of $5,000 then paid, the total of the loans for $2,250 and $500 and the check $439.33. The subtraction of the total of these four amounts from the principal of the note leaves $430.67 which might be accounted for by the interest due on the last three debts, but which is insufficient to satisfy the original debt for $3,000. Respondent did not deny or contradict the attorney's testimony and did not expressly testify that the sum of $3,000 was included in the sum of $8,620 or that there was any dispute as to his indebtedness which would require a settlement of accounts. He merely testified that the principal of the note represented the total amount he owed his mother. The burden of proving payment of the debt of $3,000 rested upon his shoulders. In absence of any dispute there could

not be any settlement which resulted in an accord and satisfaction. It is clear therefore that the evidence shows, without conflict, that the original debt of $3,000, with interest, was erroneously omitted from the amount secured by the assignment.

[4] Second. The appellant claims that the court erred in refusing to allow, upon the ground it was a privileged communication, one of her attorneys, who, as respondent's attorney had negotiated the execution and delivery of the assignment, to testify that he, over the telephone, but in respondent's presence, had told the attorney for the trustee that an absolute assignment would be made. Although the attorney who was testifying was denied the right to make an offer of proof, the purport of his proposed testimony was adequately disclosed by the offer previously made by appellant's other attorney. Such communication to a third party was not privileged and the testimony should have been admitted. Bell v. Staacke, 159 Cal. 193, 115 P. 221; Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542. But the erroneous exclusion of this evidence was harmless because the introduction of the assignment, which was in the absolute form promised in the communication, amply proved the same fact as the excluded testimony tended to establish. 2 Cal. Jur. 1022.

Therefore, the judgment is affirmed, each party to pay his or her own costs, with instructions to correct the amount, due and secured by the assignment, by adding thereto said sum of $3,000 with interest and said shortage of $70 with interest.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

* * *

138 Cal.App. 46

KERN et al. v. HENRY et al.

Civ. 1252.

District Court of Appeal, Fourth District, California.

April 11, 1934.

Hearing Denied by Supreme Court June 7, 1934.

1. Bills and notes 🔑396.
Judgment 🔑248.

Defendants could not be held as indorsers on note where pleading showed action was not brought on note, and no presentment or notice of nonpayment, sufficient to bind defendants as indorsers, was ever made or given.

2. Bills and notes 🔑289.

Transfer and assignment of all of party's right, title, and interest in note and trust deed constituted "qualified indorsement."

[Ed. Note.—For other definitions of "Qualified Indorsement," see Words & Phrases.]

3. Payment 🔑18.

In absence of agreement of parties, transfer of note of third person does not extinguish primary obligation; but, where parties have so agreed, transfer and assignment of such note constitutes payment to that extent on original debt of transferor.

4. Payment 🔑73(4), 76(4).

Where note of third person is transferred, circumstances and conduct of parties may be sufficient to show understanding that third party obligation was accepted in satisfaction of debt, and question whether such transfer was so taken is one of fact for court or jury.

5. Vendor and purchaser 🔑80.

Evidence *held* to sustain finding that it was agreement and intention of parties that third party obligation transferred should be taken by plaintiffs as absolute and not conditional payment on purchase price of land sold by plaintiffs to defendant, notwithstanding that words "without recourse" were stricken from indorsement on note.

6. Evidence 🔑450(1).

In view of uncertainty in language used in escrow instructions, resort was properly had to other evidence as to what agreement was and what was thereafter done by parties in determining agreement and intention of parties.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action for money due, brought by Herbert F. Kern and others against C. V. Henry and another. From an adverse judgment, plaintiffs appeal.

Affirmed.

J. E. Trabucco and Vincent Surr, both of San Francisco, for appellants.

C. W. Braswell, of Long Beach, and Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondents.

BARNARD, Presiding Justice.

In March, 1928, the defendants purchased from the plaintiffs a certain tract of land, the deal being handled through an escrow. The escrow instructions recited that the purchase price of the property was $100,000, payable as follows: $26,000 by the delivery of a deed of trust executed by third parties covering an apartment house in Long Beach, $4,000 by the conveyance of other real property, $500 in cash, and the balance of $69,500 to be secured by a note and deed of trust on the property sold, to be executed by the defendants. In relation to the $26,000 trust deed referred to, the escrow instructions provided that the defendants would deliver to the escrow agent the note and trust deed, with a policy of title insurance and a policy of fire insurance, and that: "There will also be delivered with said promissory note and said deed of trust such instruments as may be necessary to vest title thereto in the vendors and said promissory note will be duly endorsed by the vendees, and there will also be furnished therewith a statement from the makers of said promissory note and deed of trust that the said sum of twenty-six thousand dollars remains unpaid on said promissory note, and that interest has been paid thereon to a date not later than April 1, 1928, and that there are no defenses or offsets to said note."

Apparently the papers called for by the escrow instructions were delivered to the escrow agent and the escrow closed. At some time, and the evidence justifies the inference that it was immediately after the transaction was closed, one of the plaintiffs made objection to the defendants to the manner in which the third party note had been indorsed. That note had been indorsed as follows:

"Long Beach, Cal., March 28th, 1928.

"For Value Received I hereby transfer, grant and assign to Herbert F. Kern, Reuben W. Kern, and Rose Kern Good, all my right, title and interest in the within note, together with all rights accrued and to accrue under the deed of trust securing same, so far as the same relate to this note, without recourse."

By consent and agreement of the parties the words "without recourse" were thereupon stricken out, the change being initialed by the defendants. Thereafter, the plaintiffs collected interest on said third party note up to July 1, 1930, although the principal sum became due on April 27, 1930. Nothing further was paid on the note and for nearly two years the plaintiffs made various attempts to collect from the makers thereof and the makers of the note made a number of attempts to secure extensions from the plaintiffs. Finally, on January 29, 1932, the plaintiffs had the Long Beach property sold under the trust deed, the same netting $9,183.28. No action to collect the deficiency was ever brought against the third parties, and no notice of any kind was ever given these defendants that there had been any default or that anything was expected of them until this suit was filed seeking to recover a balance of $18,354.76.

The complaint is in two counts, the first alleging an indebtedness in the amount named and the second alleging that the plaintiffs sold to the defendants certain real property for the sum of $100,000; that the defendants assigned to the plaintiffs by way of conditional payment only, of a part of the purchase price, an indebtedness of third parties to the defendants in the sum of $26,000; that it was agreed between the parties that in the event the third parties failed to pay said sum of $26,000 the defendants would pay the same; and that it was agreed that said assignment of the third party indebtedness should not constitute a payment of defendants' debt to plaintiffs save, except, and only to the extent that plaintiffs should collect thereon from the third parties prior to the date the same became due. Issue was joined and the action was tried upon the theory that the transfer and assignment of this third party indebtedness was by way of conditional payment only, and that the same was not accepted by the plaintiffs as a payment to that extent upon the purchase price of the land. The court found in favor of the defendants, finding that they were not indebted to the plaintiffs in any amount and that the transfer of the note and trust deed to the plaintiffs was not made as a conditional payment but was made as an absolute payment to that extent upon the purchase price of the land being purchased by the defendants. From the judgment which followed the plaintiffs have appealed.

[1, 2] The appellants' theory seems to be that the respondents agreed through the escrow instructions to give an unqualified indorsement to the third party note, and that when the words "without recourse" were stricken from the indorsement as originally made, the respondents became liable as indorsers of this note. The points raised by the appellants, the citations and the argument all relate to the theory that the re-

spondents are liable as such indorsers. These are of small assistance to the court and it would seem that the respondents may not be held here on a liability as indorsers on this note for the threefold reason that the pleadings show that the action was brought on the original indebtedness and not upon the note, that the transfer and assignment of all right, title, and interest in the note and trust deed which remained after the words "without recourse" were stricken therefrom still constituted a qualified indorsement (Kane v. Eastman, 110 Cal. App. 753, 295 P. 63; Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 P. 404); and that no presentment or notice of nonpayment sufficient to bind the respondents as indorsers was ever made or given. Under the circumstances here appearing, if respondents are liable at all, it is upon the theory that there was no agreement that the third party obligation should be taken as payment to that extent upon the obligation of the respondents, and that, for this reason, they are liable upon their original indebtedness.

[3-5] It is well settled in this state that in the absence of an agreement of the parties, the transfer of a note of a third person does not extinguish the primary obligation. Kane v. Eastman, supra. It is equally well settled that where the parties have so agreed, the transfer and assignment of a note given by third parties constitutes a payment to that extent on the original debt of the transferor. Swan v. Smith, 102 Cal. App. 541, 283 P. 829; Giant Powder Co. v. Fidelity & Deposit Co., 214 Cal. 639, 7 P.(2d) 1023. It is also the rule that the circumstances and conduct of the parties may be sufficient to show an understanding that the third party obligation was accepted in satisfaction of the debt and that the question whether such a transfer was so taken is one of fact for the court or jury. Conde v. Dreisam Gold Min. Co., 3 Cal. App. 583, 86 P. 825; Swan v. Smith, supra; Taylor v. King, 102 Cal. App. 361, 282 P. 1017. The real question here presented is whether the evidence sustains the court's findings to the effect that it was the agreement and intention of these parties that the third party obligation transferred should be taken by the appellants as an absolute and not a conditional payment upon the purchase price of the land being sold by them to the respondents.

The appellants rely entirely upon the wording of the escrow instructions and on the fact that the words "without recourse" were stricken from the indorsement on the note as originally made. It is significant that while one of the appellants took the witness stand, no word of testimony was given to the effect that it had ever been agreed between the parties that the transfer of the third party obligation was to be considered a conditional payment only. After the words "without recourse" were stricken from the indorsement on this note, the indorsement as thus amended purported to transfer and assign only the right, title, and interest of the respondents in the note and deed of trust securing the same and, under well-established rules, this remained a qualified indorsement. While the escrow instructions contained a clause that the respondents would deliver the third party note and that the same would be duly indorsed by the vendees, these instructions also clearly show that the sum of $26,000 of the indebtedness of the respondents was to be paid by the delivery of the third party note and the deed of trust securing the same. In great detail the instructions provide that the respondents were to deliver the note duly indorsed and deliver the deed of trust, with a policy of title insurance showing the same to be a first lien upon the property covered thereby, to deliver a policy of fire insurance, such instruments as might be necessary to vest title in the note and deed of trust in the vendors, and also a statement from the makers of the note and deed of trust to the effect that the principal sum remained unpaid, that no advance interest had been paid, and that there were no defenses or offsets to the note. It will also be observed that while a deed of trust upon the property sold was given to secure the payment of what is denominated the "balance of the indebtedness," this balance is named and is exclusive of the amount which it is provided shall be paid by the transfer of the third party indebtedness.

It appears from the evidence that the escrow instructions were prepared by the attorney for the appellants. The appellants' agent, who negotiated the deal, testified that when he first approached the respondents and endeavored to sell the land to them the respondents refused to entertain the proposition unless they could sell and obtain the money for the note and trust deed in question; that thereafter the respondents attempted to sell this third party obligation to a bank but were unsuccessful; that subsequently the respondents consented to proceed with the deal upon the condition that the appellants would accept the third party note and trust deed as a payment of $26,000 on the purchase price; that the agent submitted this proposition to the appellants and they told him they would investigate the property in Long Beach for the purpose of ascertaining the value of the security; that later the appellants assented to the proposition and escrow instructions were prepared and the deal finally consummated. One of the respondents testified to the same essential facts, that the agent reported to him that the deal was satisfactory to the other parties on that basis, and that the escrow instructions were then signed. There is uncontradicted evidence to the effect that the property covered by the third party trust deed was sold at a trustee's sale and purchased by the appellants for $10,000 at a time when it was reasonably worth $30,000, that after the note became due they carried on negotiations with the makers thereof and attempted to collect from them for a period of nearly two years before proceeding to sell the property; and that at no time prior to the filing of this suit were the respondents given any notice that the note had not been paid or that the appellants expected to look to them for the payment of the same.

[6] The agreement of the parties, as set forth in the escrow instructions, contains one ambiguity in that the clause that the note shall be "duly indorsed," if interpreted as calling for an unqualified indorsement, seems to conflict with the other provisions plainly indicating an intention that the note and trust deed were to be so assigned as to vest title thereto in the appellants, and that the same was to constitute a payment in the amount of the face of the note. It may reasonably be inferred from the wording of the instructions and from the change in the indorsement on the note, which was later requested and accepted by the appellants, that the intention was merely to provide completely for the assignment of the third party obligation, and that the change in the indorsement was asked for and made merely to carry out that purpose and to eliminate any language which might seem to throw any doubt on the value of the note. In view of the uncertainty in the language used, resort was properly had to other evidence, as to what the agreement was and what was thereafter done by the parties, which throws considerable light on the problem. The essential question presented to the trial court was one of fact and the evidence sustains the findings made.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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137 Cal.App. 455

STANDARD OIL CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 8912.

District Court of Appeal, Second District, Division 1, California.
March 20, 1934.

Rehearing Denied April 13, 1934.

1. Master and servant ⚷419.

Permanent disability from injury following temporary disability from same injury is "new and further disability" authorizing additional compensation (St. 1917, p. 831, § 11 (c).

[Ed. Note.—For other definitions of "New and Further Disability," see Words & Phrases.]

2. Master and servant ⚷419.

Evidence *held* to warrant finding that there was change of condition from temporary disability to permanent disability, authorizing additional compensation after expiration of limitation period (St. 1917, p. 831, § 11 (c).

3. Constitutional law ⚷301.
Master and servant ⚷347.

Workmen's Compensation Act, construed to permit awarding additional compensation for new and further disability when condition of original injury changes from temporary to permanent disability even after expiration of limitation period, *held* not violative of Fourteenth Amendment (St. 1917, p. 831, § 11 (c); Const. U. S. Amend. 14).

CONREY, P. J., dissenting.

Proceeding under the Workmen's Compensation Act by G. W. Winnes, opposed by the Standard Oil Company of California, employer. To review an order of the Industrial Accident Commission awarding additional compensation for change of condition, employer brings certiorari.

Affirmed.

Lawler & Degnan, of Los Angeles, for petitioner.

Arthur I. Townsend, of San Francisco, for respondent.

YORK, Justice.

One G. W. Winnes, who was employed by petitioner as a well puller, was injured September 13, 1928. He was riding on a truck which was approaching one of petitioner's oil

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rigs; the front wheels of the truck struck a rut, causing it to "shimmy," whereupon the driver suddenly swerved the truck and applied the brakes, causing Winnes (hereinafter referred to as applicant) to fall off the truck and to strike his head on a "walking beam" or timber. Upon examination of his injuries, applicant was found to have sustained a fractured skull, a fractured right shoulder, fractured metatarsal bone of the left foot, and injuries to the left ear and the right eye. On March 11, 1929, he returned to work and performed "light duty" until the end of that year, when he was returned to "regular duty," but not in the capacity of well puller. He continued working until June 22, 1931, when his employment was terminated because of a reduction in the force. The petitioner voluntarily paid compensation to the applicant to and including March 8, 1929, in the sum of $598.01, and on July 15, 1931, applicant filed his petition for adjustment of claim before the Industrial Accident Commission. Upon hearing before the commission it was found under date of October 29, 1931, as follows:

"2. Said injury caused temporary total disability continuing from September 13, 1928, to and including March 10, 1929, for which compensation as disability indemnity has been paid in the sum of $598.01 to and including March 8, 1929, by defendant to applicant herein, and the evidence does not establish that said injury has caused any compensable new and further disability up to this time, and said application is barred by the lapse of time under the Statute of Limitations applicable thereto as to any further compensation at this time, but jurisdiction is retained by this Commission to determine whether said injury causes any new and further disability within 245 weeks from the date of said injury upon Petition to Re-open being filed herein within sufficient time for such a re-determining to be made by this Commission within said jurisdictional period of 245 weeks.

"Award. Now, Therefore, it is ordered that applicant herein take nothing from defendant herein at this time."

On September 1, 1932, applicant filed his petition to reopen pursuant to section 20 (d) of the Workmen's Compensation Act (St. 1917 p. 850), and as allowed under the award of October 29, 1931. Upon another hearing being had, the commission made its "Order amending Findings and Award for a Rating" on October 31, 1932, as follows: "It is hereby ordered that Findings and Award dated October 29, 1931, be and they are hereby amended as follows:

"Finding No. 2 in said Findings and Award is amended to read as follows:

"2. The injury herein has caused permanent disability consisting of post traumatic head symptoms of vertigo, headaches, irritability, emotionalism, et cetera; deafness in left ear; weakness of left arm and shoulders; impairment of grasping power of left hand; tinnitus over right side of skull. The percentage of said disability is 45½, entitling the employee to $20.83 a week for 182 weeks beginning with September 21, 1928, and amounting to $3,791.06, payable forthwith. Said weekly benefit is based upon a maximum average earnings fixed by law as a basis for computing compensation at the time of said injury. Defendant is entitled to credit of $598.01, heretofore paid as temporary disability indemnity against said permanent disability indemnity on account of said injury.

* * *

"The Award in said Findings and Award is amended to read as follows:

"'Award

"'Award Is Hereby Made in favor of George Wilbur Winnes, applicant, against Standard Oil Company of California, a corporation, defendant, in the sum of $3,791.06 payable forthwith, less $598.01 heretofore paid thereon. * * *'"

The Industrial Accident Commission under date of December 12, 1932, denied petition for rehearing in the matter, and the Standard Oil Company of California now seeks through writ of review in this court annulment of the award of October 31, 1932.

Petitioner complains that the respondent commission acted without and in excess of its powers in making an award upon claims not only barred by the period of limitations, but which had previously been heard and finally determined by it; also that the order of October 31, 1932, was unreasonable because of failure of evidence to establish the existence of new and further disability and that the findings do not support the order; also that the Workmen's Compensation, Insurance and Safety Act, as applied herein, violates the Fourteenth amendment to the Constitution of the United States.

The main contention, therefore, is that jurisdiction of the commission to make the award of October 31, 1932, is dependent upon proof of new and further disability accruing subsequent to the first order made on October 29, 1931, and that there is no evidence sufficient to prove such new and further disability. Also that the commission's findings do not include any finding of new and further disability.

It appears from the record that the applicant's right to compensation for temporary total disability was barred six months from March 8, 1929, or on September 8, 1929, and therefore his application filed July 5, 1931, was too late in so far as temporary total disability is concerned. It was incumbent upon the commission at the hearing of August 10, 1931, to discover whether or not the applicant had new and further disability within the meaning of section 11 (c) of the Workmen's Compensation Act, which provides as follows: "The payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment; provided, however, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period." (St. 1917, p. 831.)

[1] Quoting from the case of City of Pasadena v. Industrial Accident Commission and Fred Silka (Cal. App.) 29 P.(2d) 447, 448: "In the case of Associated Oil Co. v. Industrial Accident Commission, 214 Cal. 358, 5 P.(2d) 420, in substance the principle of law was announced (syllabus) that 'it is only when there is a change in the condition of the original injury, from a temporary to a permanent disability, that a "new and further disability" is established. * * *' And in Cowell L. & C. Co. v. Industrial Accident Commission, 211 Cal. 154, 294 P. 703, 72 A. L. R. 1118, it was ruled (syllabus) that 'a permanent disability from an injury which follows a temporary disability from said injury is a new and further disability within the provisions of the Workmen's Compensation Act.'"

[2] The record here contains reports of various physicians who examined the applicant during the months of July, September, and October of the year 1932, and we here set out excerpts therefrom to show that there was sufficient evidence adduced to establish permanent disability of the applicant.

"The patient complains of severe headache, severe vertigo occurring at irregular periods and of varying intensity, has disturbance of vision, general malaise and weakness, forces himself to do any type of work occasionally, lameness in the left foot and leg, gradual loss of power in the left arm and forearm, extreme sensitiveness to heat, pain over the frontal and right temporal regions, this latter almost constant. Impaired hearing in left ear, difficulty in mastication, frequent attacks of toothache, much distress and worry about his physical condition and inability to get well. * * * For the present claimant is totally unfitted for his usual occupation and some of the above symptoms would indicate that pressure is being exerted on some centers by the fracture repair in the skull."

From another report the following is taken: "(1) I think it extremely unlikely, because of the existence of this deafness for 5 years, that any further recovery in hearing will take place. (The quoted 5 years is in error—4 years is correct.)

"(2) I further believe that Mr. Winnes has suffered permanent brain damage which is sufficient to cause the symptoms of which he complains. It does not seem likely that he is able at the present time to fully carry out the arduous duties he had performed prior to the accident. I do think however that he is, and will be able to carry out light tasks not involving exposure to extremes of heat or physical fatigue.

"(1) I believe the deafness is permanent.

"(2) It is impossible to say how long the remainder of symptoms due to skull and brain injury will persist, but there is a strong likelihood that a certain degree of this disability will be permanent."

From another report: "The evidence in the case shows that he has not been improving recently, but is stationary or regressing slightly. In such cases the damage which the brain suffers disappears to a certain point, which is usually reached in about twelve to eighteen months. Since the accident occurred four years ago, I do not expect any further improvement, and I think that the patient is permanently disabled for the occupation in which he was engaged when injured. He is able to do work of a less strenuous nature if it can be provided for him, but he is emotionally inadequate to meet the exigencies of life such as is necessary in competition with normal men. His mental state is not that of an ordinary psycho-neurotic who has been injured. He feels no resentment and has no complaints but merely wishes to get himself rehabilitated."

From another report, we quote: "In September, 1929, he became ill from the odor of an oil tank and remained at home for one week. He was engaged in general lease work occasionally helping out in his old position as well-puller. On June 21st, 1931, he was discharged and has not worked since.

"Ever since his injury he has had headaches which are deep seated, of a bursting, aching, throbbing character; occurring in attacks lasting several hours to a week and at a frequency of two to three times a week. These pains are extremely severe and are exaggerated by movement, excitement, nervousness, worry, rapid head movements, stooping and riding in elevators. They are situated in the right frontal region, radiating to the right occipital region, occasionally moving across his eyes. Associated with these headaches he has dizziness. This dizziness never occurred alone. It is an actual rotation, things go black before his eyes, he feels unsteady, sways from side to side, but has never fallen."

Another report states: "It is clear from the history and X-ray findings that this patient suffered a fracture of the skull with a severe concussion at the time of the injury. At the present time the only objective finding is a deafness in the left ear. The patient has numerous subjective complaints including an area of hyperasthesia over the right side of the skull. I believe his present condition is due to a post concussional syndrone and considering the length of time since the accident, I believe the outlook for complete recovery is poor. * * * Taking into consideration the severity of the injury and the length of time that has elapsed I believe there will be some permanent disability."

In cases of this type, it would be extremely difficult to ascertain within a few months of the injury whether the disability was merely temporary, or of a permanent nature; hence the propriety of the provisions of section 11 (c) of the Workmen's Compensation Act giving to the commission a continuing jurisdiction for a period of 245 weeks within which time the injured employee may show that his injuries have caused a permanent disability. The record shows that the employee here was required to attend several hearings and examinations made by physicians in order to ascertain his condition, and that these took place during the hot weather. It is also shown that the heat to which he was thus exposed greatly aggravated is condition. With this in mind—that he had to travel in the heat after his original injury and after the original hearing before the commission, and that this exposure to the heat may very well have caused a relapse or further injury to the applicant—this court does not feel disposed to disturb the finding of the commission.

[3] As to petitioner's claim that the Workmen's Compensation Act is unconstitutional, we believe the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398, cited by respondent, answers such claim in the negative.

The award is affirmed.

I concur: HOUSER, J.

I dissent: CONREY, P. J.

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138 Cal.App. 39

d'ARTENAY et al. v. HANSEN et al.

Civ. 1228.

District Court of Appeal, Fourth District, California.

April 11, 1934.

1. Vendor and purchaser 🔑334(1).

Vendor who wrongfully attempts to enforce forfeiture in contract of sale by suit to quiet title abandons contract, and purchaser may immediately elect to treat contract as rescinded and sue for purchase money paid.

2. Limitation of actions 🔑28(2).

Purchasers' action to recover back purchase money paid *held* barred two years after vendor filed complaint to quiet title, where purchasers elected to stand on contracts and defend them in such action (Code Civ. Proc. § 339, subd. 1).

3. Limitation of actions 🔑104½.

Where party fails to bring available action within time prescribed, and there is no legal disability existing, statute of limitations is not tolled by such party's election to avail himself of some other remedy.

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Appeal from Superior Court, Kings County; J. A. Allen, Judge.

Action to rescind contracts to purchase real property and to recover money paid thereunder by J. A. d'Artenay and another against Nis Hansen and another. From an adverse judgment, plaintiffs appeal.

Affirmed.

Clark Clement, of Lemoore, and E. W. Holland, of Tulare, for appellants.

John F. Pryor, of Hanford, and Farnsworth, Burke & Maddox, of Visalia (James K. Abercrombie, of Visalia, of counsel), for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after the sustaining of an amended demurrer to plaintiffs' complaint without leave to amend. The demurrer was both general and special. Among various grounds it pleaded the bar of the cause of action by the provisions of subdivision 1, § 339, of the Code of Civil Procedure.

An examination of the complaint discloses the following allegations: That the plaintiffs and the defendants were husbands and wives; that on or about September 1, 1922, a written contract was entered into whereby the defendants agreed to sell land in Kings county, together with three hundred twenty shares of water stock, to J. A. d'Artenay, and on the same day entered into a written amendment of the contract, copies of both of which agreements were attached to the pleading; that J. A. d'Artenay entered into possession of the property and retained possession until he was ejected by process of court; that on June 20, 1929, defendants commenced an action in the superior court of Kings county against these plaintiffs to quiet the title to the real property in question; that these plaintiffs filed an answer in the quiet title action setting forth the two contracts of September 1, 1922, and alleging that J. A. d'Artenay had performed all of the terms and conditions of the two contracts to be performed by him; that the action was tried; that judgment was rendered on October 28, 1929, quieting the title of Nis and Minnie D. Hansen to the real property and canceling the two contracts of purchase; that execution was immediately issued and J. A. and Octavia d'Artenay ejected from the property; that J. A. and Octavia d'Artenay appealed and the judgment was reversed and remittitur filed on May 20, 1932 (see Hansen v. D'Artenay, 121 Cal. App. 746, 9 P.(2d) 889); "that the commencement of said action, and the making and entry of said judgment, and the ejection of said plaintiffs (J. A. and Octavia d'Artenay) from said premises thereunder as aforesaid, were without legal cause or right, and that it was the intent of said defendants (Nis and Minnie D. Hansen) in causing said unauthorized acts, to abandon said contract and said modification thereof, and to rescind the same"; that prior to the commencement of the quiet title action J. A. and Octavia d'Artenay had paid Nis and Minnie D. Hansen $51,485.32 on account of the purchase price; that, at the time that action was instituted, "the plaintiff J. A. d'Artenay had performed all of the terms and conditions of said agreement and modification thereof required of him to be performed thereunder"; "that said plaintiffs (J. A. and Octavia d'Artenay) have elected, and do hereby elect, to treat said contract as abandoned as aforesaid, and have therefore demanded, and hereby demand, from said defendants (Nis and Minnie D. Hansen) the repayment to plaintiffs (J. A. and Octavia d'Artenay) of said sum of fifty-one thousand four hundred eighty-five dollars and thirty-two cents ($51,485.32); that since said judgment of reversal, and preceding the commencement of this action, plaintiffs (J. A. and Octavia d'Artenay) served upon defendants (Nis and Minnie D. Hansen) notice in writing of said election and said demand, a copy of which said notice is attached hereto, marked 'Exhibit C,' and made a part of this complaint;" that no part of the sum of $51,485.32 has been repaid to J. A. and Octavia d'Artenay, and judgment is prayed for that amount together with interest.

[1, 2] It is the theory of the plaintiffs that the suit instituted by defendants to quiet title, and the ejectment of plaintiffs from the property, was a wrongful invasion of their rights under the two contracts of purchase and amounted to an abandonment of the contracts and entitled the plaintiffs to rescind them and recover the purchase money. Heilig v. Parlin, 134 Cal. 99, 66 P. 186; Bray v Lowery, 163 Cal. 256, 124 P. 1004; San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 P. 325; Lemle v. Barry, 181 Cal. 6, 183 P. 148, 149; Gaume v. Sheets, 181 Cal. 119, 183 P. 535; Peloian v. Waldman, 54 Cal. App. 116, 201 P. 344; Michaelian v. Elba Land Co., 76 Cal. App. 541, 245 P. 476.

That the institution of the action to quiet title might have been regarded by the plaintiffs as an invasion of their rights and an abandonment of the contracts is admitted by the defendants. They urge that the intention to abandon the contracts was evidenced by the filing of the suit to quiet title on June

20, 1929; that the plaintiffs could have acquiesced in the abandonment of the contracts and effected the rescission on that date. They further urge that the plaintiffs' cause of action for the recovery of the money paid accrued on June 20, 1929; that it was not founded upon a written instrument but an implied promise to repay the money; that the time within which to institute the action to recover the money is limited to two years by the provisions of subdivision 1, § 339, of the Code of Civil Procedure; that as their complaint was not filed until May 27, 1932, their cause of action is barred by the statute of limitations. The trial court adopted this theory in sustaining the amended demurrer to the complaint without leave to amend.

The plaintiffs seek to escape the results of this argument by urging that the question of whether or not they had violated the terms of the two contracts was the essence of the dispute between the parties in the quiet title action; that Nis and Minnie D. Hansen urged that such a breach had occurred and that it permitted them to enforce the forfeiture clause of the contracts. Plaintiffs maintained that no such breach had occurred and that the contracts were in full force and effect; that this question was not adjudicated until the decision of this court in the case of Hansen v. D'Artenay, supra, had become final and the remittitur had been filed in the trial court; that they acted promptly thereafter to assert the abandonment and rescission and sue for the return of the money.

[3] It seems well settled in California that, when a vendor wrongfully attempts to enforce the forfeiture clause in a contract of sale by a suit to quiet title, such action amounts to an abandonment of the contract, and the vendee may immediately elect to treat the contract as rescinded and sue for the return of the purchase money paid. In Lemle v. Barry, supra, it was said: "It follows that on June 4, 1913, the vendee was not in default for failure to make the payment due 60 days from the date of the contract, and that the attempt to declare a forfeiture on the theory that the vendee was in default was unavailing, and that the contract still remained in full force and effect. Boone v. Templeman, supra, 158 Cal. 298, 139 Am. St. Rep. 126, 110 P. 947. Under the circumstances the vendors' notice was, in effect, an unauthorized attempt to abandon the contract. It is true that their action was predicated upon the erroneous claim that the vendee was in default for failing to make the 60-day payment. If the vendee, in fact, had been in default, a notice that the contract was terminated would have been proper, and the vendors would be no longer bound either to convey the land or refund the purchase money. Such notice would have been in strict accord with the contract. Glock v. Howard, 123 Cal. 1, 10, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 P. 713; Oursler v. Thacher, 152 Cal. 739, 93 P. 1007; Skookum Oil Co. v. Thomas, 162 Cal. 539, 549, 123 P. 363; Cross v. Mayo, 167 Cal. 594, 140 P. 283; Myers v. Williams, 173 Cal. 301, 159 P. 982. As it was, the vendee immediately upon receiving the vendors' unwarranted notice had the right to treat the same as an abandonment of the contract, and to the return of the installment of the purchase price theretofore paid." See, also, Gaume v. Sheets, supra. It seems clear, therefore, that, had the plaintiffs here elected to do so, they could have treated the contract as abandoned at any time after the complaint to quiet title was filed on June 20, 1929, and could have sued immediately for the refund of their money. This they did not elect to do. They filed an answer setting forth their contracts and asserting an interest in the property under them, denying that they were in default in the performance of their obligations under the contracts, and alleging faithful performance by themselves. The case went to trial on the issues thus framed, and the trial court rendered judgment against them. The judgment was reversed by this court on appeal upon the ground that the evidence failed to show default on the part of J. A. and Octavia d'Artenay. This decision left the case in the same condition as though it had never been tried except for our conclusion on the sufficiency of the evidence introduced at the trial. We established no new rights in any of the parties, but merely declared their rights as they existed when the pleadings were filed in that action. When the remittitur was filed, it left the case at issue to be tried again on the complaint of the plaintiffs to quiet title to the property and the answer of the defendants in which they set up an interest in the property through their contracts of purchase which must have been considered by them in full force and effect under such allegations. Without abandoning this defense or releasing or offering to release any interest held in the real estate and water stock under the contracts of purchase then in full force and effect under the allegations of the answer in the quiet title action, J. A. d'Artenay served a notice on Nis and Minnie D. Hansen stating that he acquiesced in their

abandonment of the contracts, treating them as rescinded and demanded the repayment to him of the $51,485.32 and interest. This notice was dated May 19, 1932, and the present action was filed May 27, 1932. The legal position of the parties was exactly the same on May 19 and May 27, 1932, as it was immediately after the filing of the complaint to quiet title on May 20, 1929. At that time J. A. and Octavia d'Artenay had the choice of various methods of procedure. They could stand upon their contracts and insist upon the maintenance of their rights under them, "or, they could accept the defendants' (Nis and Minnie D. Hansen) attempted repudiation and abandonment of the contract, and, treating them as thus rescinded, sue for the return of the money already paid on them." Pearson v. Brown, 27 Cal. App. 125, 148 P. 956. J. A. and Octavia d'Artenay elected to stand on the contracts and defend under them for almost three years. In the meantime the statute of limitations ran against their cause of action for the recovery of the portion of the purchase price paid. The plaintiffs cannot complain at this result, because the choice of remedies was their own. They might be able to stand on their contracts and defend against the quiet title action, retaining whatever interest in the land and water stock their contracts give them. Where a party fails to bring an available action within the time prescribed, and there is no legal disability existing, the statute of limitations is not tolled by their electing to avail themselves of some other remedy.

The case of Thomas v. Pacific Beach Co., 115 Cal. 136, 46 P. 899, 900, is factually similar to the instant case and is decisive of the question we are considering. The Pacific Beach Company and Thomas entered into a contract of sale and purchase of real property. The Pacific Beach Company served Thomas with a notice of default under the terms of his contract, which consisted in the failure of Thomas to make a payment on the purchase price. It appeared that Thomas was not in default at the time of the service of the notice for the reason that the Pacific Beach Company had failed to tender a deed to the property. Thomas treated the notice of default as an abandonment of the contract by the Pacific Beach Company and brought suit for the recovery of the installments which he had paid on the purchase price. The trial court overruled a demurrer to the plaintiff's complaint, which pleaded the bar of the action in two years by the provisions of subdivision 1, § 339, of the Code of Civil Procedure. The question decided was whether the limitation of two years or four years applied. In deciding this matter, the Supreme Court said: "There is in this contract no express stipulation or agreement to do the thing which the action seeks to enforce. The contract was to convey the title upon payment of the price, but there is no agreement to repay in default of such conveyance. The action is to recover the money so paid, by reason of a refusal to convey, and is necessarily based upon the implied promise of the grantor that it would so repay the money in default of making title. * * * Actions of the character of the one at bar have been uniformly treated as actions resting in implied assumpsit as for money had and received (Joyce v. Shafer, 97 Cal. 335, 32 P. 320; Shively v. Semi-Tropic Land, etc., Co., 99 Cal. 259, 33 P. 848); and, under the facts alleged, we think this case must be so regarded and as governed by the two-years limitation prescribed by subdivision 1 of section 339."

It follows in the instant case that the plaintiffs' cause of action to recover the purchase money was barred in two years after the filing of the complaint to quiet title by Nis and Minnie D. Hansen and that the amended demurrer to their complaint was properly sustained.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

138 Cal.App. 21

CITY OF PASADENA v. UNION TRUST CO. OF SAN FRANCISCO et al.

Civ. 9329.

District Court of Appeal, First District, Division 2, California.

April 11, 1934.

Hearing Denied by Supreme Court June 7, 1934.

1. Eminent domain 🔑202(1).

Evidence *held* to sustain finding in action to condemn land for proposed dam and reservoir site, that parcel consisting of 31.07 acres had market value of $15,000.

2. Eminent domain 🔑134.

In eminent domain proceeding, adaptability of land for particular purpose may be considered in fixing market value only so far as public would have considered it if land had been offered for sale in absence of exercise of power of eminent domain.

3. Eminent domain 🔑134.

That most profitable use of land could be made only in connection with other land is not conclusive against its being considered in determining market value in eminent domain proceeding if union of properties is so practicable that possibility would affect market price.

4. Eminent domain 🔑134.

City exercising power of eminent domain should not be made to pay for any part of what it has added to land by uniting it with other lots, if such union would not have been practicable and not attempted except by intervention of eminent domain.

5. Eminent domain 🔑202(4).

In action to condemn land for dam and reservoir site court *held* justified in determining that because of impracticability of joining defendant's land with remaining land in site without resorting to eminent domain, and because city had acquired certain rights and permits, adaptability of defendants' land for use as part of dam and reservoir site would not have increased value in minds of purchasers generally and hence should not be considered in fixing market value.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action to condemn land for proposed dam and reservoir site brought by City of Pasadena against the Union Trust Company of San Francisco and others. From an adverse judgment, defendant Louie Pollard and another appeal.

Affirmed.

Bernard Potter and Donald M. Keith, both of Los Angeles, for appellants.

Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, for the People.

SPENCE, Justice.

Plaintiff sought to condemn two parcels of land for use as part of a proposed dam and reservoir site in San Gabriel Canyon. The parcel designated as parcel No. 2 belonged to the defendants Pollard, while the parcel designated No. 5 belonged to the defendants O'Melveny. Upon a trial by the court sitting without a jury, plaintiff had judgment. The trial court found in part that the market value of said parcel No. 2, belonging to the defendants Pollard, was the sum of $15,000 and entered judgment accordingly. This appeal from the judgment has been taken solely by the defendants Pollard.

Appellants' attack upon the judgment relates solely to the amount which they were awarded for said parcel No. 2, which parcel consisted of 31.07 acres. The testimony relating to the market value of said parcel on February 23, 1932, which was stipulated as the proper date for the determination of market value, was voluminous. Several witnesses were called and their opinions on the market value of said parcel varied from $1,389 to $75,000. Only two of the ten experts placed the figure at more than $20,000, while five of said experts placed the figure at less than $10,000. The reason for the wide variance between these figures is found in the fact that certain experts based their estimates of market value upon the availability of said parcel 2 for use as part of a dam and reservoir site consisting of over 400 acres, while other experts made their estimates of market value without considering the availability of said parcel 2 for use for such purposes. A great deal of the testimony of appellants' witnesses was admitted over the objections of respondent, who contended throughout the trial that the availability of said land for use as part of a dam and reservoir site could not be considered in fixing the market value for the reasons hereafter discussed. At the conclusion of the trial, the court expressed dissatisfaction regarding the state of the testimony. During the discussion between court and counsel, the trial court said that "the only testimony that is at all satisfactory to the court is Mr. Sonderegger's testimony, and he puts the value at $13,328." The court further said, "As the evidence stands now, the Court is going to be compelled to find that the value of this particular property is just about the same for dam and reservoir purposes as it is for cabin sites. And I do not mind giving you the Court's estimate of value now. * * * It will be $15,000.00." The trial court therefore found as follows in finding No. XI: "The court finds that the market value of the property of the defendant Grace Pollard sought to be condemned herein and heretofore in these Findings of Fact described, on the 23rd day of February, 1932, was $12,500.00; and that the value of all of the improvements thereon pertaining to the realty on said date was the sum of $2,500.00; that the land of the defendant Grace Pollard, sought to be condemned herein, consists of all of an entire parcel of land and that there is no damage to any remaining parcel; that the aggregate market value of said lands, and the improvements thereon, as of said date, was the sum of $15,000."

[1] It is apparent from what has been said that there is ample evidence to sustain said finding No. XI relating to market value. The trial court, however, made certain further findings bearing upon this subject and it is upon certain portions of these further findings that appellants make their attack and thereby indirectly attack said finding No. XI. We deem it advisable to set forth some of these further findings bearing upon the question of the market value of said parcel No. 2.

Finding No. VI reads: "The Court further finds that no one of the several parcels of land sought herein to be condemned is, when considered alone, useful or adaptable to use as a reservoir right of way or dam site; that prior to the commencement of this action, the plaintiff endeavored to purchase parcels of privately owned land in the reservoir right of way sought to be condemned herein and of which the land of the defendant Grace Pollard hereinabove described is a part; that in endeavoring to acquire said parcels of land, the plaintiff City of Pasadena approached the owner of one of said parcels (Parcel No. 5 herein), to-wit, H. W. O'Melveny, for the purpose of negotiating such purchase; and that the said H. W. O'Melveny thereupon refused to sell his said parcel of land and refused to name any price at which the City might acquire his said land; that without union with said Parcel No. 5 the highest available use of Parcel No. 2 is for cabin sites and like resort and residential purposes."

Finding No. VII reads: "The court further finds that on March 27, 1923, prior to the commencement of this action, the City of Pasadena, the plaintiff herein, filed with the Division of Water Rights of the Department of Public Works of the State of California, applications for the appropriation of unappropriated waters of the San Gabriel River; that in response thereto there has been granted to the City of Pasadena by the said Division of Water Rights, a permit to appropriate 40,000 acre feet of such water per year, not to exceed 30,000 acre feet per year over any five year period."

Finding No. VIII reads: "The court further finds that in 1925, and prior to the commencement of this action, the City of Pasadena acquired and now holds title to two parcels of property which lie within that part of San Gabriel Canyon embraced within the flowline of any reservoir right of way which might be topographically available for lands in union with Parcel No. 2; that the City of Pasadena heretofore has obtained an option on 139.81 acres of land belonging to the Southern California Edison Company and lying within that part of San Gabriel Canyon which would be embraced within the flow-line of any reservoir which might be topographically available for lands in union with Parcel No. 2."

Finding No. X reads: "The court further finds that the highest available use of the lands included within Parcel No. 2 is for cabin sites and like resort and residential purposes."

Assuming, without deciding, that findings VI, VII, VIII, and X were material findings, we shall proceed to a consideration of appellants' contentions with respect thereto. Appellants state their contentions as follows: (1) "Adaptability of parcel for dam or reservoir purposes may be considered although it alone does not constitute an entire site and a complete site requires joining it to a number of other tracts belonging to different owners;" (2) "commencement of eminent domain proceedings could not affect right to show adaptability for any purpose;" and (3) "the fact that the City of Pasadena had acquired certain rights to water, rights of way, etc., did not preclude the right to show the adaptability of parcel 2 for dam site and reservoir purposes."

[2-5] At first glance the above-mentioned points raised by appellants would seem to indicate that appellants were deprived of the opportunity of showing that parcel 2 was part of a larger tract, which larger tract was adaptable as a dam and reservoir site. On the contrary, appellants were given the widest latitude in making such showing and it appears that such adaptability was conceded by all parties. Said points would seem to indicate further that appellants' experts were not permitted to consider the adaptability of the entire site for dam and reservoir purposes in estimating the market value of parcel No. 2. Such was not the case.

The trial court, over the objection of respondent, allowed appellants' witnesses to consider the adaptability of appellants' land for every purpose in making their estimates of market value. As we view the record and the briefs filed herein, the gist of appellants' attack is that the trial court erred in determining that "the highest available use" of parcel No. 2 was for cabin sites and further erred in fixing the market value, as indicated by the findings above set forth, without considering the adaptability of parcel No. 2 for use as part of a site for dam and reservoir purposes.

The general question before us on this appeal is not a new one. Similar questions have frequently been before the courts of this state and also before the courts of other jurisdictions. In City of Stockton v. Vote, 76 Cal. App. 369, 244 P. 609, this general subject and numerous authorities are discussed at length. We quote but a short passage from page 407 of 76 Cal. App., 244 P. 609, 624, where the court said: "If it should appear in the case at bar that there are other lands which the defendant does not own and cannot acquire, then and in that case, which is a fact for the jury to pass upon, the value of the land for reservoir purposes should be eliminated." In City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 P. 228, the authorities are again reviewed. The court there said on pages 728 and 729 of 96 Cal. App., 275 P. 228, 237: "In the principal case of City of New York v. Sage, 239 U. S. 57, 36 S. Ct. 25, 60 L. Ed. 143, the Supreme Court of the United States holds: 'The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.'" Continuing on page 731 of 96 Cal. App., 275 P. 228, 238, the court said: "There is nothing in the record indicating that any attempt whatever has been made to unite the lands in one parcel without resort to eminent domain proceedings."

We believe that the general rules set forth in the foregoing cases are too well settled to require further citation of authority. We shall therefore proceed to discuss briefly the application of said rules to the facts in the present case. It appears that appellants owned a parcel of land which constituted a part of a possible dam and reservoir site; that the vast area of land making up the entire dam and reservoir site was previously in the hands of numerous owners; that respondent had acquired numerous valuable rights from the federal and state authorities for the purpose of proceeding with its proposed dam and reservoir project; that respondent had acquired certain parcels of land and had obtained an option on other land; the respondent had attempted to acquire all of the land within the proposed dam and reservoir site without resorting to proceedings in eminent domain, but that said attempt had failed as the owner of parcel No. 5, which parcel consisted of approximately 60 acres, had absolutely refused to sell said parcel 5 at any price and that respondent had been compelled to resort to proceedings in eminent domain in order to accomplish the joinder of the parcels of land within the dam and reservoir site.

The question thus presented is stated by appellants in their brief as follows: "It being conceded by all to be a natural dam site and reservoir site, did the Court err in holding that by reason of the facts that Pasadena had purchased two parcels prior to starting condemnation proceedings; that it had secured a reservoir right of way from the Federal Government; that it had made water filings and acquired certain water rights; permits from Division of Water Resources; secured permit to construct dam; acquired all other properties in reservoir site except Parcels 2 and 5, and owner of Parcel 5 had refused to fix a price thereon, no consideration could be given to the testimony of witnesses as to the value of the property when based upon its adaptability for dam or reservoir purposes?"

We believe that the answer to the question as thus stated is that the trial court, as the trier of the facts, was justified in determining that because of the impracticability shown by the record of joining appellants' land with the remaining lands in the dam and reservoir site without resort to eminent domain and because respondent had theretofore acquired certain rights and permits from the federal and state authorities, the adaptability of appellants' land for use as a part of a dam and reservoir site would not have increased the value of appellants' land in the minds of purchasers generally and therefore should not be considered in fixing the market value. We believe that all the findings of the trial court were sustained by the evidence and under the circumstances the fixing of the market value without regard to the adaptability of appellants' land for use as part of a dam and reservoir site was entirely proper under the rules set forth in the authorities cited. In view of what has been said we do not deem it necessary to deal separately with each of the contentions of appellants as above set forth.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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137 Cal.App. 760

CITY OF STOCKTON v. MARENGO et ux.

Civ. 4983.

District Court of Appeal, Third District, California.

April 10, 1934.

Rehearing Denied May 10, 1934.

1. Eminent domain 🔑113.
Where street for which land was condemned through tract adjoining highway would divert traffic therefrom, the consequent reduction of value of gas station property resulting from diminished business *held* not element of damages (Code Civ. Proc. § 1248, subd. 2; Const. art. 1, § 14).

2. Eminent domain 🔑113.
Ordinarily, loss of business resulting from condemnation is not element of damages (Const. art. 1, § 14).

3. Eminent domain 🔑221.
What constitutes single parcel of land within condemnation statute governing damages is question for court (Code Civ. Proc. § 1248, subd. 2).

4. Eminent domain 🔑137.
Tract which, although mapped and platted for lots, was used for farming, *held* single parcel within condemnation statute allowing damages to remaining part (Code Civ. Proc. § 1248, subd. 2).

5. Eminent domain 🔑137.
Where part of farm, through which city condemned land for street, was separated by fence and occupied by gas station leased to third persons, court's including gas station property in holding that farm constituted single parcel within condemnation statute governing damages to remaining part *held* erroneous (Code Civ. Proc. § 1248, subd. 2).

◆

Appeals from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Condemnation action by the City of Stockton against Louis Marengo and wife. From a judgment for damages, both plaintiff and defendants appeal.

Reversed, with directions.

J. Leroy Johnson, of Stockton, for plaintiff.

Harry A. Encell, of San Francisco, for defendants.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

Both parties to this action in eminent domain have appealed from a judgment for damages which was entered pursuant to the verdict of a jury rendered incident to the condemnation of a strip of land beyond the limit of the city of Stockton, to be used as an extension of Washington street therein.

[1] The tract through which the proposed street is to be extended consists of several acres of land used by the defendants for the purpose of farming, except that the defendants' land has been platted and three lots have been sold therefrom with reference to the map which is on file. The northerly portion of this tract of land fronts on Borden public highway. The extreme northwesterly corner of this land, designated as lots 35 and 36 of the Marengo property, is separated from the balance of the tract by a fence and is occupied by a gas station, which is leased to strangers to this suit. The proposed extension of Washington street branches off on the southerly side of Borden highway, at a point about 600 feet southeasterly from the northwestern corner of the Marengo property, and extends westerly through that tract a distance of about 500 feet. The condemned strip of land is separated from the gas station property by an interval of 200 feet. The jury found that the value of the property condemned is the sum of $900, and that the damages to the portion which is not taken, occurring by virtue of the severance of the right of way therefrom, is $1,600. Findings

of court were adopted accordingly. A decree of condemnation was rendered in favor of the city of Stockton. The damages were assessed at the sum of $2,500 and costs of suit.

At the trial of the cause evidence was received in behalf of the defendants to the effect that the construction of the extension of Washington street along the condemned strip of land would have the effect of diverting a large proportion of the traffic from Borden highway and thus greatly depreciate the value of the gas station property. Evidence was adduced that this diverting traffic would damage the defendants' property which remains after the condemned strip of land had been severed therefrom to the extent of $25,000. Subsequently, on motion of the plaintiff, this evidence was stricken from the record, and the jury were instructed to disregard it in estimating the damage to the property resulting from a severance of the condemned strip from the remaining portion thereof.

The defendants contend the court erred in striking out the evidence of the damage resulting to the remaining portion of the tract by virtue of the alleged diverting of traffic from the Borden highway and the consequent reduction of the value of the gas station property. In support of this contention they have cited numerous authorities in other jurisdictions, some of which appear to be directly in point. There is, however, a conflict of authorities in eminent domain proceedings in other jurisdictions regarding this element of damages.

Article I, § 14, of the Constitution, declares that "Private property shall not be taken or damaged * * * without just compensation having first been made" therefor. Section 1248, subd. 2, of the Code of Civil Procedure, provides for the consideration of the following elements in determining damages accruing as a result of severance: "If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff," shall be ascertained and assessed.

In construing these rules applicable to severance damages in a proceeding in eminent domain, the defendants plausibly insist that the construction of the proposed extension of Washington street through their property will leave the gas station more than 200 feet away from the street, which will result in diverting a considerable amount of patronage and traffic from Borden highway, upon which patronage the gas station depends for its income to the detriment of the property which is not taken in the condemnation proceedings. This exact question has been determined adversely to the contention of the defendants in the case of People v. Gianni, 130 Cal. App. 584, 20 P.(2d) 87, 89, in which a hearing by the Supreme Court was denied. We are unable to distinguish that case from the facts of the present action. The Gianni Case appears to be determinative of the California rule in eminent domain proceedings that damages to the remaining property by virtue of severance may not be estimated on the ground of loss of business resulting from the abandonment of a highway or the diverting of traffic therefrom. In the Gianni Case the defendant owned a large tract of land upon which he operated a gas station adjacent to the public highway. The course of the highway was changed so as to leave the defendant's gas station a considerable distance therefrom. The new route, however, did require the condemnation of a small remote portion of the same tract of land some distance from the gas station. The value of the land taken in condemnation was fully compensated. There was no damage to the balance of the tract on account of severance of the new roadway, except the alleged damage resulting from the change of the route of the highway and the consequent diverting of traffic. The trial court held this last-mentioned element could not properly be considered in assessing damages on account of severance. The appellate court sustained the judgment, and the Supreme Court denied a hearing thereof. The court said in that case:

"The authorities seem in accord to the effect that an owner shall be compensated for all damage sustained. * * *

"The Code section quoted specifically relates that the severance damages to be awarded are such as will accrue to the portion not condemned, by reason of its severance and by reason of the construction of the improvement, etc. It is not a strained or forced construction to hold that the section implies at least some slight but direct connection between the claimed damage and either the severance or the construction of the improvement. * * *

"Whatever of apparent hardships there may be in particular cases where roads have been created for public use when the country was new, as in this state, and for the temporary convenience of a sparsely settled country, a greater hardship would be entailed upon the public if these roads could now be vacated or changed to meet the present situation without compensating those whose premises may abut thereon for the loss or inconvenience they may sustain, as, if that were the rule, none would consent to the change, and the added burden would be an embargo upon the creation of new and desirable roads."

[2] The loss of business resulting from condemnation proceedings is not usually deemed to be a proper element of damages to be considered in eminent domain. 20 C. J. p. 779, § 234; Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 P. 705.

With reference to the construction of the term "damaged" as it is used in the Constitution, the opinion in the Gianni Case holds that the loss suffered by the owner of condemned property must be special and different in character from the general damage sustained by other owners on account of the mere fact that their property abuts upon a highway and which damage is therefore common to all. That case quotes with approval from Wolff v. City of Los Angeles, 49 Cal. App. 400, 193 P. 862, as follows: "We do not intend to say, nor do we think, it extends to such damage as the owner of the property injured sustains in common with the other abutters on the street or the general public, but only to that special injury which he receives over and above such common injury."

It is argued that a business located upon land which is injuriously affected by condemnation proceedings because of the diverting of traffic therefrom is a special loss and is peculiarly applicable to the owner of such property. But whether this be true or not, in view of the conclusive effect of the Gianni decision, we are impelled to hold that the evidence of damage to the remaining property of the defendants accruing as a result of diminished trade on account of a diversion of traffic on a highway, is not competent to be considered, and that this evidence was therefore properly stricken from the record.

It is conceded by the defendants that, except for this excluded element of alleged damages, they have been fully compensated for the taking of their property. The defendants assign no other ground for reversal. There is therefore no merit in their appeal.

Upon the plaintiff's separate appeal it is asserted the court erred in holding that the entire tract of defendants' land constitutes but one parcel, and upon the contrary that each lot designated on the map of their subdivided tract constitutes a separate parcel. The plaintiff also contends that the item contained in the judgment of $1,600 which was assessed as severance damages is not supported by the evidence.

[3] Damages to the remaining part of a tract of land, which is not taken, may be assessed on account of severance of the condemned portion thereof as provided in section 1248, subd. 2, of the Code of Civil Procedure, "if the property sought to be condemned constitutes only a part of a larger parcel." The problem as to what constitutes a single parcel of land in contemplation of the foregoing statute is essentially a question of law for the determination of the court. Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 P. 705.

[4] In the present case, this question was determined by the court. A finding to that effect was adopted by the court in the following language: "The land sought to be taken by the plaintiff is only a part of a larger tract of land." The court instructed the jury as a matter of law that the defendants' entire tract of land, including lots 35 and 36, situated in the northwest corner thereof, constitutes a single parcel of land, upon which entire tract it should separately assess damages on account of the severance of the condemned strip of land, in determining which damages it might take into consideration the loss of rental value which would accrue by virtue of the severance. Accordingly, the jury did separately assess the damages to the entire tract of land owned by the defendants, including the gas station lots, as a result of the severance of the condemned strip, at $1,600. In our opinion, this constitutes reversible error. For about twelve years the defendants have owned the entire tract of land through which the right of way was condemned. In the hope of finding a market for city lots by means of a subdivision project, this tract was platted and a map thereof was filed. The defendants, however, continued to farm the tract as a whole. Only two lots were sold during that period of time. In assessing damages in this condemnation proceeding, these two lots were excluded. The balance of the entire tract, with the exception of the gas station lots, has been continuously farmed as one parcel, without regard to the subdivision plan. The defendants lived upon the premises. The mere fact that the tract was mapped and platted for future prospective sales does not necessarily determine its identity as separate parcels in contemplation of law. The use of the land for farming, regardless of the sub-

division project, is an important factor in determining whether it constitutes one parcel. 2 Lewis on Eminent Domain (2d Ed.) § 475, p. 1032; 20 C. J. § 190, p. 735. In Lewis on Eminent Domain, supra, it is said: "If two or more contiguous city or village lots are improved and used as one tract, and any part of any one is taken, the owner may recover the damage to all; so, where a tract is subdivided into lots and blocks, but continues to be used as before for agricultural purposes, the subdivision being a mere paper one."

In 20 C. J. § 190, it is said in that regard:

"The owner of contiguous lots or tracts of which one or a part of one is taken under the power of eminent domain is not ordinarily entitled to damages accruing from the improvement to the other lots or tracts owned by him. If, however, several contiguous lots or tracts in reality constitute an entire parcel used for one general purpose by the common owner, the inquiry should embrace all injuries which will be caused to the entire body of land. Thus, if several tracts are used together as one farm, in determining the compensation to be paid the owner for the location of a railroad across one or more of the tracts, the injury to the whole farm should be considered. * * *

"To constitute a unity of property between two or more contiguous but prima facie distinct parcels of land, there must be such a connection or relation of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used. * * * The mere platting of a tract of land on a map into lots and blocks does not constitute such a division of it into separate lots that the owner's damage must be limited to the particular lot a portion of which, as shown on the map, is actually taken."

[5] We are of the opinion the defendants' entire tract of land, with the exception of the inclosed gas station property, may be deemed to be a single parcel in contemplation of law for the purpose of estimating the severance damage resulting from the condemnation of the strip of land to be used for highway purpose.

We are, however, of the opinion the court erred in considering lots 35 and 36, which were leased and operated as a gas station, as a part of the balance of defendants' property which was used solely for farming purpose. It was clearly erroneous to include this gas station property in the instruction which was given to the jury authorizing it to estimate severance damages to the entire tract, including the gas station property, by determining whether the rental value of the property was diminished by the condemnation of the strip of land to be used for the construction of the extension of Washington street. The gas station property was separated from the balance of the tract by a fence. It was set apart from the tract to be used exclusively for the operation of another business. It had been actually used for several years for operating a gas station business. It was under an eight-year lease to a stranger to this litigation. The only evidence to which our attention is called of the rental value of the tract is confined to this gas station property. It therefore appears that the jury must have assessed the severance damages on the basis of the rental value of the gas station property. This was clearly improper and prejudicial, with respect to the severance damages.

The judgment is reversed, with directions to ascertain and assess the amount of severance damages to the entire tract owned by the defendants exclusive of the gas station property. The defendants are allowed their costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

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138 Cal.App. 56

PEOPLE v. PIBURN.

Cr. 260.

District Court of Appeal, Fourth District, California.
April 12, 1934.

1. Infants ⇨**20.**

Whether defendant was guilty of committing lewd and lascivious acts upon child under 14 *held* for jury (Pen. Code, § 288).

2. Criminal law ⇨**29.**

That defendant also was guilty of rape, attempt to commit rape, or assault with intent to commit rape did not invalidate conviction of committing lewd and lascivious acts upon child under 14, where there was evidence tending to prove commission of such offense (Pen. Code, § 288).

3. Criminal law ⚷407(2).

Admission of evidence that defendant stood mute when prosecutrix accused him in presence of police officers, prosecutrix' parents, and the stenographer of acts for which defendant was prosecuted *held* not error in prosecution for statutory offenses (Pen. Code, § 288; St. 1915, p. 1225, as amended).

4. Infants ⚷20.

Exclusion, on cross-examination of prosecutrix' mother, of question whether defendant had not told her that prosecutrix was having sexual intercourse with another person before prosecutrix complained about defendant, *held* not error in prosecution for statutory offenses (Pen. Code, § 288; St. 1915, p. 1225, as amended).

5. Criminal law ⚷1172(1).
Infants ⚷20.

Instruction that jury must find defendant guilty or innocent under both counts, one of which charged commission of lewd and lascivious acts upon child under 14, and the other charged the same acts and attempt to induce such child to engage in sexual intercourse, *held* error, where there was evidence of such attempt, but harmless where jury disbelieved defendant's unqualified denials (Pen. Code, § 288; St. 1915, p. 1225, as amended; Const. art. 6, § 4½).

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Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

John Logan Piburn was convicted of committing lewd and lascivious acts upon the body of a child and of attempting to induce such child to engage in sexual intercourse, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant was accused in an information filed by the district attorney of San Diego county with the commission of two offenses. The first count of the information alleged a violation by the defendant of section 288 of the Penal Code. The second count alleged a violation by the defendant of the Juvenile Court Law of the state of California (St. 1915, p. 1225, as amended). Upon arraignment, the defendant entered a plea of not guilty of each of the two offenses charged, and a trial of the action was had before the court and a jury selected for the purpose. The jury returned a verdict finding that the defendant was guilty of both offenses charged. Thereafter the defendant presented a motion for a new trial, which was denied, and judgment was thereupon pronounced in conformity with the verdict. From the judgment thus rendered the defendant has prosecuted this appeal.

[1, 2] The first contention which is advanced by appellant as a ground for the reversal of the judgment is that the evidence was insufficient to justify his conviction of the crime charged in the first count of the information, to wit, a violation of section 288 of the Penal Code. In making this contention appellant first points to the fact that, so far as the details of the alleged offense are concerned, the single witness who testified with respect to them was the prosecutrix, a girl 10 years and 10 months of age at the time the offense was alleged to have been committed. It is then properly conceded that the return of a verdict finding appellant guilty of the crime forecloses this court from reversing the judgment because of the claimed improbability of the testimony of this witness. It is, however, contended that, assuming that the testimony of this witness is credible in every respect and that it comprehends a true and correct narrative of the events which occurred on the date specified in the information, nevertheless it did not show that appellant had committed the specific offense charged against him. Section 288 of the Penal Code denounces as a felony the commission of any lewd or lascivious act "other than the acts constituting other crimes provided for in part (one)" of the Penal Code upon or with the body or any part thereof of a child. It is argued that, assuming the truth of the testimony of the prosecutrix in its entirety, it appears that appellant was probably guilty of rape, attempt to commit rape, or assault with intent to commit rape, all of which are specifically denounced in part one of the Penal Code. The inevitable result is therefore that appellant could not have been properly convicted of a violation of the aforesaid statute.

The contention thus advanced is by no means novel. Reliance has been placed upon it in numerous instances. In giving consideration to it, the observation must be made that, in its support, appellant has quoted a portion of the testimony of the prosecutrix which tended to prove that he had committed one of the offenses denounced in part 1 of the Penal Code. He has, however, carefully refrained from calling attention to certain other portions of the testimony of this witness which tended to show the commission by him of an offense comprehended by the provisions of the above-mentioned statute. The language of the court in People v. Meyer, 94 Cal. App. 696, 271 P. 751, 752, is so apropos to the situation which is thus presented that a quotation therefrom is in order. In discussing the contention of an appellant who had been convicted of a violation of section 288 of the Penal Code, Justice Sturtevant said: "Continuing, the defendant quotes certain parts of the record which would tend to prove the commission of an assault to commit rape. In doing so he neglects to quote passages from the record which tend to prove the commission of a violation of section 288 of the Penal Code. Having given a one-sided view of the evidence, the defendant makes the claim that the defendant was guilty of an assault to commit rape, if anything, and therefore by the expressed language contained in section 288 of the Penal Code he was not properly charged under that section, that the evidence was insufficient, and that the verdict may not be sustained. However, as suggested above, there was evidence that the defendant violated the provisions of section 288 of the Penal Code, and perhaps there was evidence that he committed an assault to commit rape. Under no logical reasoning was the latter offense a defense to the former."

Similarly, in the instant case there was evidence which tended to prove that appellant committed an offense specifically denounced by some provision of part 1 of the Penal Code. This cannot serve as a defense to the charge that he committed an offense in violation of section 288, Penal Code, if the record contains evidence tending to prove a violation of the specified statute. Certainly, it is not impossible that a person may at the same time commit two or more criminal offenses. It must be borne in mind that the specific intent with which an act is done is usually an important and essential element of a crime. Indeed, the intent is often the determinative factor.

The specific intent which must appear in the crime of rape is the intent to accomplish an act of sexual intercourse. This same intent is likewise an essential element of the cognate offenses of attempt to commit rape and assault with the intent to commit rape. Whether this specific intent appears in a given case is obviously a question of fact for the determination of the jury. The evidence respecting this fact may be, and often is, conflicting. Since the verdict in the instant case was against the appellant, it is evident that the jury believed that the evidence showed the presence of an intent to violate the provisions of section 288 of the Penal Code. Under these circumstances, the verdict is binding upon a reviewing court, unless it can be declared that the record shows the absence of any evidentiary support for the jury's finding that appellant intended to violate the aforementioned statute. People v. Jori, 99 Cal. App. 280, 278 P. 250.

Careful examination of the record produces the conviction that it may not be said that there is an absence of evidentiary support for the jury's finding that appellant possessed an intent to violate the specified statute. The prosecutrix testified that she was in appellant's home for several hours on the date specified in the information, and that some time prior to the commission by appellant of the acts which appellant claims constituted some offense denounced by part 1 of the Penal Code he placed his hands on her breasts. She also testified that at another time during her visit, and prior to appellant's commission of the acts which it is said constituted rape, attempted rape, or an assault with intent to commit rape, he put his arms around her. Undoubtedly, the jury would have been warranted in finding that, when appellant placed his hands on the child's breasts and when he put his arms around her, he did so with the intent then and there to have carnal connection with her. "But the existence of that specific intent at those particular moments is not the only possible conclusion which may reasonably be deduced from the circumstances of this case. * * * The jury may well have concluded that at this stage of his dastardly conduct appellant intended only to fondle his victim as a means of gratifying his lustful passions, and that later, emboldened by his success and further inflamed with passion, he conceived the nefarious intent to penetrate her body. The jurors, who saw appellant and thus had an opportunity to judge the character of his perverted instincts, were in a position to determine the nature of the intent which actuated him to fondle the girl in the manner he did." People v. Parker, 74 Cal. App. 540, 548, 241 P. 401, 404. By its verdict the jury determined that the intent which was present in appellant's mind was the particular intent which is so plainly stated to be an essential element of the crime denounced by section 288 of the Penal Code. One who is permitted to review only the cold record cannot fairly declare that the jury which had the opportunity of first-hand observation of appellant, his appearance, and the manner in which he testified, made an incorrect finding as to this fact.

[3] Appellant complains that the trial court erroneously admitted evidence which showed that, in the presence of a number of police officers, the parents of prosecutrix, the prosecutrix, a stenographer, and appellant, the prosecutrix was asked by one of the officers to state whether anything took place on any one of the various visits which she had made to appellant's home, whereupon she related substantially the same story which she told when called as a witness during the trial and that appellant in the face of this accusation remained mute. It is objected that the reception of this evidence was improper and highly prejudicial to appellant because it appears that on the above-mentioned occasion he was asked no questions, was not asked if he had anything to say upon the conclusion of the accusatory statement made in his presence by the prosecutrix, and was allowed no opportunity to make any statement. It is urged that the trial court's determination that the accusatory statement thus made by the prosecutrix was made under circumstances which called for a reply by appellant was erroneous and that the affair took on the aspect of a "third degree" more treacherous and far more subtle than those which have heretofore received the condemnation of courts generally.

Appellant's complaint with respect to the admission of the aforesaid evidence is not persuasive. The question of whether or not the facts in a given case are such as to permit the introduction of an accusatory statement made in a defendant's presence and his reaction thereto is primarily a question for the determination of the trial court. People v. Byrne, 160 Cal. 217, 234 et seq., 116 P. 521; People v. Kelly, 203 Cal. 128, 138, 263 P. 226; People v. Rhinehart, 79 Cal. App. 499, 502, 250 P. 203. We think the record shows that the evidence was sufficient to support a conclusion by the trial court that it prima facie showed that the accusatory statement was made in appellant's presence and hearing; that appellant understood its meaning; that it was one that might under all the circumstances shown be held naturally to call for some action or reply on his part; and that opportunity was not wanting for him to make a reply. This being so, the evidence was admissible as tending to show an admission by appellant; the question of its weight in that respect being purely a question for the jury. People v. Byrne, supra; People v. Smith, 111 Cal. App. 579, 295 P. 862.

[4] Appellant further complains that the trial court sustained an objection by the prosecution to a certain question propounded to the mother of the prosecutrix on cross-examination. This witness had testified on direct examination that the prosecutrix on a certain date had complained to her of appellant's conduct on the date specified in the information. Appellant's counsel on cross-examination asked the witness if, prior to the date of the complaint, appellant had not warned her that the prosecutrix was engaging in acts of sexual intercourse with a certain individual. It is urged that the court erred in sustaining an objection to the question because, in view of the equivocal nature of the testimony of the witness regarding the complaint made by the prosecutrix, it seems reasonable that the jury might well have given less credence to the testimony of the prosecutrix if they had been permitted to learn that she had made no complaint of appellant's conduct until after she herself had been accused by appellant of sexual misconduct with another person.

This complaint is entirely without merit. The inquiry was not proper cross-examination. The subject-matter of the question was wholly immaterial to the issue of appellant's guilt or innocence of the charge made against him. The obvious purpose of the inquiry was to divert the minds of the jury from the real issue in the case. The court's action in sustaining the objection to the question was proper, and appellant has no valid cause for complaint.

[5] Appellant's final contention is that the trial court gave the jury a specified instruction which embodied an incorrect statement of law and which was highly prejudicial to appellant. This instruction is in the following language:

"Some confusion may arise. Should the evidence justify it so that you would want to find the defendant guilty of the first count and not guilty of the second count, or not guilty of the first count and guilty of the second count, should you do that your verdicts would be inconsistent verdicts due to the fact that the same acts are charged in the first count as are charged in the second count and which go to make out the second count, that of violating the Juvenile Court Law. So if you find the defendant not guilty on the first count, and guilty on the second count, it would be an inconsistent verdict, because the same acts go to make up the two counts. So if you find the defendant guilty of the first count, and you also feel he is guilty of the second count, you may return a verdict of guilty on both counts, or you may return a verdict of not guilty on both counts; but do not interchange them."

It is urged that, under the facts developed by the evidence, the above-quoted instruction was incorrect and misleading, for the reason that the facts which are specifically alleged in the two counts of the information as those which constituted the two offenses are not identical. Since this is true, the jury might well have found that certain facts alleged in the second count and not alleged in the first count had been established by the evidence, and therefore that appellant was guilty of the offense charged in the second count, but that the facts set forth in the first count had not been proven, and that therefore appellant was not guilty of the offense charged in count 1. Nevertheless, the criticized instruction plainly advised them that a verdict of acquittal on the first count and one of conviction on the second count would be inconsistent "because the same acts go to make up the two counts." Intelligent consideration of this contention necessitates an examination of the information.

In the first count of this accusatory pleading appellant is charged with the crime of committing lewd and lascivious acts upon the body of a child. This count then sets forth a detailed description of the acts which the pleader alleges constituted the crime. It is specifically stated therein that on the date mentioned appellant placed his "private parts against the body, parts, and private parts of said child," and that these acts were committed with the intent of arousing, appealing to and gratifying the lust and passions and sexual desires of appellant and of the child. In the second count appellant is charged with the crime of violation of the Juvenile Court Law of the state of California. This count then proceeds to set forth a detailed description of the various acts which the pleader alleges were committed by appellant and which constituted the specific offense charged in said count. It is therein plainly stated that on the same date mentioned in the first count appellant "did then and there propose to, and attempt to cause, encourage and induce said Lois Piburn to engage in an act of sexual intercourse with said defendant and said defendant did then and there place" his private parts against the body and private parts of said Lois Piburn.

It is manifest that the acts which are specifically alleged in the two counts as having been committed by appellant and as constituting the two offenses charged are not in every respect identical, and that in the second count there is contained an allegation which, if alone proven, would have justified a verdict of conviction of the offense charged in the second count, but would not alone have justified a verdict of conviction of the offense charged in the first count. This allegation is that wherein it is alleged that appellant solicited the child to engage in an act of sexual intercourse with him. In addition, it must be noted that there was evidence from which the jury might have found that this particular act was committed. Under these circumstances we think that the trial court erred in giving the criticized instruction.

There remains for consideration the question of whether or not the error thus committed is of sufficient importance to require a reversal of the judgment. It is our opinion that the error is not such as to require or to justify a reversal. The record shows that only two witnesses testified during the trial regarding what took place on the date specified in both counts of the information. These witnesses were the prosecutrix and appellant. The prosecutrix testified that she went to appellant's home on the date mentioned and that she remained there for several hours; that on the occasion of this visit appellant solicited her to engage in an act of sexual intercourse; that she refused; that appellant at one time during this visit placed his hands on her breasts and at another time put his arm around her; that without penetrating her person he committed the acts specifically alleged in count 1 of the information. Appellant specifically and absolutely denied having committed any of the acts which the prosecutrix had testified he had committed or that he had solicited her to engage in an act of sexual intercourse with him. With the record in this state, it would be unreasonable to presume that the jury believed that part of the testimony of the prosecutrix which related to appellant's soliciting her to engage in an act of sexual intercourse and rejected those portions which related to the commission by him of those acts which constituted the offense charged in the first count of the information. The only reasonable presumption, and that in which we feel bound to indulge, is that the jury accepted in toto the testimony of the prosecutrix, and accordingly returned its verdicts convicting appellant of both offenses.

Finally, an examination of the entire record herein has produced the firm conviction that appellant suffered no prejudice by reason of the giving of the criticized instruction, and that the error complained of has resulted in no miscarriage of justice. Section 4½, art. 6, Constitution of California.

The judgment from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

137 Cal.App. 750

WHIMS v. MARCO et al.

Civ. 9319.

District Court of Appeal, First District, Division 2, California.

April 10, 1934.

1. **Corporations** ⇨121(7).

Where buyer's breach of contract to accept and pay for corporate stock causes detriment, measure of damages is contract price (Civ. Code, § 3310).

2. **Corporations** ⇨121(4).

Complaint *held* to state cause of action for detriment caused by breach of buyer's agreement to accept and pay for corporate stock (Civ. Code, § 3310).

> Contract for sale of stock provided that plaintiff should have limited time to perfect title and secure approval of commissioner of corporations, and that when this was done, he should give notice to buyers, and that balance of purchase price should be paid within ten days after service of notice; and complaint alleged that plaintiff had duly performed all such conditions and was ready to transfer stock to defendants free and clear of all claims.

3. **Corporations** ⇨118.

Passing of title to corporate stock from seller to buyer, so as to entitle seller to recover contract price, was effected by seller's tender under terms of statute (Civ. Code, §§ 1141, 3310).

4. **Courts** ⇨121(1).

Where buyers did not exercise right to relieve themselves from liability under contract for sale of stock by electing forthwith to pay $300 on receipt of notice of seller's perfection of title as contract required, Superior Court held jurisdiction of action for price of stock, since seller could rest on contract and amount involved for jurisdictional purposes was not limited to $300 (Civ. Code, § 1449).

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by N. M. Whims against Vincent A. Marco and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Weber & Kidder, of Santa Monica, for appellants.

Warner I. Praul, of Los Angeles, for respondent.

NOURSE, Presiding Judge.

Plaintiff sued for the balance of the purchase price of certain shares of stock or "promotional interests," basing his action upon a written contract which was pleaded in full. Plaintiff had judgment, and the defendants appeal on typewritten transcripts.

There are but two points raised by appellants which require consideration:

[1-3] First, whether the complaint states a cause of action for the detriment caused by the breach of the buyers' agreement to accept and pay for the stock. In such a case the measure of plaintiff's recovery is the contract price. Section 3310, Civ. Code. The contract provided that the plaintiff should have a limited time to perfect his title and to secure the approval of the commissioner of corporations; that, when this was done, he should give notice thereof to the defendants; and that the balance of the purchase price should be paid within ten days after service of such notice. The complaint alleges that the plaintiff had duly performed all these conditions and was ready to transfer the stock to defendants free and clear of all claims. These allegations were admitted in the answer. The cause of action as presented in the pleadings and findings is one for the balance of the contract price of personal property, title to which had passed to defendants. The passing of title was effected by plaintiff's tender under the terms of section 1141, Civil Code, as it read when the cause was tried. Cuthill v. Peabody, 19 Cal. App. 304, 309, 125 P. 926; Lewin v. Hanford, 35 Cal. App. 36, 38, 169 P. 242; Tucker v. Scott, 181 Cal. 734, 737, 186 P. 150. This is emphasized by the undisputed evidence of defendants' refusal to accept performance. Hulen v. Stuart, 191 Cal. 562, 569,

217 P. 750; Nielsen v. Swanberg, 99 Cal. App. 270, 275, 278 P. 876.

[4] Second, it is argued that the superior court did not have jurisdiction because the contract was merely an option to buy and the amount in controversy was but $300. The point arises out of the provision of the contract giving the defendants the right to relieve themselves from liability by paying plaintiff the sum of $300 upon receipt of notice of plaintiff's perfection of title. The complaint alleges that the defendants did not pay or offer to pay this sum and the trial court so found. As the contract called for payment "forthwith," it is evident that, whatever right of election the defendants may have had, they failed to exercise it and plaintiff was entitled to rest on his contract of sale. Section 1449, Civ. Code.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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138 Cal.App. 6

CLARK et al. v. ELSINORE OIL CO.

Civ. 1289.

District Court of Appeal, Fourth District, California.

April 10, 1934.

1. Mines and minerals 🔑79(1).

Provision in contract for joint lease of adjoining tracts, that oil royalties should be equally divided between respective owners *held* not surplusage, but important as indicating intention to divide profits from all producing wells on either tract between such owners equally, thus warranting presumption of intent to continue such division after lessee surrendered one tract.

2. Mines and minerals 🔑79(1).

Absence of provision in agreement for joint lease of adjoining tracts that respective owners should continue to share oil royalties equally, notwithstanding lessee's surrender of one tract, *held* not to require inference of intent to discontinue such equal division in that event.

3. Appeal and error 🔑1050(1).

Admission of evidence in lessors' action against colessor for oil royalties, paid defendant by lessee after drilling producing well on defendant's land and surrendering plaintiffs' adjoining tract, that plaintiffs tried to make independent lease of their tract to lessee before executing joint lease, *held* not prejudicial to defendant.

◆

Appeal from Superior Court, Fresno County; Frank Lamberson, Judge.

Action by James Clark and others against the Elsinore Oil Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Strother P. Walton, of Fresno, for appellant.

W. H. Stammer, of Fresno, for respondents.

JENNINGS, Justice.

Plaintiffs instituted this action to recover from the defendant the sum of $1,109.46 which the complaint alleged was paid to said defendant as trustee for plaintiffs on January 23, 1933. Trial of the action resulted in the rendition of a judgment in favor of plaintiffs for the amount demanded. The defendant thereupon prosecuted this appeal from said judgment. The record on appeal indicates that there is no controversy between the parties as to the essential facts which were developed by the evidence.

On May 3, 1929, plaintiffs were the owners as tenants in common of a certain tract of land in Kings county comprising approximately 40 acres. On the same date the defendant was the owner of another tract in said county which contained approximately the same acreage. The two tracts adjoined each other. On the aforesaid date plaintiffs and defendant as lessors joined in the execution of a lease of the two tracts to the Signal Oil & Gas Company, a corporation, as lessee. The contract of lease provided that the term should be 20 years "and so long thereafter as oil, petroleum, natural gas or kindred substances, or any one or more of them, shall be produced from said land." The express purpose of the lease was to enable the lessee "to explore for, discover, produce, extract, treat, refine, transport, sell and otherwise dispose of for its own use and benefit, all petroleum, natural gas and other hydrocarbon substances, in, under and upon said tracts of land." The contract further provided that the lessee should pay to the lessors as rent of the leased premises a royalty of ⅛ of the net proceeds derived by it from the sale of oil, gas, gasoline, and other products manufactured and sold by the lessee from gas that might be produced from any well drilled on the land. The lessee obligated itself to commence drilling operations within a period of 18 months from the date of delivery to it of a certificate of title showing that the title to the land was as warranted by the lessors and to prosecute the drilling of such well for the production of petroleum in paying quantities with reasonable diligence. It further obligated itself to drill a total of eight wells on said land.

The lease contract contained two provisions which, as will appear, are of peculiar importance to the legal problem presented upon this appeal. The first of these provisions related to the division of royalties among the lessors and was as follows: "It is understood and agreed that all of the lessors herein shall participate in the bonuses, rentals and royalties covering all of the demised premises in the proportion that their respective interests shall bear to the whole of said demised premises." The second provision expressly authorized the lessee at any time during the term of the lease to surrender and turn back to the lessors all or any part of the leased property and was in the following language:

> "The lessee may at any time quitclaim to the lessors this lease in its entirety or as to part of the acreage covered hereby and thereupon lessee shall be released from all further obligations as to the part of the land so quitclaimed and all rentals and drilling obligations shall be reduced pro rata according to the acreage quitclaimed. All lands quitclaimed shall remain subject to easement for rights-of-way necessary or convenient for lessee's operations on land retained by it. Except as herein provided, full right to said land shall revest in lessors, free and clear of all claims of lessee, except that lessors, their successors or assigns, shall not drill any well on the said land within three hundred (300) feet of any producing well retained by lessee."

On May 2, 1932, the parties to the original lease contract amended the same by providing that all payments to be made by the lessee should be made "as to one half thereof to Elsinore Oil Company, and as to one half to Elsinore Oil Company, Trustee." The provision relating to the participation in bonuses, rentals, and royalties by the lessors was repeated in said amendment.

Subsequent to the execution of the original lease agreement the lessee entered into possession of the demised premises and pursuant to the terms of said agreement drilled an oil well on that portion of said land which was owned by the defendant. This well was completed on July 12, 1932, and thereafter produced oil and gas in paying quantities. Thereupon, in accordance with the amendment to the lease of May 2, 1932, the lessee each month paid to the defendant the royalty provided for in the lease contract by delivering to the defendant two checks, one of which representing one-half of the royalty for the preceding month was drawn to the order of defendant and the second check representing one-half of said royalty was drawn to defendant as trustee. On December 10, 1932, the lessee executed a quitclaim deed "unto the person or parties legally entitled thereto" of all right, title, and interest of said lessee in the demised premises expressly excepting therefrom 10 acres of land surrounding the oil well which had been drilled by the lessee on defendant's land as aforesaid. On January 23, 1933, the defendant received from the lessee a check made payable to "Elsinore Oil Company, Trustee" in the amount of $1,905.14. The above-stated amount represented one-half of the royalty for the month of December, 1932. From the proceeds of this check the defendant paid to plaintiffs the sum of $795.68 and retained the balance of $1,109.46 for the recovery of which this action was instituted.

[1] Appellant contends that the trial court erred in allowing recovery of the amount demanded. In support of this contention it is urged that the lessee was expressly permitted by the terms of the lease agreement to quitclaim all or any part of the demised premises and that when it did so respondents became vested with all right, title, and interest in the tract of land owned by them and could deal with the land as they might choose. It is said that the land being fully released from the lease contract, neither the lessee nor appellant has any claim of any character upon it. It is further claimed that the drilling by the lessee of a producing oil well on that portion of appellant's land which is still retained by the lessee has had the effect of making the land of respondents "proven" oil land so that respondents have been thus directly benefited by the drilling of the well on appellant's land and it is argued that to permit respondents to continue to share in the royalty paid by the lessee as rental for that portion of appellant's land which is still retained by the lessee after the restoration to respondents of the tract of land owned by them, especially since it has now become "proven" oil land is most unjust and unfair to appellant.

In connection with the above-stated argument it is said that in accordance with the decision in Higgins v. California P. & A. Co., 109 Cal. 304, 41 P. 1087, respondents and appellant as lessors would have been entitled to an equal division of whatever royalties were paid for the use of the land by the lessee and that therefore the inclusion in the lease agreement of a clause specifically for an equal division of such royalties was entirely unnecessary and should be disregarded as pure surplusage.

The decision in Higgins v. California P. & A. Co., supra, is authority for the proposition that where the owners of distinct contiguous parcels of land enter into a joint lease of their properties such lease is valid; that the reservation of a specified monthly royalty for each ton of bituminous rock and liquid asphaltum that may be mined or removed from the leased premises as rent of such premises is unobjectionable; and that although the agreement of lease contained no language providing for equal division of the royalty, the terms of the lease warranted the presumption that each lessor was to receive one-half of such royalty, which presumption was in perfect accord with the practical construction of the lease by the parties thereto.

From the above recital it is apparent that if the lease agreement made by respondents and appellant on May 3, 1929, had contained no clause providing for equal division of whatever royalties might be received, the above-cited case would, under the terms of said lease, have been authority for the proposition that the lessors were entitled to an equal division of such royalty. However, since the parties to the lease contract which is here considered chose to render it certain that there was to be an equal division of whatever royalties might be received, we fail to grasp the force of appellant's argument that no consideration should be given to this very plain provision. On the contrary, it would seem that the provision is of considerable importance, and that we are not warranted in disregarding it. We entertain the opinion that the provision sheds light on the intention of the parties and particularly on the intention of the lessors and points to the fact that respondents and appellant intended to pool their holdings to the end that one or more oil-producing wells might be developed on their joint properties and that no matter at what location or on whose land such well or wells might be drilled whatever profit might result therefrom should be divided equally between appellant on the one hand and respondents on the other.

Since this was undoubtedly the intention of the lessors, it is entirely reasonable to presume that they intended that this equal division of any royalties that might be received should continue in the event that the lessee should surrender any portion of the demised premises covered by the joint lease. It is true that the lease agreement contains no language which specifically so provides. However, we find the reasoning of the decision in Higgins v. California P. & A. Co., supra, applicable to the problem here presented. In the Higgins Case plaintiff and one Ashley, owners of adjoining lands on which there was a deposit of bituminous rock, had made a joint lease of their properties. Subsequently and during the term of the lease Ashley conveyed her land to the lessee. The evidence showed that no bituminous rock had ever been mined from that part of the deposit lying within plaintiff's land and that all rock mined under the lease had been mined on the Ashley property. For this reason the lessee contended that it was not obligated by the lease to pay any royalty to plaintiff on account of rock mined from that part of the deposit lying within the Ashley tract. This contention did not prevail, the court holding that if plaintiff and Ashley had been tenants in common of the demised premises, the effect of a conveyance by Ashley of her reversionary estate would have been to merge her interest in the leasehold term in the reversion and thereby to extinguish pro tanto the covenant of the lessee to pay rent to her, but that the plaintiff's right to continue to receive the same rent which he had received prior to the conveyance would not have been affected and that no good reason appeared why the effect of Ashley's conveyance of her separate part of the demised premises, of which she was sole owner should not be substantially the same as it would have been if the lessors had been tenants in common of every part of such premises. The court further observed that if the lessors had been tenants in common, the plaintiff would still be entitled to a part of the rent proportionate to his undivided portion of the demised premises, but that since they were not tenants in common, he was entitled, in the absence of an express or presumed agreement to the contrary, to a portion of the royalty proportionate to the comparative value of his distinct part of the demised property and that the terms of the lease warranted the presumption that each lessor was to receive one-half of the royalty, which presumption accorded perfectly with the practical construction of the lease by the parties thereto.

In the instant case if the respondents and appellant had been tenants in common of the demised premises, appellant could not, with any hope of success, have advanced the contention that a surrender by the lessee to the lessors of all of the demised property except the 10 acres immediately surrounding the oil well had the effect of extinguishing the right of respondents to receive any further share of the royalty paid by the lessee as rent for that portion of the land which was still retained by it. It is clear that respondents, under these circumstances, would still be entitled to a part of the rent proportionate to their undivided portion of the demised premises. Since the lessors were not tenants in common, respondents were entitled, in the absence of an express or presumed agreement to the contrary, to that portion of the royalty which the lease contract expressly provided they were to receive, to wit, one-half. The fact that the lessee had elected to drill a well on that portion of the demised premises owned by appellant detracts nothing from the right of respondents to receive their proper share of the royalty. The terms of the lease agreement made the royalty payable to the lessors, not to the particular lessor on whose land a producing well might be drilled. When the lease contract was made, the lessee had the right to drill a well on any portion of the demised premises and except for its surrender of ⅞ of such premises would not only have had the right, but would have been obligated to drill seven additional wells. The royalty of ⅛ of the net proceeds derived from any producing well or wells is simply a convenient and customary mode of estimating the rent to be paid for the exclusive occupation of the whole premises and the right to drill for oil at any place on such premises during the term of the lease.

Appellant places much reliance upon the decision in Petroleum Midway Co., Ltd., v. Moynier, reported in 205 Cal. at page 733, 272 P. 740. The facts upon which this decision rests are somewhat involved, but in the broad outline there is sufficient similarity to warrant appellant's reliance upon it as an authority directly in point. A close scrutiny of both the factual background and the legal principles announced by the decision is therefore justified.

The following synopsis of facts will suffice for the purposes of this opinion: A, B, and C, who were brothers, were owners in common of a tract of land comprising something more than 100 acres. While they were such owners, they subdivided the tract into ten lots and became owners in severalty of such lots as follows: A became the owner of lots 2, 9, and 10, containing 34.73 acres; B became the owner of lots 1, 5, and 6, containing 34.73 acres; and C became the owner of lots 3, 4, 7, and 8, containing 34.73 acres. After they had thus become the owners in severalty of the respective lots, the three entered into a lease of the whole of said property on May 9, 1921. The lease was an oil lease and by its terms the lessee became obligated to pay to the lessors $2 per acre per month until drilling operations were begun, and, upon the discovery and production of oil, a royalty of ⅙ of the oil produced. It was provided that the lessee should commence the work of constructing a drilling rig upon the land within one year from the time title to the land was satisfactorily shown to be in the lessors. On May 19, 1922, the time for the commencement of work was extended by a written agreement executed by the three lessors and the lessee. In this agreement it was provided that lots 5 and 7, which had been sold by their respective owners after the execution of the original lease, should be excluded from the operation of the lease. It was further provided in this agreement that a clause of the original lease permitting a well to be drilled on the division line of any two lots in the tract should be abrogated and that each well to be drilled should be drilled wholly on one lot and that the owner of that lot should be the only participant in the royalty from such well. On March 31, 1923, a second agreement further extending the time for commencing work was executed by all the parties. This second extension agreement also provided that the monthly rental prior to the commencement of drilling operations should be $500 instead of $2 per acre and it was further provided that the lessors were authorized to sell any portion of the leased land, except for oil development, and in case of any such sale the land so sold should be excluded from the terms of the lease. On April 24, 1924, the lessors entered into a supplemental agreement whose terms were substantially the same as those of the second extension agreement except that it contained an additional paragraph which provided as follows: "Except as above, the said lease shall remain unchanged, and all previous extensions and amendments of said lease are superseded and canceled hereby." On June 11, 1924, the three lessors joined in a letter to the lessee which directed that payment of the monthly rental should be made direct to the respective lot owners, as follows: to A, $247.18; to B, $120.82; and to C, $132. This letter concluded with the statement that "except as herein modified, all the terms, covenants, and conditions of said lease and said supplemental agreement shall remain in full force and effect." Subsequently wells were drilled pursuant to the lease on lot 9, of which, as above noted, A was the owner. A controversy then arose between A, B, and C as to their rights to share in the royalties which were paid for the oil produced from these wells. The trial court held that A was the owner of lots 2, 9, and 10; that B and C had no interest therein; and that A alone was entitled to receive all royalties to be paid to the lessors under the original lease in so far as said lease affected said lots and that B and C were not entitled to any of said royalties and had no interest therein.

B and C appealed from the judgment of the trial court and on their appeal contended that the lease was a joint undertaking; that the rights of the lessors were joint and not several; and that consequently each lessor was the owner of and entitled to receive an equal share of the royalties which might accrue under the lease.

In affirming the judgment of the trial court the Supreme Court held that the agreement between the lessors was so uncertain upon the question of the payment of royalties as to warrant the introduction of parol evidence to show how the lessors were to participate in such royalties and that the parol evidence relating to this subject which was submitted, together with all the other evidence in the case, was sufficient to support the findings of the trial court in A's favor. It was observed that the original lease had been expressly modified in two material respects. After its execution, B and C had each sold one of the lots covered by the lease contract, thereby reducing the amount of leased land which each owned to approximately one-half of that owned by A. The lots so sold had been expressly released from the terms of the lease. This was the first modification. The second modification was made by the second extension agreement and confirmed by the supplemental agreement. As so confirmed, it gave to the lessors the right to sell any portion of the leased premises, except for oil development, prior to the commencement of drilling operations. The supplemental agreement further specifically provided that, if any land covered by the lease should be sold, the lease as to such portion so sold should become canceled and a quitclaim should be given the lessor releasing it from the operation of the lease, the balance of the land still to remain under the lease until sold or until the completion of a certain test well being drilled on other property. The two questions which were presented by reason of the aforesaid modifications were stated to be: (1) Under the conditions which prevailed were B and C to be permitted to share equally in all royalties with A, who owned almost as much land as B and C together owned? and (2) If B and C had exercised the right of sale as provided in the supplemental agreement and sold all land which they owned which was covered by the lease, would they still be entitled, under the lease, to participate in the royalties that might have accrued under the lease equally with A, who would then have been the sole owner of all land covered by the lease? It was said that the original lease furnished no answer to either of these two questions and that the lease, as modified by the supplemental agreement, was so uncertain with respect to the disposition of royalties that might accrue as to justify the admission of parol evidence to explain the uncertainty, at least to the extent of showing the circumstances under which the supplemental agreement, which caused the uncertainty to exist, was entered into by the parties thereto.

It may well appear that it is entirely unnecessary and superfluous to point out the many material respects in which the factual background of the cited case differs from that which is here presented. Nevertheless, since appellant relies so strongly upon the decision in Petroleum Midway Co., Ltd., v. Moynier, supra, this differentiation may properly be noted. In the first place, in the instant case there is no such modification as appeared in the Midway Petroleum Case. It is true that the original lease was once amended, but the amendment expressly repeated the clause in the original lease, which provided that all lessors should participate in royalties in the proportion that their respective interests bore to the whole of the demised premises. The amendment then provided that all payments of royalties to be made by the lessee should be made as to one-half thereof to appellant and as to the remaining one-half to appellant as trustee, and that, upon making such payments in the manner designated, the lessee should be relieved of all responsibility for the proper division thereof among the respective lessors. It is obvious that this amendment was made solely for the convenience of the lessee and that, so far as the question of the division of royalties between the lessors is concerned, it neither modified the terms of the original lease contract nor produced any uncertainty.

In the second place, there is no provision in the lease contract in the instant case which expressly permits the lessors to sell any portion of the land covered by the lease. The only provision which in any manner refers to such a possibility consists of a clause which merely provides that "no change in the ownership of the land hereby leased, or assignment of rentals or royalties shall be binding upon the lessee until after the lessee has been furnished with an original or duplicate original of the written transfer or assignment thereof."

In the third place, and more important, there is here no pretense that there was any sale or transfer of any portion of the demised premises by any lessor. In this respect, the facts of the instant case are entirely different from those of the Petroleum Midway Co. Case.

In the fourth place, the release or surrender by the lessee of the entire acreage owned by respondents was accomplished by virtue of a provision of the lease contract which expressly permitted the lessee to do exactly this thing. This provision was one that was obviously inserted for the sole benefit of the lessee and its expressed object was to relieve the lessee from all further obligations with respect to the land surrendered.

In the fifth place, although the clause which permits the lessee at any time to quitclaim to the lessors all or any part of the demised premises provides that full right to such quitclaimed land shall revest in the lessors free and clear of all claims of the lessee, it is also expressly provided that such released land shall remain subject to easements for rights of way necessary or convenient for lessee's operations on land retained by it and that lessors, their successors, or assigns, shall not drill any well on such released land within 300 feet of any producing well retained by lessee. It is clear, therefore, that the surrender of all land covered by the lease which was owned by respondents in pursuance of the above-mentioned clause of the lease did not operate to return to respondents that full and unqualified use of their land which they had enjoyed prior to the execution of the lease contract. Their land was returned to them, but it was returned burdened with certain restrictions. Evidence which was produced by respondents showed that after the execution of the quitclaim deed releasing respondents' land from the operation of the lease a pipe line which extended across respondents' land and which was utilized by the lessee for the conveyance of oil from the well to certain traps located on respondents' property was continued in use by the lessee and that traps and tanks located on respondents' land remained thereon and were used by the lessee and that a roadway which extended across a portion of respondents' property from the oil well to the tanks near the eastern boundary of respondents' land continued in use. This evidence showed that at the time of trial, which was more than three months subsequent to the execution by the lessee of the quitclaim deed, the pipe line, the road, the traps, and the tanks were being used by the lessee. It is apparent therefore that respondents did not become revested with the unqualified interest and estate in the land which they owned at the time the original lease was executed, but that their land was released to them burdened with certain definite easements which under the express provisions of the lease contract may continue in existence for the remainder of the term of the lease.

[2] A further contention advanced by appellant deserves consideration. It is urged that the absence of a provision in the lease agreement definitely declaring that the lessors should continue to share royalties notwithstanding the surrender by the lessee of any of the demised premises is indicative of an intention of the parties that in the event of such surrender the clause providing for the equal division of royalties between the lessors should become inoperative. It is urged that a proper construction of the lease is determined not only by what is specifically declared therein, but also by what is expressly omitted therefrom on important features which are germane to the subject-matter of the instrument and that the omission from the agreement of a clause expressly providing that the division of royalties should continue in the event of a surrender by the lessee of a part of the demised premises creates an irresistible inference that the parties to the agreement did not intend that the sharing of royalties should continue in the event of such surrender. In support of this contention appellant relies upon the decision in First National Bank v. Standard Oil Co., 91 Cal. App. 705, 267 P. 548, 549. In the case cited the court was called upon to construe a lease agreement similar to that which is here being considered. The lease contract in the First National Bank Case, however, contained two provisions which are not present in the lease in the present action. These were,

first, a definite statement that the lessors agreed "to 'pool their interest in this lease'" and, second, that a provision as to apportionment of benefits was to be operative "notwithstanding the surrender by the lessee of any land described therein." The appellate court held that the former provision regarding the pooling of interests indicated that the lessors had surrendered their individual rights for the common good and that the second provision relative to the continuance of the apportionment of benefits notwithstanding a surrender was too plain and unambiguous to permit of a claim of uncertainty.

The above-cited decision is not authority for appellant's contention that the absence in the lease here considered of a provision for the continuance of equal division of royalties notwithstanding a surrender by the lessee of a portion of the demised premises justifies the drawing of an inference that the parties did not intend that the apportionment of benefits should continue if a surrender should occur. The cited case is not authority for the above-stated contention for the simple reason that the court had no occasion to discuss and did not discuss the absence of such a provision, since the lease contract there considered contained a clear, unambiguous, and express statement that the apportionment of benefits should continue notwithstanding a surrender by the lessee of a part of the demised premises. In our opinion it was at least as reasonable for the trial court in the present action to infer that the absence in the lease of any provision that the division of royalties should be different in the event of a surrender by the lessee of part of the demised premises was indicative that the lessors who had embarked upon a joint enterprise intended that the apportionment of benefits should continue in the event of such surrender by the lessee. Evidently the trial court did so infer and since we entertain a definite opinion that such an inference was entirely reasonable we cannot declare that the inference was improper or unwarranted.

[3] Appellant's final contention on this appeal is that the trial court erroneously admitted evidence regarding the circumstances which surrounded the making of the lease contract. The record shows that during the trial of the action and when appellant was presenting its defense the court, over respondents' objection, admitted in evidence the quitclaim deed which was executed by the lessee by which the lessee surrendered all of respondents' land and ¾ of appellant's land. On rebuttal the respondents were permitted, over appellant's objection, to introduce evidence which tended to prove that prior to the execution of the lease respondents endeavored to make an independent lease of their separate property to the lessee, but were unable to do so for the reason that the lessee insisted upon having a joint lease of the two tracts and that thereafter respondents and appellant executed the lease whose construction presents the problem to be determined by this litigation. This evidence was undoubtedly admitted on the theory that the lease contract was in some respects uncertain and that the trial court was entitled to be placed in the position of the parties and to be advised fully of the circumstances surrounding the execution of the instrument. If it be conceded for the sake of argument that appellant's contention relative to the admission of this evidence is sound and that the court erred in its admission, we entertain a settled conviction that no prejudice resulted to appellant therefrom and that the claimed error was harmless. We entertain this opinion for the reason that we think that the very language and terms of the lease show that the instrument was a joint lease whereby respondents as owners of one 40-acre tract and appellant as the owner of an adjoining 40-acre tract pooled their lands for the common benefit of both lessors. We think therefore that the admission of the evidence to which objection was made did no more than emphasize the fact that the lease contract was a joint adventure so far as the lessors were concerned and that no different result could have been reached if appellant's objection had prevailed and admission of the evidence had been refused.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

KIEKHOEFER v. UNITED STATES NAT. BANK OF LOS ANGELES. *

Civ. 5085.

District Court of Appeal, Third District, California.

April 3, 1934.

Hearing Granted by Supreme Court May 31, 1934.

1. **Appeal and error 🔑417(1).**
Notice of appeal, stating that plaintiff "desires" to appeal from the judgment, and requesting transcript to be prepared, *held* sufficient to prevent dismissal of appeal, especially where respondent was not misled and briefs were submitted on merits (Code Civ. Proc. § 940).

2. **Principal and agent 🔑109(4).**
General power of attorney, granting power to execute "bills," "notes," and other necessary or proper instruments, *held* not to authorize attorney in fact to indorse cashier's check or other negotiable instruments payable to principal.

> The word "bill" found in the power could not, standing alone, be construed to cover bills of exchange or other negotiable instruments, nor could the word "note" be construed as referring to negotiable instruments without being so designated.
>
> [Ed. Note.—For other definitions of "Bill" and "Note," see Words & Phrases.]

3. **Principal and agent 🔑97.**
Authority of one holding general power of attorney must be confined to transactions incident and appertaining to business of principal and intrusted to agent's care, and strained and unnatural construction is to be avoided.

4. **Principal and agent 🔑109(1).**
Authority of agent must be particularly scrutinized where agent assumes to make or indorse negotiable instruments.

5. **Principal and agent 🔑109(4).**
Where general power of attorney was executed expressly for use and benefit of principal, but indorsement on check named attorney in fact as beneficiary, bank should have made inquiry in regard thereto (Civ. Code, §§ 2229, 2232).

6. **Principal and agent 🔑109(4).**
Where bank, without examining power of attorney, rejected check indorsement executed by attorney in fact as such, and such indorsement was canceled, and bank accepted subsequent indorsement which was forgery, evidence *held* not to support bank's claim that it relied on supposed power in attorney in fact to indorse for principal.

7. **Banks and banking 🔑148(2).**
Bank paying check on forged indorsement of payee's name does so at its peril, in absence of negligence on part of payee-depositor inducing such payment.

8. **Principal and agent 🔑166(2).**
Where principal had no knowledge of forgery of indorsement on check by attorney in fact and of payment by bank until some ten months thereafter, dealings between principal and attorney in fact before discovery of forgery *held* not chargeable against principal so as to establish ratification.

9. **Banks and banking 🔑154(2).**
Where attorney in fact unauthorizedly borrowed money on principal's property and forged principal's indorsement on bank cashier's check which was cashed November 16, 1927, but principal did not discover forgery until August 6, 1928, principal's action against bank, commenced February 24, 1930, after negotiations between principal and bank in endeavor to adjust respective rights, *held* not barred by laches.

10. **Banks and banking 🔑148(2).**
Where attorney in fact forged principal's indorsement on bank cashier's check and bank paid the money to attorney in fact, believing indorsement to be genuine, principal *held* entitled to recover the money from bank.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Emma Martha Kiekhoefer against the United States National Bank of Los Angeles. Judgment for defendant, and plaintiff appeals.

Reversed.

M. D. Andrews and Lewis M. Andrews, both of Los Angeles, for appellant.

Edmund Nelson and G. L. Berrey, both of Los Angeles, and Louis Ferrari, of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by plaintiff, who prior to her marriage was known as Emma Martha Storz, in an action to recover money paid by defendant and charged against the account of plaintiff upon an order which plaintiff claims was not authorized by her.

One Arthur Palmer held a general power of attorney from plaintiff. He executed a deed of trust on plaintiff's property for $8,000 and out of that amount paid off a $2,000 existing incumbrance and certain other

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*For subsequent opinion see 39 P.2d 807.

deductions and procured a cashier's check for the remainder of $5,654.91 from the United States National Bank, which handled the escrow. Palmer first presented this check to the Bank of Italy, indorsing the same with plaintiff's name, by himself, as her attorney in fact. The bank refused to cash the check upon this indorsement. Palmer withdrew the check and subsequently again presented the same for payment which then bore the indorsement, "Pay to the Order of Arthur Palmer Company," and under that indorsement appeared the name of plaintiff, whereupon the Bank of Italy accepted the same and paid to Palmer the amount of the check. This indorsement and the signature of plaintiff were not in her handwriting, but were written by Palmer. It is the contention of plaintiff that the indorsement by Palmer of her signature was unauthorized and defendant bank was liable for payment made thereon.

[1] It is suggested by defendant that this court is without jurisdiction to consider the appeal herein because of the failure of plaintiff to give sufficient notice thereof. Plaintiff filed with the clerk of the superior court an instrument entitled: "Notice of Appeal to District Court of Appeal * * * and Request for Transcript." It then proceeds: "Please take notice that the plaintiff in the above entitled action desires to appeal from the judgment * * * to the District Court of Appeal * * * and requests that a transcript be made up and prepared. * * *" Reviewing courts have on several occasions been called upon to pass upon notices of appeal containing language very similar to that set forth above, but have almost uniformly held the notice a sufficient compliance with the requirements of the statute. Purity Springs Water Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810; Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65, 67; Wright & Hogan, Inc., v. Heide, 72 Cal. App. 16, 236 P. 219; In re Forthmann, 118 Cal. App. 332, 5 P.(2d) 472; Estate of Faber, 168 Cal. 491, 143 P. 737; Estate of Nutt, 180 Cal. 419, 181 P. 661. The original line of cases, of which Michelson v. City of Sacramento, 173 Cal. 108, 159 P. 431, is illustrative, hold to the contrary, but an amendment to section 940 of the Code of Civil Procedure has liberalized the requirements of the notice of appeal and we believe the cases cited above in support of the notice are indicative of the judicial trend. Here respondent was not misled. Briefs were submitted on the questions raised by the appeal and the cause is now before this court for consideration on its merits. As was said in Anderson v. Standard Lumber Company, supra, in denying the motion to dismiss the appeal on the ground no actual notice of appeal had been given: "Of course, the disposition of the courts is to hear appeals upon their merits, and the sections of the Code relating to the subject should be liberally construed with a view of promoting such purpose."

Turning now to a consideration of the appeal, the first question that confronts us is whether or not the indorsement was a forgery. Respondent insists that it was not because Palmer, holding an unrevoked power of attorney, was expressly authorized to so indorse.

[2-4] It is further urged that respondent was entitled to rely upon the indorsement because Palmer was authorized as attorney in fact to execute the indorsement of appellant. The power of attorney by its terms appointed Arthur Palmer as plaintiff's attorney "for me and in my name, place and stead, and for my use and benefit, to ask, demand, sue for," etc., and also "for me and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases * * * bills, bonds, notes, receipts, evidences of debt, * * * and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises." However, nowhere is found a power to execute bills of exchange, promissory notes, checks, drafts, or any form of negotiable instrument. The word "bill" found in the power cannot, standing alone, be inferred to cover a bill of exchange or other negotiable instrument, nor does a "note" refer to a negotiable instrument without being so designated. The authority of a general attorney is not unlimited and while its apparent authority is not to be restricted by undisclosed limitations it must, however, be confined to such transactions as are incident and appertain to the business of his principal and that part thereof intrusted to his care. Strained and unnatural constructions are to be avoided and limited to those which are reasonable and ordinary. The scope of the general agent's authority is not a matter of conjecture or surmise (Mechem on Agency [2d Ed.] vol. 1, § 740), and particularly must one scrutinize the act of an agent when the agent assumes to make or indorse negotiable instruments (2 Cor. Jur. "Agency," § 205, p. 564; Brown v. Rouse, 93 Cal. 237, 28 P. 1044).

"Commercial paper, such as bills, notes, and checks, passes current to a limited extent like money, and accordingly power to an agent to execute or indorse it is to be strictly limited, and will never be lightly inferred, but ordinarily must be conferred expressly. The most comprehensive grant, in general terms, of power to an agent conveys no power to subject the principal to liability upon such paper unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual. Thus such power is ordinarily not to be inferred from * * * a general authority to manage a business, unless such authority is necessarily implied from the peculiar circumstances of the particular case and is indispensable to the proper execution of the authority granted." 2 Cor. Jur., § 280, pp. 636, 637; Golinsky v. Allison, 114 Cal. 458, 46 P. 295.

[5] We do not believe, therefore, that the authority conferred upon Palmer gave him power to indorse negotiable instruments in general nor the check here involved in particular. Furthermore, the bank was placed upon notice by the attorney in fact being named the beneficiary in the indorsement and the power being expressly for the use and benefit of plaintiff should have caused the bank to have made inquiry in regard thereto. Sections 2229 and 2232, Civ. Code.

[6, 7] Neither do we believe the evidence supports the claim that the bank relied upon a power in Palmer to indorse for plaintiff. The record discloses the first indorsement was—

"Emma Martha Storz
"By Arthur Palmer, Attorney in Fact
"Arthur Palmer."

This indorsement the bank refused to accept and the check was returned to Palmer who had presented it. That indorsement was then canceled by drawing lines across and the word "Cancelled" was written over it and the check was again presented, indorsed, "Pay to the order of Arthur Palmer Company" and below was what appeared to be the genuine signature of "Emma Martha Storz." This signature had been placed there by Palmer and in fact was a tracing of an original signature of plaintiff and upon representation the check was paid by the bank. It seems apparent, therefore, that the bank did not pay upon the authority of the power of attorney, as it had rejected that indorsement, but did pay upon the signature of Emma Martha Storz, believing it to be her true and genuine signature. The bank, having no actual knowledge of an existing or outstanding power, cannot now shield itself from an unauthorized payment of plaintiff's funds by asserting the existence of this unknown power. If the first indorsement was knowledge to the bank of an outstanding authority in Palmer, they failed to investigate the scope thereof or restrictions thereon and did not require an inspection of the power itself. The bank could not have been misled by the power, for Palmer did not purport to act under it nor the bank purport to pay by virtue thereof. In the absence of negligence on the part of the depositor inducing such payments, when a bank pays a check on a forged indorsement of the payee's name it does so at its peril. Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A. L. R. 1193.

[8] We find no support in the evidence of a ratification of Palmer's acts by plaintiff. It does not appear that plaintiff had knowledge of the forgery by Palmer and the payment by the bank until some ten months thereafter, and any dealings she may have had with him prior to a knowledge on her part of his misdeeds cannot be charged against her.

[9] Neither do the facts bar plaintiff's action by reason of laches. The check in question, which was a cashier's draft and therefore returned to and retained by the bank, was cashed November 16, 1927. Plaintiff did not discover that Palmer had used the power of attorney or borrowed money on her property until about April 15, 1928, and she did not know of the forgery of her name to the check until August 6, 1928, when the check was for the first time produced by defendant at Palmer's preliminary hearing on charges of forgery of the indorsement of this check and grand theft. It was probably on August 6, 1928, also, that defendant herein learned for the first time that the indorsement in question was a forgery. The present action was commenced February 24, 1930, after negotiations between the parties hereto in an endeavor to adjust their respective rights.

In support of the contention of respondent that it was justified in relying upon the act of Palmer as the attorney in fact of appellant, it cites several cases, the first being Flat Top National Bank v. Parsons, 90 W. Va. 51, 110 S. E. 491. In that case Benton and Parsons were partners. Benton signed the latter's name as maker to a promissory note payable to himself, indorsed it and gave it as collateral security for his own $15,000 note to plaintiff bank. It appeared that prior thereto Parsons had given Benton a power of attorney, expressly authorizing him to sign and execute negotiable instruments. The court found that the proceeds of this transaction were turned over to Parsons and were ultimately used for his benefit, and the court held it was his duty upon repudiating the note in the hands of plaintiff bank to refund the money received thereon. In the instant case plaintiff did not give her agent Palmer express authority "to sign and execute negotiable instruments," nor did she receive anything either directly or indirectly from the transaction involving the forgery on the indorsement of the check. The next case referred to by respondent is Indiana Flooring Co. v. District National Bank, 51 App. D. C. 391, 280 F. 522. In that case the agent of plaintiff had complete charge of the Washington office of the plaintiff corporation and accepted and refused credits, made all collections, received payments in cash, notes, or checks payable to the order of plaintiff or himself. He also indorsed, cashed, or deposited checks and bought merchandise for which he paid by check or in cash. Blank checks signed by an officer of the company were delivered to him to countersign, fill in the necessary amounts, and cash them at the bank. It is conceded he had authority to indorse for deposit the checks herein involved, but the authority to cash them is challenged. It is apparent that in this case the agent had authority to indorse checks and that it was necessary and incident to his employment and the nature of his business. The next case cited by respondent is Salen v. Bank of State of New York, 110 App. Div. 636, 97 N. Y. S. 361. The plaintiffs therein granted full power to their agent to indorse checks in blank without any restrictive words, but they restricted the use which he should make of the check after he had indorsed it by requiring it deposited in the bank to their credit. This he failed to do, but a departure by the agent of such authority and instructions was a mere diverting of a negotiable instrument from an authorized use, in which case the loss would fall upon the principals rather than upon a bona fide holder for value and without notice. In other words, the unauthorized diversion of the checks would not make the original indorsements forgeries. In the case at bar the power of attorney of the agent Palmer did not authorize him to indorse for deposit or for any other purpose. In the case of Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529, the agent had been intrusted with the duty of filling out checks to be signed by his principal and presenting them and having them cashed at the depositary bank over a period of several years. The agent on certain checks changed the designation from a third person so as to be made payable to bearer and raised the amounts, and in other checks payable to bearer raised the amounts, all of which the bank paid. It was there held where the principal holds out the agent as competent and fitted to be trusted he thereby in effect warrants his fidelity and good conduct within the scope of his agency and when checks are regular in appearance and nothing appears to raise suspicion as to their validity, the loss falls upon the depositor where the agent forges or alters them. This case differs from the case at bar in that the agent had express authority to perform the acts complained of. The acts of the agent were customary in the business of the principal and the agent had been so acting in depositing and cashing checks for his principal over a period of years and was held out over a considerable time as a trusted employee. Respondent also cites the cases of Cluett v. Couture, 140 App. Div. 830, 125 N. Y. S. 813, McCabe Hanger Mfg. Co. v. Chelsea Exchange Bank, 183 App. Div. 441, 170 N. Y. S. 759, and Substantial B. & L. Ass'n v. Real Estate Title Ins. & T. Co., 82 Pa. Super. Ct. 211, all of which may likewise be distinguished.

[10] We therefore believe from the foregoing that respondent was not authorized in honoring the check in question, and the judgment should be and is hereby reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

220 Cal. 529

ROSENKRANZ v. BENTLEY et al.

L. A. 13897.

Supreme Court of California.
April 16, 1934.

Courts ⚷121(1).

Chattel mortgage given to secure payment of two notes and providing for foreclosure upon default in payment of either *held* primary obligation as to each note, so that superior court had jurisdiction of action to foreclose, which was not lost because larger note was discharged and amount of smaller note was below jurisdictional amount.

In Bank.

Appeal from Superior Court, Los Angeles County; Thos. C. Gould, Judge.

Action by H. A. Rosenkranz against H. L. Bentley and Lurene H. Bentley and others. From a judgment for plaintiff, the named defendants appeal.

Affirmed.

Oliver M. Hickey, Wm. J. Clark, and Henry M. Lee, all of Los Angeles, for appellants.

Phillips & Thompson and L. H. Phillips, all of Los Angeles, for respondent.

PRESTON, Justice.

In this, a judgment roll appeal by defendants in an action to foreclose a chattel mortgage, they seek to show a lack of jurisdiction in the superior court of Los Angeles to enter the decree of foreclosure because, at the time the decree was rendered in the action, the sum due was one over which the municipal court alone had jurisdiction. This claim seems to be entirely without merit. The facts necessary to confirm this conclusion are:

Plaintiff held a promissory note of defendants dated September 12, 1929, for the principal sum of $1,750, due one year after date, and secured by a second deed of trust on real property. On April 24, 1931, defendants were in default in the payments required by this note; there being due at that time the sum of $2,125. On said date proceedings to conduct a sale in foreclosure were in progress but not completed. Likewise, on said date, defendants became further indebted to plaintiff in the sum of $900, also evidenced by a promissory note, and they executed to plaintiff a chattel mortgage on certain household effects to secure both notes. The chattel mortgage contained the following provision:

"* * * With the further understanding however, that upon any default of the terms or conditions of the note herein mentioned and/or upon the failure of the mortgagors to pay any or all taxes and assessments upon said real property mentioned in said deed of trust given as security for the repayment of said loan of $1,750 * * * and/or of any sums due as principal and/or interest upon the first mortgage or trust deed * * * and/or upon the failure of mortgagors to fulfill each and all of the terms and conditions of this chattel mortgage and of the terms of the note in the sum of $900. herein mentioned, being one of the items for which this chattel mortgage is given as security, then, in that event, mortgagee shall have the right to proceed with the foreclosure of this chattel mortgage in accordance with the terms thereof, and shall have the further right to resume the proceedings already instituted * * * for the sale of said real property in accordance with said deed of trust. * * *"

Defendants being in default on all their obligations, plaintiff instituted this action to foreclose said chattel mortgage. The amount due on the first note was $538.15 and on the second note (secured by the second trust deed) $2,286.45. After commencement of the action and before judgment of foreclosure, plaintiff resumed proceedings for sale under the deed of trust; the foreclosure sale was held and the proceeds thereof were sufficient to discharge the larger note. Thereupon the court, in this action, proceeded with foreclosure of the chattel mortgage in liquidation of the smaller note only.

It is conceded that, if jurisdiction attached at the time of institution of the action, it remained throughout, even though the amount of the debt at the time of judgment was below the limit required for the jurisdiction of the superior court. Gardiner v. Royer, 167 Cal. 238, 139 P. 75. The contention of appellants is that the chattel mortgage, as to the larger note, was a second, and not a primary, obligation; therefore plaintiff could not foreclose except as to a deficiency which might arise from a sale first had under the deed of trust; hence the superior court never had jurisdiction. The unsoundness of this contention is evident. The provision of the chattel mortgage above quoted seems clearly to provide for a primary action of foreclosure as to both notes, on default as to either or as to certain other covenants, all with the option in respondent to resume foreclosure proceedings under the deed of trust. This also appears from the plain language of the following further provisions of said chattel mortgage: "The mortgagors mortgage to the mortgagee all that certain personal property * * * (describing it) as security for the payment to H. A. Rosenkranz of the following obligations: 1. The sum of $900 with interest * * * according to the terms and conditions of a certain promissory note of even date herewith * * * (setting forth the note in hæc verba). 2. The sum of $2,125 approximately which is represented by a promissory note * * * (setting forth the note in hæc verba). * * *"

The doctrine of the recent case of Bank of Italy Nat. Trust & Savings Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940, does not seem to be in any way involved. Plaintiff here has a double primary security and has the right to proceed to realize upon the one, the other, or both, at his election.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.

PEOPLE v. SONOQUI et al. *

Cr. 3692.

Supreme Court of California.

April 2, 1934.

Rehearing Granted April 30, 1934.

1. Homicide 🔑253(1).

Evidence supported conviction of first degree murder.

2. Criminal law 🔑741(1).

It is jury's function to determine weight of evidence in first instance.

3. Criminal law 🔑1160.

Before verdict approved by court can be set aside for insufficiency of evidence, it must clearly appear that on no hypothesis is there sufficient substantial evidence to support conclusion reached.

4. Criminal law 🔑1180.

Ruling granting new trial for insufficiency of evidence in murder case did not establish law of case on that question in second

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*For subsequent opinion see 55 P.2d 123.

trial, even though evidence might be substantially the same.

5. **Criminal law** ⟹1144(15).

Reviewing court presumes jurors followed trial court's admonition and instruction respecting improper argument.

6. **Criminal law** ⟹404(4).

In murder prosecution, guns and bullets found in defendants' home *held* properly introduced in rebuttal of defendants' statement denying such possession, and as showing defendants had means to commit offense charged.

7. **Criminal law** ⟹404(4).

In murder prosecution, lantern carried by deceased and piece of lead found *held* admissible to show complete picture of physical surroundings of crime.

8. **Homicide** ⟹166(8).

In murder prosecution, love letter from defendant to decedent's wife under assumed name 19 months after crime, during which time defendant had been in jail, *held* admissible.

9. **Criminal law** ⟹742(3).

In murder prosecution, credibility of testimony of deceased's daughter, 14 years old at time of homicide, because of delay of four years in stating she saw defendant at time of homicide, *held* for jury, in view of testimony that daughter was under dominating influence of mother.

10. **Homicide** ⟹339.

In murder prosecution, refusing to permit testimony that defendant was having carnal relations with decedent's daughter before killing *held* error in favor of defendant.

11. **Criminal law** ⟹369(3).

In murder prosecution evidence that defendant had served term in state prison was admissible to show place from which defendant wrote letter to deceased's wife and to explain why love liaison evidenced by letter had become suspended.

12. **Criminal law** ⟹470.

In murder prosecution, pistol and cartridges found in defendants' home were admissible without calling ballistic expert; it being for jury to determine whether cartridges corresponded to bullet producing death.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Remigio Sonoqui and another were convicted of murder, and they appeal.

Affirmed.

Prior opinion, 24 P.(2d) 517.

William T. Kendrick, Jr., and L. V. Peterman, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SEAWELL, Justice.

Inasmuch as we deemed the question of the insufficiency of the evidence as presented by the petition filed in this court for a hearing to be a close one, we granted a hearing in the matter. We have since examined the record, both as to the question of the insufficiency of the evidence to sustain the judgment and also as to the alleged prejudicial conduct of the district attorney. Upon such examination we do not find ourselves able to agree with the contention of appellants that this court would be warranted in holding that the evidence is insufficient as a matter of law to sustain the judgment, or that the appellants suffered prejudicial error by or through the conduct of the district attorney during the trial of said causes. We therefore adopt the opinion of the District Court of Appeal, Second Appellate District, Division 2, Archbald, justice pro tempore, author, as the opinion of this court, with a few brief observations added. Said opinion follows:

Defendants were jointly charged with the crime of murder, to which charge each pleaded not guilty. At the first trial defendants Sonoqui were apparently found guilty; the action having been dismissed as to their codefendant Martina Ruiz. Motions for a new trial were granted and the cause was again set for trial, before another judge, at the conclusion of which both were found guilty of murder in the first degree; the verdict fixing the punishment at life imprisonment. Defendants' motions for a new trial and in arrest of judgment were denied. Each has appealed from the order denying his motion for a new trial and from the judgment entered upon said verdict.

[1-3] Appellants contend: (1) That the evidence is insufficient to justify the verdict and judgment; (2) that the matter of the sufficiency of the evidence was adjudicated by the action of the judge presiding at the first trial in granting a new trial on the ground of insufficiency of the evidence to support the verdict; (3) that the district attorney conducted himself in a manner prejudicial to appellants; and (4) that the court erred in admitting certain exhibits in evidence.

(1) Vicente Ruiz, who at the time was liv-

ing with his wife and daughter, was killed on September 15, 1928, in Azusa, Calif., as the result of a gunshot wound in his abdomen, caused by a .22 short bullet. His daughter, Mrs. Dorothy Sierra, testified that she had known defendants Sonoqui for two years before her father's death—that they lived about two blocks from the Ruiz home; that about a month before her father was shot he came home in the middle of the afternoon and found defendant Remigio Sonoqui at their home; that said defendant had been there all morning and afternoon, and when her father arrived her mother was in the dining room and Remigio was in the living room playing the phonograph. Evidence showing quite a different picture just preceding the arrival of Ruiz was excluded by the court. Ruiz asked Remigio what he was doing there, to which the latter replied, "Nothing, nothing, just playing the phonograph." Ruiz then said, "You had better stay away from this house, I don't want you here any more." About the same time, according to the testimony of the daughter, she heard a conversation between Remigio Sonoqui and her mother. Asked as to what was said, she testified: "Well, Remigio told my mother that he loved her and my mother said, 'I love you too.' He said, 'Shall we run away?' My mother says, 'If I run away I will lose my property and my children both.' He said, 'I will fix that.'" Mrs. Sierra further testified that she retired on the evening of the murder at about 9:20 p. m. Later she heard a noise at her bedroom window and saw defendant, John Sonoqui outside, about four feet from the house; that shortly thereafter she heard her father go to the kitchen for some coffee; that he returned to his bed and immediately took a lantern and went outside. A few minutes later she heard two shots fired, and on running to the window she saw two men running across a vacant lot next to their home and recognized them as the defendants Sonoqui. Ruiz was taken to the hospital and the witness was taken to the Sonoqui home. Later, when Mrs. Ruiz returned from the hospital with John Sonoqui, she went to the Sonoqui home also. When defendant Remigio arrived, according to Mrs. Sierra, he was crying and pulling his hair, and Mrs. Ruiz said to him, "Don't cry, don't be a coward."

It will be seen from the foregoing that the daughter played a very important part in making plaintiff's case, and she was the only one who testified to seeing defendants, or either of them, at or near the scene of the murder at the time it occurred. It is true that certain investigating officers testified to tracing the tracks across the lot and to a point directly across the street from the Sonoqui home, in the direction of which they pointed, and that such tracks showed that the men ran from the scene of the murder. Defendants were taken by the officers over soft ground and the tracks so made compared in size to those made by the men fleeing from the scene of the crime. There was other evidence which tended to point to appellants as the perpetrators of the act. Their conflicting stories of their whereabouts on the evening in question, told to the officers, did not sound good. There is ample evidence to justify the verdict. The principal contention of appellants is that the testimony of the daughter is unworthy of belief. She testified at the inquest that she saw no one in the yard that night and had no idea who shot her father. She told no one that she saw appellants running from the scene of the murder, or that she saw John Sonoqui near her bedroom window, until she told her husband about it some two weeks before the preliminary hearing, which was held November 18, 1932. However, she had an explanation as to why the story was not told before, which was believed by the jury and which, with other facts in the case, would seem to make it sufficient as an explanation.

The matters above referred to go but to the weight of the evidence, which it is the function of the jury to determine in the first instance and the trial court on motion made after verdict; "and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal" upon the ground herein discussed, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. Under the evidence in this case, even in the face of the contention of appellants as to the testimony of the daughter, we cannot so say.

[4] (2) Nor can we see any merit in appellants' claim that the ruling of the judge presiding at the first trial, in granting a new trial on the ground of insufficiency of the evidence, established the law of the case on that question in the second trial, even assuming that the evidence might be substantially the same. To so hold would mean that there could be no new trial. Instead of granting a motion on that ground the court should make some order finally disposing of the case, which of course it has no jurisdiction to do. In few cases is there any very substantial change in the evidence on the new trial. Such order

was not a final judgment, and yet that is the effect appellants claim for it. The cases cited show that the phrase "law of the case" arises out of a final determination of a question of law on appeal. City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298. It is true the judge presiding on the first trial with brutal frankness, but without judicial poise, branded the daughter as a "liar"; but an equally honest man might come to an entirely different conclusion in that regard.

[5] (3) Appellants urge that the conduct of the district attorney in his opening statement in the trial in chief and in his argument to the jury was calculated to and did prejudice the rights of defendants and prevented them from having a fair trial. * * * The record shows, however, that appellants either did not object, or if objection was made the court admonished both the district attorney and the jurors in such a way that we fail to see how prejudice could have resulted; and we must presume that the jurors followed such admonition and instruction, in the absence of an express showing to the contrary in the record before us.

[6, 7] (4) In the investigation of the case appellants were asked by the officers if they had any guns or shells of .22 caliber, to which they replied that they did not. This was after the officers had found some .22 short caliber shells at the scene of the homicide. Subsequently in the Sonoqui home the investigators found a rifle and revolver of .22 caliber, as well as some .22 short caliber shells. Asked as to why they said they had no guns in the house except two shotguns, they responded that it was because they "didn't want to get mixed up in this murder of Ruiz." The lantern being used by Ruiz when he was shot was found with a nick in the handle, as though made by a bullet, and an irregular piece of lead smaller than a bullet was found near by, which might have been a piece of the bullet cut off and deflected after striking the lantern handle. These were all introduced in evidence over appellants' objection that they were incompetent, irrelevant, and immaterial, and no proper foundation laid. The guns and bullets found in the home of appellants were properly introduced in connection with the evidence of their finding, in rebuttal of the statement made to the officers denying possession of any such articles. Being the same size and caliber as those used in perpetrating the crime, they were also competent evidence showing that appellants had the means at hand to commit the offense charged against them. People v. Mooney, 177 Cal. 642, 171 P. 690. The lantern and piece of lead found were necessary to show a complete picture of the physical surroundings of the crime as a part of the people's case and as furnishing a circumstance bearing upon the charge, "whether directly or remotely" being "for the jury to decide in view of all the other facts and circumstances." People v. Mar Gin Suie, 11 Cal. App. 42, 51, 103 P. 951, 956.

[8] A letter written by appellant Remigio Sonoqui to Martina Ruiz, wife of decedent, was admitted in evidence against said appellant and over his objection. The missive was dated at San Quentin, Calif., Wednesday, July 23, 1930, some nineteen months after the crime charged, and it might well be characterized as a fervent love letter. It was introduced in connection with a statement made by Remigio to Officer Morrell, in the course of which he was asked if he was ever in love with decedent's wife, to which he replied, "No, I was not." He was then asked if he ever wrote her any love letters, to which he answered, "Well, that one you had [referring to the letter in question] is the only one, because I didn't know who she was." The letter was addressed to "Miss Margaret Sonoqui." When first asked if he wrote to Mrs. Ruiz under the name of Sonoqui, Remigio denied it and said, "That is a forged letter." After admitting in the statement that he wrote the letter he stated that he did not know it was Mrs. Ruiz, but that it was in reply to a letter signed by the same name which he received and thought came from a cousin of his. It was stipulated that defendant Remigio Sonoqui was either in jail or prison from the day following the homicide up to the time of writing the letter in question, and that he did not visit Mrs. Ruiz during such time. The particular objection appellants' counsel seem to have to the letter is that it was dated at San Quentin. After the stipulation above referred to was made the court instructed the jury that the fact as to defendant Remigio Sonoqui being in custody was not for their consideration except to show his inability to have personal relationship with Mrs. Ruiz, and that they were not under any consideration whatsoever to allow the fact of some other offense having been committed to enter into their deliberations, which admonition was stated to be satisfactory by appellants' counsel. It would seem, however, that with the evidence already before the court as to the love existing between such appellant and the wife of decedent prior to the murder, the fact that it could endure in spite of bars from the day after the murder until the date of the ardent letter had a very material bearing on the depth of such affection and as to whether

or not it was deep enough to motivate an act such as that here in question. Furthermore, the fact that the correspondence with Mrs. Ruiz was carried on under an assumed name might evidence a desire to keep the relationship secret, and to some degree at least point to a guilty conscience on Remigio's part.

[9] Appellants vigorously assail the testimony of Dorothy Sierra, the daughter of the deceased, as being inherently incredible. Said daughter, who was but fourteen years of age at the time of the homicide, gave testimony at the coroner's inquest held shortly after the homicide to the effect that she did not see any one about the yard or grounds of her father's residence at about the time her father received the fatal shot. She did not communicate to the peace officers who were engaged in apprehending the murderers that she had seen the appellants in the yard and saw them flee from the scene of the homicide shortly after the shots were fired (as she afterwards testified), until a period of approximately four years thereafter. She did testify that she told her husband what she had seen some time after marriage. She claimed that she was under the dominating and deterring influence of her mother, and that she had been admonished by her that it would be better for all concerned if she did not make public the identity of the defendants. Appellants make much of the fact that the daughter stated under a somewhat confused situation that the mother did not instruct her not to relate what she had seen until some four years after the incident had happened. The daughter, who is of Mexican blood, was not an adept in the use of the English language, and her lack of comprehension of the full import of questions propounded to her plainly appears. Some of her answers as reported may be said to literally support appellants' claim, while others do not. The construction contended for by appellants would lead to a palpable absurdity. It would have her saying that her mother admonished her four years after the incident had passed not to make mention of it.

The jury, under the state of the evidence, may have well given her testimony the natural and only reasonable construction that can be placed upon it, to wit, that the daughter was instructed by the mother to remain mute at the time the peace officers were investigating the crime. The daughter was then of the immature age of fourteen years. What prompting effect the reflections of maturer years may have had upon her conscience after the mother's influence had been broken by their separation was a question of fact entirely within the province of the jury.

It was not error to show that the defendant Remigio wrote from San Quentin under a fictitious name to the wife of the deceased. The evidence was sufficient to show that a love liaison existed between the defendant Remigio and the wife, which began before the homicide and continued thereafter while he was serving a term in the state prison, from which he wrote said letter. This meretricious relation, which was interfered with by imprisonment, was a legitimate subject of consideration as furnishing a motive for the crime.

[10] We think the court erred in favor of the other brother, John, in refusing to permit the prosecution to show that John was having carnal relations with the fourteen year old daughter at the time of and prior to the killing of the father. The record contains evidence tending to show that the deceased had reason to doubt the purposes of the Sonoqui brothers' visits at his home.

[11] There is no merit in the claim that it was error to bring before the jury the fact that said defendants had served terms in the state prison. Such evidence was admissible on several grounds. It was proper to show the place from which said letter was written. It was admissible to explain why said liaison, the existence of which was evidenced by said letter, had become suspended.

[12] The pistol and cartridges found in the home of the defendants—the possession of which had been denied by them, and which corresponded to the size of the bullet which caused the death of the decedent—were properly admitted in evidence. The weight and effect of this evidence was entirely for the jury's consideration. The district attorney was not required, as contended by defendants, to call a ballistic expert whose ability or integrity he may have had cause to doubt. He introduced the cartridges recovered from the defendants' home and the empty shells found at the scene of the homicide, and it was the province of the jury to determine as a question of fact whether or not the cartridges or shells corresponded to the shells or bullet which it was shown produced death.

The case is a typical one of facts upon which two juries found the defendants guilty, and in which two courts have held the evidence sufficient to support the judgment. We see no reason why this court should disturb the judgments of conviction.

Judgment and orders affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; IRA F. THOMPSON, J.

220 Cal. 532

BROWN et al. v. GUARANTY MORTG. CO. OF CALIFORNIA et al.

FIDELITY SAVINGS & LOAN ASS'N v. BROWN et al.

L. A. 13715, 13716.

Supreme Court of California.

April 16, 1934.

Rehearing Denied May 14, 1934.

Bills and notes ⚿376.

Negotiable note, which does not show its usurious nature on its face, is enforceable in hands of bona fide holder who became such before maturity, though contract was usurious in its inception.

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In Bank.

Appeals from Superior Court, Los Angeles County; Claude L. Purkitt, Deceased, Judge, and Victor R. McLucas, Judge.

Action by Claude H. Brown and others against the Guaranty Mortgage Company of California and others, consolidated with an action by the Fidelity Savings & Loan Association, a corporation, against Claude H. Brown and others. From the judgment in the first action, the plaintiffs and the named defendant appeal, and from the judgment in the second action, the defendants appeal.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellants Brown and others.

Arthur F. Coe, John L. Mace, Woodruff, Burr & Smith, Woodruff, Musick & Hartke, Laurence B. Martin, and Christian H. Hartke, all of Los Angeles, for respondents.

SHENK, Justice.

The appeals by the appellants Brown are from judgments in the consolidated cases above entitled and are presented on one record.

The appellants Brown in 1923 applied to Guaranty Mortgage Company of California for and received a loan, the proceeds of which were used in completing the construction of a certain building. Two notes were given to evidence the loan, one for $90,000 and the other for $95,000, each payable to the Guaranty Mortgage Company and bearing interest at 7 per cent. per annum. The notes were negotiable in form. To secure payment of the note for $90,000 the makers executed a first mortgage on said property, and to secure the $95,000 note a deed of trust on the same property was executed. The Fidelity Savings & Loan Association became the owner and holder of the $90,000 note before its maturity. Certain payments on account of the interest on that note were made by the makers, but nothing was paid on the principal. The Fidelity Savings & Loan Association brought an action to foreclose the mortgage. The Browns, the makers of the notes, commenced an action against the lender, Guaranty Mortgage Company of California, the Fidelity Savings & Loan Association, and others to have it declared that said loan transaction was usurious, for an injunction preventing the defendants from proceeding with foreclosure proceedings, and for other relief. The basis for the charge of usury was the claim that the defendant Guaranty Mortgage Company deducted and retained from the proceeds of said $90,000 note the sum of $36,867 as a bonus for making said loan of $185,000. Upon issue joined the cases were consolidated and tried together. The trial court found that the transaction between the plaintiffs Brown and the Guaranty Mortgage Company was usurious. It also found that the Fidelity Savings & Loan Association and certain other defendants were purchasers of said notes for value before maturity and without notice or knowledge of the usurious character of the transaction between the makers and the lender. The court rendered judgment for the plaintiff Fidelity Savings & Loan Association in the foreclosure action. It denied to the plaintiffs Brown in their action for an injunction any relief as against the Fidelity Savings & Loan Association or the other defendants who were found to have been bona fide purchasers from the Guaranty Mortgage Company. The Browns have prosecuted appeals from both judgments.

No contention is made that the evidence does not support the finding that the purchasers gave value and had no notice or knowledge of the usurious nature of the transaction. The only contention of the appellants is that under the provisions of the usury law an agreement to pay interest in violation of the act is void and that this invalidity continues throughout the existence of the agreement into whosesoever hands it might come. The appellants rely on cases such as Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849, 5 A. L. R. 1444, which have been distinguished in the case of Baker v. Butcher, 106 Cal. App. 358, 366, 367, 289 P. 236, wherein a similar question was involved and a judgment similar to the one in the case at bar was affirmed. The appellants question the authority of that case inasmuch as the court there relied upon the case of Community Lumber Co. v. Chute (Cal. App.) 284 P. 466, in which a petition for rehearing was granted and the case as finally decided (Community Lumber Co. v. Chute, 215 Cal. 268, 10 P.(2d) 57), did not determine the immediate question involved. More recently, however, the case of Connon v. Goebel, 217 Cal. 399, 18 P.(2d) 931, of necessity recognized the force of the distinction made in the case of Baker v. Butcher, supra. The Connon Case has settled the question in this state at least to the extent that a negotiable promissory note, which does not show its usurious nature on its face is enforceable in the hands of a bona fide holder who became such before maturity, even though the contract was usurious in its inception.

The state of the decisions in this state renders it unnecessary to discuss or decide the question whether the makers' "waiver of offset statement" involved herein could have the effect of creating as against them an estoppel to claim the note or any part thereof void.

The judgments are affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

YOUNG v. THREE FOR ONE OIL ROYALTIES et al. *

L. A. 12648.

Supreme Court of California.

April 5, 1934.

Rehearing Granted May 3, 1934.

Licenses 🔑18½.

National bank, acting as trustee to apportion proceeds of oil among parties to lease and purchasers of beneficial interests, *held* excluded from operation of Corporate Securities Act (St. 1917, p. 673, § 2, subd. 3; p. 675, § 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Harry T. Young, trustee for Ralph R. Martin and others, against the Three For One Oil Royalties and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

For prior opinion, see 24 P.(2d) 894.

W. C. Dalzell, of Los Angeles, for appellant.

G. C. De Garmo and W. M. Crane, both of Los Angeles, amici curiæ.

Lauro & Boone and McCaughan & McCaughan, all of Long Beach, Virgil G. Lewis, of Los Angeles, Francis D. Adams, of Hollywood, Howard Waterman, Haas & Dunnigan, and H. C. Johnston, all of Los Angeles, Robert Clifton, of Hollywood, Phil N. McCaughan and Edmund J. Lauro, both of Long Beach, Walter F. Haas, of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles (Freston & Files and Ralph E. Lewis, all of Los Angeles, of counsel), for respondents.

Freston & Files and Overton, Lyman & Plumb, all of Los Angeles, amici curiæ.

IRA F. THOMPSON, Justice.

This appeal is from a judgment in favor of the defendants in an action brought to recover the amounts paid for certain certificates of beneficial interests in a common-law trust, it being the theory of the complaint that the sales of the interests were in violation of the Corporate Securities Act (St. 1917, p. 673, as amended), and that defendants had falsely and fraudulently represented that they had secured a permit from the corporation commissioner to sell the certificates and had fully complied with the law respecting the sale of securities. Briefly, the facts are as follows: On January 3, 1923, the respondents R. G. Welch, W. J. Dallas, and E. J. Boland, as lessees, assigned to the Long Beach National Bank as trustee three oil leases and formed a common-law trust for the purpose of apportioning any production arising from the operation of wells to be drilled upon the property to the lessors, to purchasers of beneficial interests, and to themselves as owners of the interests not sold. The respondent Bank of Italy, by reason of a change of ownership of the Long Beach National Bank, became trustee to succeed the latter on May 14, 1924. The complaint was filed May 20, 1929, by appellant as trustee for Ralph R. Martin, Albert H. Bailey, and C. P. Wiand (assignee of E. D. Lindley), who purchased certificates of beneficial interests on the following dates, paying therefor the sums set after their

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*For subsequent opinion see 36 P.2d 1065.

names: February 10, 1923, Ralph R. Martin, one unit, $1,600; March 1, 1923, Albert H. Bailey, one unit, $1,800; and April 12, 1923, E. D. Lindley, two units, $3,200. The money was paid to R. G. Welch as agent for the Long Beach National Bank as trustee and the other defendants, the bank as trustee issuing to the purchasers the certificates of beneficial ownership. In other words, the action was not commenced until more than six years after the sales were made and the money paid in. Unattacked findings of the court reveal that Martin, Bailey, and Lindley each knew at the time of his purchase he was buying an "interest or unit in the proceeds and avails arising out of said trust known as the 'Three for One Oil Royalties' "; that during the period when the sales were made the defendants did not have any permit from the corporation commissioner authorizing them, or the trustee, to sell beneficial interests in the trust. Another finding, supported by a stipulation of counsel, is to the effect that inquiry was made of the corporation commissioner concerning whether a permit for the "Three for One Oil Royalties" was necessary and the commissioner ruled that it was not necessary. Other findings are in substance that none of the defendants represented that a permit had been issued, or concealed any facts from the purchasers, or practiced any fraud upon any of them. The defendants interposed the plea that the complaint was barred by the statute of limitations and the court concluded that this defense was well grounded.

It is the contention of appellant that he is entitled to a judgment either upon the ground of fraud or of mistake; that he did not discover the facts constituting the fraud or concerning which there was a mistake until about one year before the complaint was filed, i. e., the parties for whom he appears as trustee did not discover the fact that the "Three for One Oil Royalties" had no permit until May or June, 1928. Hence it is argued that the action is governed by subdivision 4 of section 338, Code of Civil Procedure, which provides that three years shall be the period of limitation for such an action, and reads as follows: "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Assuming the invalidity of the sale of the certificates, it would be interesting to follow the questions thus raised to their logical conclusion; but the view we entertain of this cause would make such a discussion purely academic, because we have concluded that as the law stood in 1923 there was nothing to prevent the issuance of certificates by the trustee, the Long Beach National Bank. If such be true, there was neither fraud nor mistake nor an action for money had and received on the theory of failure of consideration.

Turning to the Corporate Securities Act as it then existed (Stats. 1917, p. 673), we read in subdivision 3, § 2 thereof, as follows:

"The word 'company' includes all domestic and foreign, private corporations, associations, joint stock companies, and partnerships, of every kind, and *also trustees*, as hereinafter defined; excepting therefrom:

"(a) All national banking associations and other corporations organized and existing under and by virtue of the acts of the congress of the United States;" (Four other exceptions not necessary for us to here notice are set forth.)

Subsequently a "trustee" is defined as a person or company executing a voluntary trust expressly created or declared by an instrument in writing with certain exceptions which are also not germane in our present situation. In section 3 of the act we find the inhibition against sale by a company of its securities. It therefore follows that the important word is that of "company," which by its definition is broad enough to include trustee. The question arises whether, by the exception which immediately follows, a national bank acting as trustee is such a company. The District Court of Appeal had occasion to critically examine the excepting clause in the case of In re Flesher, 81 Cal. App. 128, 252 P. 1057, 1059, and concluded that "the Legislature had in mind the advisability of excluding from its definition and from the operation of the act those corporations which, comparable to national banking organizations, are organized in furtherance of some power or authority vested in Congress and with the operation of which it was without power to interfere." That court also said that it was "the legislative intent to exclude from the definitive words of the section all corporations subject to some other supervisory power of the state."

It follows from the decision from which we have quoted, as well as from the plain, unequivocal language of the act, that national banks were excepted. It is argued by some of the amici curiæ that while the provision excludes from the operation of the law national banks while issuing their own obligations or securities, yet it does not exclude them when acting as trustees. In this contention we cannot agree for the following reason: The word "company" is defined to include trustee, and a "trustee" is defined as one who executes a voluntary trust. Hence a trustee executing a voluntary trust which happens to be a national banking organization is excluded from the operation of the act. And we could not construe the language otherwise without doing violence to the English language.

The Legislature recognized this defect in the law and at the first legislative session following the Flesher Case the exception was stricken out and in its stead it was provided the act should not apply to certain securities, among which we find: "Any security issued by and representing an interest in or a direct obligation of a national bank * * *."

We are compelled to conclude that the certificates of beneficial interests issued by the Long Beach National Bank as trustee were not invalid and void. Consequently plaintiff had no cause of action.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

220 Cal. 525

PHILP v. PHILP.

L. A. 14443.

Supreme Court of California.
April 13, 1934.

Husband and wife 🔑281.

Evidence sustained finding that property settlement between husband and wife, entered into before divorce, was just and fair and not induced by fraud of husband.

In Bank.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Norman La Rue Philp against Ethel Louise Philp, wherein defendant filed cross-action. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal, or affirm judgment.

Judgment affirmed.

Clarke & Bowker, of Los Angeles (Dixie Dunnigan, of Los Angeles, of counsel), for appellant.

Golden & Kaufman, of Los Angeles, for respondent.

PRESTON, Justice.

This appeal by defendant from judgment for plaintiff, submitted on motion to dismiss appeal or affirm judgment, presents the main question of sufficiency of the evidence to support the conclusions of the court below.

On September 26, 1931, plaintiff and defendant, then husband and wife, executed a property settlement agreement, dividing equally their entire community estate, and further providing that, in the event plaintiff should be assessed upon an unsettled income tax claim, defendant would pay half of the assessment. On March 21, 1932, the United States government levied an extra assessment of $14,802.42, which plaintiff paid. Defendant refused to reimburse him as agreed, and he therefore brought this action to recover from her half of said tax or the sum of $7,401.21. Defendant answered and also cross-complained, seeking impeachment of the property settlement for fraud. To the cross-action plaintiff pleaded a general denial and res adjudicata by reason of a divorce decree; later he added pleas of estoppel and laches.

The cause went to trial. Defendant endeavored to show that plaintiff, by deceit and fraudulent representations, had induced her to execute the property settlement at a time when she was in a worried, weakened mental and physical condition; that he took undue advantage of her trust and love for him, engendered by their marriage of more than twenty-two years; that she acted without independent advice, relying solely upon plaintiff's false assurances that they would be permanently reconciled.

It appears that about August 13, 1931, some few weeks prior to execution of said agreement, defendant filed against plaintiff an action for divorce, based on charges of adultery, wherein she sought an award of all their community property. Plaintiff thereupon gathered together certain of the community assets and secreted himself. He was finally located on September 5, 1931, and served with summons. He immediately returned home, arriving about 1 o'clock in the morning, and forthwith effected with defendant what purported to be a sincere reconciliation, made in good faith with intent of full performance, it being also understood that defendant would dismiss her divorce action, and that the parties would execute an agreement settling their property rights. However, plaintiff thereafter continued to live with defendant for only about two months. In November, 1931, he left for Reno, Nev., to join one Mary Gilbert, defendant's sister-in-law, who was there securing a divorce and whom he later married. During the brief period of resumption by plaintiff and defendant of their marital relations, the property agreement here in question was executed and the divorce action was dismissed. To accomplish the latter result, it was necessary for defendant to secure new counsel, as her then attorneys refused to dismiss the case.

Defendant claimed that, so far as plaintiff was concerned, the reconciliation was but a pretension or gesture made for the sole purpose of securing her confidence and inducing her to give him a favorable property settlement and to dismiss her divorce complaint, thus relinquishing all chance of securing more than half of the community estate, together with the right to share in future community earnings and to claim support, maintenance, and counsel fees. There was evidence that, while plaintiff was evading service of summons in the divorce action, he stated that he would return home, "soft soap" the defendant, get a property settlement out of her, and then leave. Defendant claims that he did in fact succeed in doing just this, and that her continuing love for him made her a willing victim for, she believed that he would return to her as a dutiful husband; thus, even over the protest of her attorneys, she hired new counsel to secure a dismissal of the divorce action and to draw up the property contract—a contract which was manifestly unfair to her, as it failed to account for substantial sums which had been paid out by plaintiff from the community assets. Further defendant asserted that her new attorney made no independent investigation, but merely followed her directions; therefore she really acted without independent advice, in sole reliance upon the misrepresentations of plaintiff.

Plaintiff thereafter filed a Mexican divorce proceeding against defendant; she opposed the action, and on November 30, 1931, commenced another divorce action against plaintiff, resting on allegations of cruelty. Plaintiff did not contest the case, and on December 24, 1931, the court rendered therein its interlocutory decree in favor of defendant, which later became final, granting her a divorce and awarding to her the sum of $3,233.35, stated to be one-half of the community assets of the parties, which consisted of two accounts aggregating $6,466.71. In explanation of her failure to question the validity of the property settlement in said divorce proceeding, defendant stated that it was not until she heard of plaintiff's marriage in May, 1932, to said Mary Gilbert, that she finally became convinced that he would never return to her, and that during the intervening period she had been worried, harassed, and mentally, if not physically, ill.

Plaintiff, as above stated, in answering the cross-complaint, raised defenses of res adjudicata by reason of said divorce decree, estoppel, and laches. Furthermore, resisting the charges of fraud on the merits, he offered evidence to show that he acted sincerely and in good faith in undertaking the reconciliation, in procuring the property agreement, and in approving the dismissal of the first divorce proceeding. He testified that he resumed marital relations with defendant in good faith, but that after a few weeks, and about December 31, 1931, he was again forced to leave home by reason of her misconduct; that he had told her, if she wanted a property settlement, they could have it, and that he would live at home for the sake of their boys if she would "leave Bromo Seltzer alone and stop nagging," but that she thought he was a liar and a thief and stole money from her, and that she tried to poison herself and give herself gas; that the situation became so unbearable that he finally left her. Evidence was also received, which need not be detailed here, to show that the property settlement was equitable, just, and fair to both parties, dividing equally their community estate, and that defendant was mentally capable and competent to contract throughout the period in question; that she was independently advised and through her several attorneys knew and was at all times fully aware of her rights and of the consequences of dismissal of the first divorce action.

The court below, after hearing the cause, made findings and gave judgment for plaintiff. Defendant appealed, urging the insufficiency of the evidence to uphold the findings that the property settlement was just and fair and not induced by fraud, actual or constructive, on the part of plaintiff. She also contends that the said interlocutory decree of divorce, disposing of a small portion of the community assets, did not bar her attack upon the property settlement in this action, and that the finding of laches was not justified. The last two questions need not be here discussed, as they become immaterial in view of our conclusion that the court below was warranted, under the evidence, in refusing to set aside the property agreement.

We have examined the record with care, and find, in the conflicting evidence, sufficient support for the findings upholding the validity of the property settlement agreement. In other words, it appears that said agreement made a full and fair division of the community estate, and that defendant at all times had full knowledge of her rights in the premises. It was the privilege of the court below to credit the testimony and evidence of plaintiff that he entered upon the reconciliation with sincere motives and acted in good faith in his dealings with defendant and left her only because of the insufferable situation created by the continual differences arising between them.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; IRA F. THOMPSON, J.

220 Cal. 515

COMMERCIAL UNION ASSUR. CO., Limited, et al., v. PACIFIC GAS & ELECTRIC CO. et al.

S. F. 14996.

Supreme Court of California.

April 11, 1934.

1. **Appeal and error** 🔑989.

Appellate court may examine evidence only to determine whether there is substantial evidence to support verdict.

2. **Negligence** 🔑12.

Owner is not liable for injury to another's property due to attempt to protect his own property from danger, provided reasonable prudence is exercised.

3. **Trial** 🔑252(7), 255(10), 296(3).

In action by fire insurers who had paid losses of other owners against defendant for negligently causing fire to get out of control, instruction that, if defendant had reasonable grounds for believing that his property was in danger of destruction, entry into warehouse threatened by fire and use of ordinarily careful means to remove property were warranted, *held* not error as authorizing entry after belief no longer existed or for failure to note provisions of Penal Code prohibiting obstruction of firemen, in view of other instructions, evidence, and failure to request instruction on Penal Code (Pen. Code, § 385).

4. **Negligence** 🔑12.

Instruction that defendant, charged with negligently causing fire to get out of control in attempt to save his own property, was not liable to fire insurers who had paid losses of other owners unless defendant was negligent and that warehouse and contents would not have been destroyed except for such negligence, *held* not erroneous.

5. **Appeal and error** 🔑1058(1).
Evidence 🔑317(9).

Exclusion of testimony as to what fire chief had told witnesses with respect to keeping warehouse closed during fire *held* proper as hearsay, and harmless where evidence sought to be introduced was received at other stages of the trial.

6. **Evidence** 🔑548.

Fire chief's opinion whether fire was under control during laying of pipe *held* properly excluded, where he was absent during large part of such time.

7. **Evidence** 🔑547.

In action by insurers who had paid fire losses of others against defendant charged with negligently causing fire to get out of control in attempt to move his own goods from warehouse, question whether fire was under control at certain time *held* properly rejected, where court stated that witness, a member of the fire department, might state the effect defendant's opening of warehouse wall had upon extension of fire.

8. **Negligence** 🔑138(4).

In action by insurers who had paid fire losses against owner whose removal of his goods from warehouse during fire allegedly caused it to get out of control, evidence that warehouse was old wooden structure containing inflammable products justified instruction on contributory negligence.

9. **Evidence** 🔑553(2, 4).

Hypothetical question, not put to expert to test his qualifications, was properly excluded, where it not only failed to state facts shown by evidence, but assumed facts contrary to undisputed facts.

10. **Trial** 🔑18.
Witnesses 🔑225.

Considerable latitude must be allowed trial court in controlling examination of witnesses and general conduct of the trial.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Commercial Union Assurance Corporation, Limited, and others against the Pacific Gas & Electric Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Prior opinion in 23 P.(2d) 822.

Long & Levit, Percy V. Long, and Bert W. Levit, all of San Francisco, for appellants.

Clinton F. Stanley, Thomas J. Straub, and W. H. Spaulding, all of San Francisco, for respondents.

WASTE, Chief Justice.

This cause was taken over after decision in the District Court of Appeal, First District, Division 2, in order that we might more fully consider certain assignments of alleged error on the part of the trial judge in his conduct of the case. Upon an examination of the entire record, including the evidence, we are satisfied with, and adopt as and for the decision of this court, the following portions of the opinion of the District Court of Appeal, prepared by Mr. Presiding Justice Nourse:

Plaintiffs are twenty-four fire insurance companies who sued the defendant for loss by fire of a warehouse building and goods stored therein upon which the plaintiffs had satisfied claims for loss. The cause was tried by a jury, which returned a verdict for the defendant. From the judgment following the verdict, the plaintiffs have appealed upon typewritten transcripts.

On May 5, 1931, the warehouse and all its contents were totally destroyed by a fire of unknown origin. Stored therein at the time were 155 reels of copper wire owned by the defendant. All the property destroyed other than that owned by the defendant was insured by one or more of the plaintiff companies. The basis of their action is that for the purpose of saving its own property the defendant broke into the warehouse at a time when the plaintiffs claim that the fire was under control and confined to a small area, and that such entry caused the fire to flare up and pass beyond control. The defense is that, when the employees of the defendant entered the warehouse, the fire, which had been smouldering for approximately three hours, showed definite signs of being beyond control, and that these employees were then convinced that the fire was then incapable of being controlled, and that the property of the defendant would be destroyed unless removed from the warehouse.

The warehouse was located at the town of Irvington in Alameda county. The fire was discovered at the warehouse at about 4 a. m. The town of Irvington had no fire department, and calls were made on the adjoining towns of Centerville, Niles, and Mission San Jose. These responded with fire trucks and chemical tanks. The chief of the Centerville department, who was in charge of the operations, located the fire in a small area in the northeast portion of the warehouse where sacks of beet pulp were stored and in the wooden frame of the skylight immediately above the beet pulp. Firemen entered the building on the east side and opened the skylight for the purpose of throwing water upon the framework and upon the beet pulp underneath. The flame in this portion of the building was put out, but the fire continued to smoulder, filling the warehouse with smoke for a period of approximately two hours thereafter and until the entry of the defendant's employees as hereafter stated. During the course of the operations, the fire chief discovered that the water supply was insufficient, and ordered the laying of a pipe line to tap an additional water supply about a quarter of a mile away from the warehouse. While he was in charge of this work, the employees of the defendant discovered that the fire had broken out underneath the floor of the warehouse and was running into the northwest corner of the building, where defendant's cable was stored. They then asked permission of the owner of the warehouse to enter and remove their property. Some fifteen or thirty minutes after the fire was discovered burning underneath the floor defendant's employees made entry and then discovered it had moved from the beet pulp in the northeasterly corner of the building to the northwest corner, where their cable was stored, so that they were unable to remove the cable through the door by which they had entered. A portion of the wall of the warehouse was therefore removed and four of the 155 reels were rolled through this opening. Other reels had fallen through the burning floor, causing sparks to fly about the workmen, and this, together with the heat from the burning floor, prevented them from making further recovery of defendant's property.

There is no dispute as to the essential facts involved. Some of the witnesses differed in their opinion as to the question whether the fire was under control or could be controlled by the facilities at hand, but upon the main fact that the fire had extended from the beet pulp and was destroying the floor of the warehouse before defendants entered there is no substantial dispute. In plaintiffs' behalf their witnesses adopted the theory that, when defendant's employees opened the door on the northwest corner of the warehouse, they caused a draft through the building which fanned to flame the smouldering fire in the beet pulp, thus causing the total destruction of the building. On defendant's behalf, witnesses testified that the fire was completely out of control at the time they entered the building; that it had proceeded along the floor and underneath the building to such an extent that no further effort could save the building and the destruction of its contents. This opinion is based more or less upon the admitted fact that at all times there was an opening on the east wall of the building close to the place where the beet pulp was stored, an open skylight directly above the beet pulp, and an opening under the eaves three or four inches high all around the building. It was also undisputed that smoke was pouring out of all these openings from 4:00 a. m. until about 7:30 a. m., when defendant's employees entered the building.

[1] Disregarding the opinions and theories of the various witnesses and confining the case strictly to the undisputed evidence, the single question that was presented to the jury was whether the defendant, in its efforts to protect its own property, believed, and had reasonable grounds for believing, that its property was in danger of destruction unless removed and whether the acts of defendant's employees in this connection were reasonable and proper under the circumstances. On the issue of law involved, the briefs are singularly void in the citation of authority and long in the repetition of the testimony of witnesses. It should be unnecessary to say that this court cannot review this testimony for the purpose of passing on the credibility of the witnesses heard by the jury. Our only interest is to determine whether there is substantial evidence to support the verdict. The appellants do not claim that there is not substantial evidence for that purpose, and in view of the record this claim could not be made.

[2] On the main issue, the rule is stated in 45 Corpus Juris, p. 712, that: "Where an emergency arises involving danger to one's property, he is justified in attempting to save the same, and if he acts with reasonable prudence in the endeavor to rescue or protect his property he is not liable for resulting injury to property of another." Owen v. Cook, 9 N. D. 134, 81 N. W. 285, 47 L. R. A. 646, is cited in support of the statement. That was a case where the defendants started a back fire to save their homes from destruction by an approaching prairie fire. The plaintiff claimed that the back fire spread beyond the main fire and caused the destruction of his property. The Supreme Court of North Dakota held that the acts of the defendants were not negligent, but that they had the right to take such steps for the protection of their own property as were reasonable and proper under the circumstances. Valentine v. Ry. Co., 155 Mich. 151, 118 N. W. 970, is cited by the appellants. In that case certain forest products of the plaintiff and freight cars of the defendant were on fire. The plaintiff owned other forest products which it claimed were safe from fire. The defendant moved one of its burning cars along its track where these products were located, and they were destroyed by a fire coming from this burning car of the defendant. The defendant did not justify its removal of the burning car for the purpose of saving its own property, but relied upon the defense that the property of the plaintiff would have been destroyed in any event. The real point of the Valentine Case is that upon the issues so formed it was a simple question for the jury to determine whether defendant's act in moving its burning car was reasonable and prudent and whether the defendant had sustained the burden of proof of its issue—that plaintiff's property would have been destroyed notwithstanding the acts of the defendant complained of. Latta v. New Orleans, etc., Ry. Co., 131 La. 272, 59 So. 250, Ann. Cas. 1914A, 988, also cited by appellants, is not helpful. There the court held that, in determining the liability of one who destroys the property of another to save his own, consideration should be given to the relative values and of the comparative ability of the sufferers to bear the loss. This is a doctrine to which we need not subscribe, as the case is to be controlled by other issues.

[3] Appellants complain of the following instruction: "If you find that defendant's employees believed and had reasonable grounds for believing that defendant's copper wire and reels were in danger of destruction if left in the warehouse here in question, then I instruct you that defendant's employees had the right to enter said ware-

house and use all reasonable means to remove said wire and reels therefrom, and if you find that defendant's employees acted as ordinarily reasonable and careful men would act under such circumstances in endeavoring to remove said wire and reels from the warehouse, then I instruct you that the defendant was not negligent." It is argued that the instruction is erroneous because it excused respondent if the entry of the warehouse had been made after respondent's employees believed, and had reasonable grounds for believing that respondent's property was in danger of destruction unless removed. It it also argued that there is error in the instruction because it failed to note the provisions of the Penal Code preventing obstruction of firemen in their attempt to extinguish fires. We do not believe that the instruction is susceptible to either attack. We must bear in mind that the action is one for negligence and not one based upon acts of premeditation and formed intention. The jury was instructed that negligence is the omission to do something which an ordinarily careful and prudent person would have done under the same or similar circumstances, or doing something which such a person would not have done in the same situation; that in determining whether one exercises ordinary care the jury should consider all the facts proved and all the surrounding circumstances and say whether the conduct of the defendant was that of a person of ordinary prudence and discretion under such circumstances. Having cast their case in negligence, the appellants committed to the jury the duty of determining whether under all the facts and surrounding circumstances the conduct of defendant's employees was that of persons of ordinary prudence and discretion, and this is all that the instruction complained of advises the jury to do. Manifestly, if respondent's employees did not believe that respondent's property was in danger of destruction, they had no right to enter the warehouse, because to do so under such circumstances would have been a trespass. The instruction does not nullify the provisions of Penal Code, § 385, as claimed by appellants. The giving of the chief's orders to keep the warehouse closed and the revocation of those orders was a question which was sharply disputed in the evidence. If the jury believed the testimony of respondent's witnesses on this point, and then found that in entering the warehouse respondent's employees "acted as ordinary reasonable and careful men would act under the circumstances," the jury would have found that the respondent was not negligent in that respect, and that was all that was covered by this instruction. If the appellants had desired an instruction on the Penal Code section, they should have requested it.

[4] Criticism is made of the instruction reading: "In order to find a verdict for plaintiffs you must find two separate facts; first, that defendant, in its endeavors to save its property was negligent and careless, and second you must also find that if defendant had not so endeavored to save its property then the building and its contents would not have been destroyed but would have been saved." It is argued that this instruction casts too great a burden upon the appellants; that the jury should have been instructed that it was necessary to find nothing more than that "the building might have been saved" if respondent's employees had not made the entry complained of. It is said that such an instruction would have permitted the jury to speculate, and thus to return a verdict for the appellants, if it believed that it was possible that the building might have been saved but for respondent's act. Houren v. Chicago, M. & St. P. Ry. Co., 236 Ill. 620, 86 N. E. 611, 20 L. R. A. (N. S.) 1110, 127 Am. St. Rep. 309, is cited to the point. That was a case where a railroad train had been left standing across a public highway; thereby preventing the fire department from approaching a fire burning on property on the other side of the track. Plaintiff was allowed recovery against the railroad company on the theory that the property might have been saved if the fire department had not been delayed by the standing train. We had occasion to consider a similar question in Hanlon D. & S. Co. v. S. P. Co., 92 Cal. App. 230, 234, 268 P. 385, where other cases to the same point are cited. The rule of these cases is that the unexplained blockading of the fire department and interference in its endeavors to control the fire makes a prima facie case of negligence in favor of the plaintiff whose property was destroyed by the fire. It is not the rule that damages may be awarded upon mere conjecture or surmise or that plaintiffs' burden of proving the actual damages sustained by the acts complained of is in anywise lessened.

[5-7] Criticism is made of the rulings of the trial court in excluding testimony of witnesses as to what the fire chief told them relative to keeping the building closed. The rulings were made excluding testimony which would have been mere hearsay, but the appellants were not harmed because all

the evidence which they sought to produce through these witnesses was properly tendered and received at other stages of the trial. Appellants complain of the ruling excluding the testimony of the fire chief as to his opinion whether the fire was under control "during the time that the pipe was being laid." The answer was properly excluded because the chief was shown to have been absent from the place of the fire during a large part of the time when this pipe was being laid. Another member of the fire department was asked if in his opinion the fire was under control. The court sustained the objection as to the form of the question, stating that the witness could tell what effect, if any, the opening of the wall by the respondent had upon the extension of the fire. There was no error in the ruling.

[8] We find no error in the giving of the instruction on contributory negligence. The issue was brought into the case by way of affirmative defense. In support of its allegations thereon the defendants introduced evidence tending to show that the destroyed warehouse had been built more than forty years, had been of wooden frame construction with a wooden floor, and that at the time of the fire had contained many sacks of grain, feed, beet pulp, and other readily inflammable products. Without passing upon the weight or sufficiency of this evidence, we are satisfied that its presence warranted the giving of the instruction now assailed.

[9] Appellants complain of a ruling limiting their cross-examination of an expert witness. The hypothetical question to which an objection was sustained not only failed to state the facts as shown by the evidence, but assumed facts contrary to the uncontradicted and established facts of the case. The question was not propounded to test the qualifications of the witness. Under the circumstances, and in view of the discretion vested in a trial court in this particular, we find no impropriety in the ruling. Roche v. Baldwin, 143 Cal. 186, 192, 76 P. 956; MacCoy v. Gage, 38 Cal. App. 672, 674, 177 P. 296. Moreover, appellants by their next succeeding, and properly framed, question achieved the desired result.

[10] In conclusion, we are satisfied from an examination of the entire record that the trial court was not guilty of prejudicial misconduct by reason of certain remarks complained of by the appellants. A trial judge is not to be unduly and unreasonably hampered and restricted in the exercise of control over the proper examination of witnesses and the conduct of the trial generally. Considerable latitude is, and must be, accorded to him in this regard. We fail to discover wherein the trial judge in the present case exceeded the bounds, to the prejudice of the appellants.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; TYLER, Justice pro tem; KNIGHT, Justice pro tem.

COOPER v. KELLOGG et al.*

Civ. 4825.

District Court of Appeal, Third District, California.
April 14, 1934.

Rehearing Denied May 14, 1934.

1. Automobiles 🔑6.

Cause of action for injuries to guest caused by gross negligence of host when driving automobile *held* not abated by subsequent amendment of vehicle act restricting recovery to cases of intoxication or willful misconduct (St. 1931, p. 1693, § 141¾).

2. Automobiles 🔑244(20).

Evidence showed that host was guilty of gross negligence injuring guest when host drove his automobile across pavement to the left until he crashed into slowly on-coming automobile traveling upon shoulder of highway to avoid crash (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580; St. 1929, p. 540, § 122).

"Gross negligence" is want of slight care or an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others.

[Ed. Note.—For other definitions of "Gross Negligence," see Words & Phrases.]

3. Evidence 🔑471(13).

On issue whether injuries to guest were caused by gross negligence of host when driving automobile, testimony of host that he must have been asleep at time of accident

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*For subsequent opinion see 42 P.2d 159.

held conclusion and inadmissible (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

◆

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Jack M. Cooper, by Marce Barbara Roberts, his guardian ad litem, against Byrd W. Kellogg, also known as Mrs. Charles Kellogg, and another. From a judgment for defendants, plaintiff appeals.

Reversed.

James, Brann & Rowe, of San Francisco, for appellant.

Bronson, Bronson & Slaven, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this action plaintiff through his guardian ad litem sought to recover damages from defendants for injuries sustained while riding as a guest in an automobile driven by defendant Beecher Kellogg, the injuries being caused, so it was alleged, by the gross negligence of the defendant in the operation of the car. Upon the trial the court found against plaintiff and entered judgment in favor of defendant, from which plaintiff prosecutes this appeal.

The two principals were students at the Santa Rosa Junior College at the time of the injuries to plaintiff and were returning from a basketball game at San Mateo. They had reached a point on the main highway between Petaluma and Novato when the car driven by defendant collided with a car going in an opposite direction, causing the injuries to plaintiff. At or near the point of collision the concrete pavement of the highway was approximately twenty feet wide, marked in the center by the joint in the concrete, and had ten-foot shoulders on each side. At the place of collision the highway is level and straight for a distance of about a quarter of a mile in both directions. Just beyond the quarter-mile straightaway in the direction from which defendants' car was coming there is a gradual curve in the road. The accident occurred about 2 o'clock in the morning; there was a slight rain, but the visibility was good. Plaintiff was asleep at the time of and immediately preceding the collision. Kellogg, the driver of the car, testified he did not see the car with which he collided and did not know how the accident happened. Mr. Dresbach, the driver of the other car, testified he saw the headlights of the Kellogg car just after it made the turn and when it was approximately a quarter of a mile away from him, at which time it was proceeding in a general northerly direction on the right or easterly paved portion of the highway. When the Kellogg car was about 150 yards away from his car, Dresbach noticed the approaching car was gradually bearing from its proper side of the highway to the left. When he noticed this he applied the brakes to his machine and began to drive his car off the paved portion until all four wheels were entirely off the pavement of the westerly side of the highway. The Kellogg car continued on its course across the highway until it struck the Dresbach car almost head-on. At the time of the impact the Dresbach car was traveling from two to four miles an hour; the Kellogg car was traveling approximately twenty miles per hour. The headlights of both cars were lighted before and at the time of the impact. From the time Dresbach first observed the Kellogg car veering from the right he traveled approximately fifty yards, while the Kellogg car traveled approximately one hundred yards in the same length of time. There were no other cars or vehicles upon the highway in the vicinity at the time of the collision.

We cannot agree with the trial court that upon this testimony the defendant was not guilty of negligence. It is apparent that the collision was caused by the defendant leaving his right side of the highway and driving across the pavement to the left until he crashed head-on into an automobile headed in the opposite direction then almost at a standstill, which automobile, to avoid the impending crash, had been driven off the pavement and upon the unpaved shoulder adjoining the highway. It cannot be denied that defendant in operating his car in this manner and along such a course violated the provisions of section 122 of the California Vehicle Act (St. 1923, p. 557, as amended by St. 1929, p. 540) and was therefore guilty of negligence as a matter of law.

[1] Having determined the collision was the result of the negligence of the defendant, it now becomes necessary to find the degree of negligence, for plaintiff, being a guest, can recover only if this negligence was gross. It was originally claimed by defendants that the cause of action for gross negligence was abated by the amendment of the statute in 1931 (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), subsequent to the acci-

dent which occurred in October, 1930, and that the only recovery possible was restricted to cases of intoxication or willful misconduct. This conclusion is now abandoned in view of the recent holding of our Supreme Court in Stotts v. Blickle (Cal. Sup.) 30 P.(2d) 392, reaffirming the rule that the amendment of 1931 to section 141¾ of the California Vehicle Act did not abolish an existing cause of action for injuries to a guest because of the gross negligence of the driver, which accrued prior to the effective date of the amendment. "Gross negligence" has been defined as "want of slight care" or "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others." Redington v. Pac. P. T. C. Co., 107 Cal. 317, 40 P. 432, 434, 48 Am. St. Rep. 132.

[2] Under the facts here before the court the evidence shows without conflict that Beecher Kellogg could have seen the headlights on the Dresbach car when he was a quarter of a mile away. There were no obstructions or other vehicles on the highway and the visibility was good. The impact occurred off the highway and on defendant's left thereof. Kellogg, the driver of the car, offered no explanation as to why he did not see the approaching car nor its headlights nor why he was on the left side of the highway and practically off the paved portion thereof. He stated he had no premonition or feeling of drowsiness. The foregoing brings this case within the rule of Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474, and Malone v. Clemow, 111 Cal. App. 13, 295 P. 70, 72, in which latter case the court said: "Undoubtedly, respondents in these cases made out at least a prima facie case of gross negligence against the appellant Florence Clemow. The evidence shows without conflict that Florence Clemow, the driver, could have seen said tail-light on the truck upon which it was placed at least two hundred feet to the rear thereof; there was no obstruction to prevent her seeing the truck; the night was clear; the street was artificially lighted; the body of the truck was visible to persons driving up the street; the street was straight for some distance to the rear of the truck; her course was not interfered with by any other obstacle or traffic; on the left rear end of the parked truck was a red lighted tail-light, visible for a distance of at least two hundred feet along the course of travel of appellant's automobile, and that the right front fender, or front part of her automobile, struck the left rear corner of said truck. Mrs. Clemow drove the automobile from Burbank, in Southern California, to Oakland, in one day, and was driving along East Fourteenth street in Oakland, and had been traveling for several blocks at a speed of from thirty to thirty-five miles per hour. No explanation was offered why she did not see the parked truck and its tail-light within about twelve feet distance therefrom."

[3] Appellant also urges the trial court erred in overruling his objection to a question by the court. At the conclusion of the examination of defendant by respective counsel the following occurred:

"The Court: Q. Were you asleep? * * *

"Mr. Rowe: I would like to interpose the objection it is incompetent, irrelevant and immaterial, calls for the opinion and conclution of the witness. * * *

"The Court: I will overrule your objection. Were you asleep? A. I must have been asleep."

From this it is apparent that the defendant Kellogg's answer that he must have been asleep at the time of the accident is but his conclusion and the objection thereto should have been sustained. With this answer out of the record there is nothing upon which the court could have based its finding that defendant was asleep and therefore not guilty of gross negligence. We need not here discuss the question as to whether or not to sleep at the wheel of an automobile constitutes gross negligence, as we have already indicated that the defendant was guilty of gross negligence in the operation of the automobile and that the findings of the court are not sustained by the evidence.

For the foregoing reasons the judgment is reversed.

We concur: THOMPSON, J.; PLUMMER, J.

137 Cal.App. 478

LUCCHESI v. STATE BOARD OF EQUALIZATION et al.

Civ. 5124.

District Court of Appeal, Third District, California.

March 21, 1934.

Hearing Denied by Supreme Court May 17, 1934.

1. **Statutes 🔑181(1), 183.**
Intention of Legislature must be ascertained if possible, and, once ascertained, will be given effect even though not consistent with strict letter of statute (Code Civ. Proc. §§ 1858, 1859).

2. **Constitutional law 🔑70(1).**
Courts have no legislative power, and, if legislative intent is not reasonably expressed or cannot by reasonable rules of construction be ascertained and given effect, court cannot insert omitted provisions or read out of statute language therein contained (Code Civ. Proc. §§ 1858, 1859).

3. **Statutes 🔑225.**
Statutes in "pari materia," which are statutes relating to same subject-matter, must be construed together.

[Ed. Note.—For other definitions of "In Pari Materia," see Words & Phrases.]

4. **Intoxicating liquors 🔑45.**
Three acts dealing with alcoholic liquors enacted in 1933 must be read as one act, and anything contained in later acts differing from former acts, will be given effect, and definitions in last act conflicting with definitions in first or second act control (St. 1933, pp. 340, 625, 1697).

5. **Intoxicating liquors 🔑45.**
Under acts to levy excise tax and regulate manufacture and sale of liquors, definition in last act in 1933 reads out of previous act in 1933 definitions of wine therein contained, and such acts must be read as defining wine as contained in last act (St. 1933, p. 340, § 1 (a); p. 626, § 1 (a); p. 1698, § 4).

6. **Intoxicating liquors 🔑55.**
Statutes which, read together, define wine as meaning alcoholic beverage obtained by fermentation of natural content of fruits or agricultural products, impose excise tax upon liquors containing alcoholic content irrespective of percentage of alcohol therein (St. 1933, p. 340, § 1 (a); p. 626, § 1 (a, c); p. 1698, § 4; p. 1706, § 36).

"Beverage" is ordinarily understood to mean a liquor suitable for human consumption irrespective of its alcoholic content.

7. **Intoxicating liquors 🔑60.**
Applicant *held* not entitled to license to conduct winery on paying $10 winery fee without paying $100 license fee demanded and not giving bond to pay excise tax (St. 1933, p. 340, §§ 1 (a), 2; p. 626, §§ 1 (a, c), 2; pp. 1698, 1702, §§ 4, 17; p. 1706, § 36).

◆

Petition by Armando Lucchesi against the State Board of Equalization and others for a writ of mandate.

Writ denied.

Charles Kasch, of Ukiah, for petitioner.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the above-named petitioner for a writ of mandate to be directed to the respondents commanding them to issue a license to conduct a winery, manufacture and sell wine upon the payment of a fee of $10.

The record shows that the petitioner has presented an application upon a form prescribed by the respondents, and that all and singular the regulations of the state board of equalization have been complied with save as to the payment of the amount of the license fee demanded by the respondents and the giving of a bond for the payment of an excise tax of 2 cents a gallon upon all wine manufactured and sold by the petitioner.

This cause involves the construction of three acts of the Legislature, to wit: The first act approved by the Governor on April 6, 1933; a second act approved by the Governor on April 27, 1933; and a third act approved by the Governor on June 3, 1933. The first act approved by the Governor, known as chapter 51, Statutes 1933, p. 340, defines the liquors therein referred to as follows: "'Beverage' means and includes any beer, lager beer, ale, porter, wine, similar fermented malt or vinous liquor, and fruit juice, or other fermented beverage containing not less than one-half of one per cent and not more than three and two-tenths per cent of alcohol by weight." Section 1 (a). This act also defines a "manufacturer" as one who brews, ferments, or manufactures a beverage, as just defined. Section 1 (b). The second act contains the same definition of the liquor therein referred to as a beverage, and the "manufacturer" as any person who produces, brews, ferments, or manufactures such a beverage. Section 1 (a, c). The second act also contains a number of provisions intending to regulate the sale of the beverage referred to, supplementing the provisions of the first act.

The licenses and the excise taxes provided for in the act known as chapter 51, § 2, supra, and chapter 178, Statutes 1933, p. 625, § 2, would impose a license tax upon the petitioner in the sum of $100 per annum as a manufacturer of a beverage as defined in those acts. The act approved by the Governor June 3, 1933, known as chapter 658, Statutes 1933, p. 1697, imposed a license tax of $10 per annum upon a winery (section 17, p. 1702). The act just referred to contains a list of definitions, the only one of which involved herein reads as follows: "'Wine' means any alcoholic beverage obtained by the fermentation of the natural content of fruits or other agricultural products containing sugar." Section 4, p. 1698.

Chapter 658, supra, contains in specific language no imposition of any excise tax upon the manufacture and sale of wine; however, section 36 of chapter 658 (page 1706) provides as follows: "Nothing contained in this act shall be construed as repealing, superseding, or otherwise affecting any of those provisions relating to an excise tax on beverages containing alcohol, which provisions are found in an act entitled 'An act to impose an excise tax on the manufacture and distribution of certain beverages, to provide for the collection and disposition thereof, to provide penalties for the violation hereof and to declare that this act shall take effect as a statute immediately,' approved April 6, 1933, and an act entitled 'An act to levy an excise tax and to regulate the manufacture, distribution and sale of certain beverages; to provide for the licensing of the manufacture, distribution and sale; to provide penalties for the violation of this act and to provide that this act shall take effect immediately,' approved April 27, 1933."

On the part of the petitioner it is contended that the Legislature has failed to impose any license tax in excess of $10 per year upon any one who engages in the manufacture and sale of wine, and has imposed no excise tax whatsoever upon the wine manufactured and sold; in other words, that the Legislature, by defining the word "beverage" as containing a limited alcoholic content, as herein stated, has confined the licensing and excise taxing provision of the acts referred to as being imposed upon a beverage containing less than 3.2 per cent. of alcohol by weight, and that any beverage containing in excess of 3.2 per cent. of alcohol by weight is entirely untaxed. That the Legislature intended any such result by reason of the enactment of the three chapters to which we have referred needs no discussion. The only question before us is whether the legislative intent has been expressed in such a manner that the courts may give it effect.

Section 1858, Code of Civil Procedure, reads: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Section 1859, Code of Civil Procedure, is in these words: "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and (a) particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

[1] In 23 California Jurisprudence, p. 725, the rule as declared by the courts is set forth in these words: "It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose of the law-makers. Such intention controls if it can be reasonably ascertained from the language used. Indeed, it has been said that the legislative intent in indicating a law is the law itself. Accordingly, the primary rule of statutory construction to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained, if possible, and once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute." "In other words, as is declared by the code in the construction of a statute, the intention of the legislature is to be pursued, if possible. Certainly, the language of a statute should never be so construed as to nullify the will of the legislature, or to cause the law to conflict with the apparent purpose had in view by the law-makers."

[2] The rule is likewise well established that courts are given no legislative power, and, if the legislative intent is not reasonably expressed, or cannot, by reasonable rules of

construction, be ascertained and given effect, courts are not authorized to insert omitted provisions or read out of the statute the language therein contained.

[3] It is also the rule of construction that statutes in pari materia, that is, statutes relating to the same subject-matter, are to be construed together. This subject is clearly expressed in the opinion of this court written by Mr. Justice Hart in the case of Old Homestead Bakery, Inc., v. Marsh, 75 Cal. App. 247, pages 258 and 259, 242 P. 749. The rules of construction of statutes in pari materia is so clearly set forth therein that reference only thereto is necessary.

[4] The three acts adopted by the Legislature in 1933, to which we have referred, deal with alcoholic liquors. Whatever is contained in the later acts differing from the former acts of the Legislature will be given effect, and, if any definitions are contained in the last act which conflict with the definitions contained in the first and second acts, the definition in the last act must be held controlling. Thus section 4 of the act known as chapter 658 (page 1698) defines both beer and wine differently from the definition found in the acts known as chapter 51 and chapter 178. As we are not dealing with any question of the manufacture and sale of beer, we confine our words strictly to the alcoholic beverage involved in this action.

[5] In section 4 of chapter 658, supra, the definition of "wine" is given as follows: "'Wine' means any alcoholic beverage obtained by the fermentation of the natural content of fruits or other agricultural products containing sugar." This definition, being the last in point of time adopted by the Legislature, reads out of subdivision (a) of section 1 of chapter 51, and likewise reads out of subdivision (a) of section 1 of chapter 178, the definition of "wine" therein contained, and those sections must hereafter be read as defining "wine" as contained in the last act of the Legislature.

Again, we find no definition of a winery contained in either chapter 51 or chapter 178. In chapter 658, a winery is defined as being an establishment where wine is manufactured, fermented, bottled, or barreled, or in any way prepared. A tax of $10 is imposed upon such an establishment.

[6] Keeping in view the definition of "wine" as adopted by the last Legislature, and reading that definition into chapters 51 and 178, we then have a basis for giving effect to the excise taxing provisions of those chapters. Section 36, as we have set it forth herein, of chapter 658, is to all intents and purposes read into and made a part of chapter 658, in so far as excise taxes are imposed upon the alcoholic liquor known as wine. It is only commonplace to state that "beverage" is ordinarily understood to mean a liquor suitable for human consumption, irrespective of its alcoholic content. It is thus apparent that the Legislature intended to impose an excise tax upon liquor containing an alcoholic content, irrespective of the percentage of alcohol therein.

[7] As the petitioner has not shown a compliance with the various acts of the Legislature as construed in this opinion, holding that they all must be read as one act, it follows that the writ of mandate should be denied. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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138 Cal.App. 97

VASILJEVICH et al. v. RADANOVICH et ux.

Civ. 8972.

District Court of Appeal, First District, Division 1, California.
April 18, 1934.

1. **Partnership** 🔑**244.**

Surviving partner must promptly settle partnership business and account (Probate Code, § 571).

2. **Partnership** 🔑**255(4).**

At election of deceased partner's representatives, surviving partner unnecessarily continuing partnership business may be charged with profits or be liable with interest for surplus at time of partner's death (Probate Code, § 571).

3. **Appeal and error** 🔑**994(3), 1012(1).**

In action without jury against surviving partner for accounting, witnesses' credibility and weight of evidence were for trial court (Code Civ. Proc. § 1847).

4. Evidence ⚷588.

In trial without jury, court may reject testimony, however positive, though witness be not discredited by direct impeaching or contradictory testimony (Code Civ. Proc. § 1847).

5. Partnership ⚷328(2).

In accounting action by deceased partner's executors against surviving member of partnership engaged in buying and selling realty, where defendant claimed amounts allegedly advanced for taxes, etc., admitting defendant's tax receipts *held* not error.

6. Partnership ⚷340.

Where partnership debts exist, court, after partner's death, may properly order cash sale of entire property.

7. Partnership ⚷340.

There being no partnership debts, partnership realty need not be sold, and court, in accounting action by deceased partner's representatives against surviving partner, may award parties undivided interests in such realty.

8. Judgment ⚷526.

In construing judgment, whole record may be examined, and uncertainty thereby made plain does not necessitate reversal.

◆

Appeal from Superior Court, Los Angeles County; J. A. Allen, Judge.

Action by Sava Vasiljevich and another, executors of Ognjen Bukvich, deceased, against George Radanovich and wife. From a judgment granting plaintiffs partial relief, plaintiffs appeal.

Affirmed.

Andrew T. Jenkins and Frank Mergenthaler, both of Los Angeles, for appellants.

W. T. McNeely, of Los Angeles, for respondents.

PER CURIAM.

Defendant George Radanovich and Ognjen Bukvich, deceased, were during the latter's lifetime engaged in the purchase and sale of real property in Los Angeles county. Bukvich died on July 20, 1926. At that time the record title to portions of two lots stood in the names of the partners. A portion of one of the lots had been sold by them to one Sotere, and the balance of the purchase price was collected by and remained on deposit in a Los Angeles bank at the time of Bukvich's death. Radanovich claimed certain amounts alleged to have been advanced by him for taxes, assessments, material used in filling in one of the lots, and also for his labor in the latter connection. Letters testamentary upon the estate of Bukvich were granted to plaintiffs on April 26, 1927. Later they requested an accounting from said defendant, and on August 27, 1927, a citation was issued by the probate department of the superior court, requiring him to show cause why such an accounting should not be made. Following this, defendant filed an account, to which objections were filed on January 25, 1929. On the same day the present action for an accounting was commenced.

After a trial the court found the sum of $544.84 to be on deposit as stated, and that defendant was entitled to credit for certain of his claims against the fund. It also found that the partnership was not indebted. Judgment was entered, by which it was decreed that defendant was entitled to $424.60 payable out of the above fund, and that plaintiffs were entitled to $120.24. It was also decreed that defendant and the estate of decedent were the owners of the lots mentioned, each having an undivided one-half interest therein.

Plaintiffs, who have appealed, claim that the estate should have been allowed a personal judgment against defendant for the value of the lots rather than for an undivided half interest therein. They base this upon the contention that it was defendant's duty to sell the lots and account for the proceeds, and that he failed to use due diligence in that respect or to account without delay, as provided by section 1585, Code of Civil Procedure (now section 571 of the Probate Code).

The evidence shows that the defendant was a carpenter by trade, was unable to read or write English, and required an interpreter; also that there was considerable negotiation between the defendant and the executors before suit in an endeavor to adjust the differences between them. Owing to the fact that the property stood of record in the names of both partners, co-operation in making any transfer was necessary; and, while there was no evidence that defendant procured offers for the property, he testified that he endeavored to sell it, but was unable to do so. Defendant appears to have had little business experience, and the record contains nothing which would compel a finding that he fraudulently delayed a sale or was guilty of bad faith, and this was not the conclusion of the trial court.

[1-4] It is the duty of a surviving partner to settle the business of the copartnership without delay and account (Code Civ. Proc. § 1585; Probate Code, § 571), and, where he continues the partnership business unnecessarily, he may be charged with the profits, or be liable for the surplus at the time of his partner's death, with interest, at the election of the representatives of the deceased partner. Kimball v. Baxter, 67 Cal. App. 635, 228 P. 381. Plaintiffs claim that testimony by certain of their witnesses show, not only undue delay, but bad faith as well. The question of their credibility, however, and the weight to be given the evidence, was for the trial court (Code Civ. Proc., § 1847), which may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements (Blankman v. Vallejo, 15 Cal. 638; Staples v. Hawthorne, 208 Cal. 578, 283 P. 67). The facts in the present instance do not justify the application of the rule upon which plaintiffs rely. We concur with the conclusions of the trial court in that respect.

[5] We find no merit in plaintiffs' contention that the orders of the court overruling their demurrer to defendant's answer, and ruling on the question of the admissibility of defendant's receipts for taxes paid for the years 1926 and 1927, were prejudicially erroneous; and the same is true of its order denying their motion for a new trial.

They also complain of the judgment awarding defendant and the estate undivided interests in the lots.

[6, 7] It is proper where there are firm debts to order the entire property of the firm to be converted into cash; but where there are no debts, as was the case here, it is unnecessary that the real property be sold, and the court may award the claimants their respective interests therein. 47 Cor. Jur., Partnership, § 988, p. 1259; 20 Cal. Jur., Partnership, § 137, p. 846; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; Harper v. Lamping, 33 Cal. 641. It has been held that executors cannot institute partition proceedings (Ryer v. Fletcher Ryer Co., 126 Cal. 482, 58 P. 908); and the evidence sufficiently shows that, due to market conditions, a sale at the time judgment was entered would not have been advantageous to the parties. This fact no doubt was considered by the trial court, and we are satisfied that it did not err in this respect.

[8] The judgment awarded an undivided one-half interest in the lots to plaintiffs as executors, while by the findings and conclusions of law it was found that this interest should have been awarded to the estate. In construing a judgment the whole record may be examined (14 Cal. Jur., Judgments, § 54, p. 959); and where, as here, any uncertainty is thereby made plain, the apparent defect does not necessitate a reversal.

We are satisfied that the trial court's conclusions were correct, and that the judgment should be affirmed.

The judgment is affirmed.

138 Cal.App. 167

GIGUIERE v. PATTERSON et al.

Civ. 4988.

District Court of Appeal, Third District, California.

April 20, 1934.

1. Pleading 🔑376.

Where material portion of petition stands admitted, proof in support thereof is unnecessary to authorize findings in accordance therewith.

2. Pleading 🔑129(2), 377.

Failure to deny allegation of petition for teacher's salary that petitioner was prevented from teaching by trustees constituted admission thereof, rendering immaterial questions relating to whether petitioner performed her contract and whether she was discharged.

3. Schools and school districts 🔑145.

Failure of teacher, prevented from teaching by trustees, to demand balance of her contractual salary until expiration of school year, *held* not laches preventing recovery thereof.

4. Schools and school districts 🔑144(1).

Teacher's illness for one week *held* not to preclude recovery of salary due under contract as abrogation of contract.

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

Action by Mary M. Giguiere against John Patterson and others, as trustees of Washington School District. From a judgment for plaintiff, defendants appeal.

Affirmed.

Neal Chalmers, Dist. Atty., of Woodland (Percy Napton, Deputy Dist. Atty., of Woodland, of counsel), for appellants.

Huston & Huberty, of Woodland, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The petitioner had judgment against the respondents, as the trustees of Washington school district, for the sum of $1,400, balance found due by the court as the petitioner's salary as a school teacher of said district for the school year of 1931–1932. From this judgment the respondents appeal.

The petition in this cause alleges the qualifications of the petitioner as a school teacher of the state of California; the appellants, as trustees of the Washington school district; that, for the school year of 1930–1931, the petitioner was regularly employed as a probationary teacher for said district, and acted as such during the school year of 1930–1931; that thereafter, and on or about June 1, 1931, the petitioner was employed by said trustees for the school year 1931–1932, and signified her willingness and intention to act as such teacher; that petitioner was regularly paid her salary as such teacher for the months of July and August, 1931; that upon the opening of school in September, 1931, she presented herself at the proper schoolroom in the school building maintained in said district, ready, willing, and able to teach, but was notified by the defendants that her services were dispensed with; that no further salary was paid said petitioner for the school year of 1931–1932, and that on or about the 3d day of September, 1932, petitioner made demands upon defendants for the balance of her accrued salary. It was for this sum that judgment was entered in favor of the petitioner.

The defense in this action appears to have been based upon the theory or contention that the services of the petitioner were to be had only in the event that a sufficient number of pupils attended said school to form the class which it was intended that the petitioner should teach, and that upon the opening of the school there was not a sufficient number of pupils present to form a class, and the petitioner was requested to await the attendance of such number. It would appear from the record that such number of pupils did subsequently attend, but that the petitioner, as found by the court, was never notified thereof, and no sufficient efforts were made by the trustees to notify the petitioner of the attendance of such number of pupils.

The court found that the petitioner was at all times willing, able, and ready to discharge the services required to be performed under her contract with the trustees. It appears from the record that the contract of employment arose by reason of the statutes provided for the re-employment of teachers, unless, on or before a certain date, notice of dismissal is given by the trustees. No question is made, however, in this case, as to the fact of employment. The only question is as to whether the petitioner abandoned the contract, or failed and refused to perform such duties by reason of not presenting herself at the schoolroom of said school upon there being present a sufficient number of pupils to form a class.

As already stated, the court found that, if the contention of the appellants is true that the petitioner was to await notification that a sufficient number of pupils were present to require her services, no sufficient notice was ever given, although such number of pupils did afterwards attend. As this contention appears to be sufficiently supported by the testimony, further discussion thereon would appear to be unnecessary.

Upon this appeal the appellants propounded eleven questions to be answered, assuming that they are all involved in this action, to wit:

"1. Can it be held as a matter of fact or of law that respondent performed all the conditions of her teaching agreement?

"2. As a matter of law, was it not respondent's duty to seek other employment?

"3. As a matter of both fact and law, was not respondent's failure to teach due to her own fault or physical condition?

"4. Can it be held as a matter of law that respondent was by the Board of Trustees of Washington School District discharged as a teacher?

"5. Can it be held as a matter of fact that she was prevented from teaching by the Board of Trustees of Washington School District?

"6. As a matter of law, did not respondent abandon her agreement?

"7. Are not the rules of law pertaining to contracts of service applicable to instant case?

"8. Is not the judgment, as a matter of law, erroneous in that it recites that defendant was discharged as a teacher?

"9. In a contract for services, as a matter of law, was it not incumbent upon respondent to show by a preponderance of the evidence that she personally performed the services?

"10. Is finding No. 8 that respondent was prevented from teaching by appellant supported by the evidence?

"11. Can it be held that the power to discharge or hire teachers may be delegated to one member of a school board without formal action or some action by said board?"

[1, 2] Several of these questions are answered by the admissions in the pleadings. Paragraph VIII of the complaint, which is undenied in the answer, reads as follows: "That on the 14th day of September, 1931, the beginning of the school term of said Washington School District, plaintiff and petitioner presented herself as a teacher of said school, and proceeded to organize and conduct classes therein; that on the said 14th day of September, 1931, at or near the end of said day, defendants and respondents verbally notified plaintiff and petitioner that her services were thereupon dispensed with, and did further thereupon prevent, and ever since continuously have prevented plaintiff and petitioner from continuing to teach in said school as a regularly employed teacher therein."

In the face of this admission, questions numbered 3, 4, 5, 8, 9, and 10 become immaterial. We do not need to cite authorities to the effect that, where a material portion of the pleadings, petition, or complaint stands admitted, it is unnecessary for the petitioner or the plaintiff to introduce evidence in support thereof, and the court may properly make findings in accordance with the admissions of the pleadings, without the aid of testimony. Having admitted that the petitioner was prevented by the board of trustees from teaching in the Washington school district, that fact is sufficiently established. And also having admitted the pleading which states that the petitioner was so prevented from performing her contract of teaching, question No. 1 likewise passes out of the case. That the petitioner was not regularly and legally discharged as a teacher of Washington school district by the board of trustees thereof becomes wholly immaterial when the pleadings admit that the petitioner was prevented from teaching in accordance with her contract with the school trustees. Thus, question No. 8 does not present anything which is in law material to the support of the judgment in this action.

It may be admitted that the petitioner was not legally discharged, yet, having admitted that the teacher was prevented by the act of the trustees from teaching, the petitioner is entitled to compensation under her contract irrespective of whether she was or was not unlawfully discharged, there being nothing in the record showing that the services of the petitioner were legally dispensed with.

Likewise, question No. 10 relating to finding No. 8, which is based upon the admission of the pleadings, as well as upon the testimony, is completely answered. If question No. 8 should be answered in the affirmative, as claimed by the appellants, we fail to see how it would affect the judgment in this action. It revolves around the statement which we have hereinbefore made. If prevented by the action of the trustees, as admitted in the pleadings, from teaching, even though the judgment erroneously recites the discharge of the petitioner as a teacher, as claimed by the appellants, it would be no cause for reversal herein, in view of the admission of the pleadings. However, a reading of the judgment does not disclose any language showing that the petitioner was discharged from her position as a teacher in the Washington school district. Nor does finding No. 8 show anything further than that the services of the petitioner were dispensed with, and that thereafter the appellants prevented the petitioner from continuing to teach in said school as a regularly employed teacher therein.

The judgment of the court is to the effect that the petitioner was at all times during the year 1931–1932, and ever since has been, and now is, a probationary teacher in said school district.

Question No. 9, to the effect whether it is incumbent upon the petitioner to show, by a preponderance of the evidence, that she personally performed her services, is really outside of anything tendered by either the evidence or the pleadings. If prevented from performing services by the action of the appellants, that is the end of the controversy.

Questions numbered 2 and 7 are in fact answered by the provisions of sections 5.401 (St. 1929 [Supplemental to School Code] p. 335), 5.680, School Code, and section 5.681 of the School Code, as amended by St. 1931, p. 1398, § 8, as well as by what was said by this court in the case of Dutart v. Woodward, 99 Cal. App. 736, 279 P. 493. The same rule as set forth in the Dutart Case applies to probationary teachers. Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713.

[3] The fact that the petitioner did not demand the balance of her salary until the expiration of the school year does not constitute laches such as to prevent the trial court from ever awarding judgment in favor of the

petitioner, is definitely settled in the case of La Shells v. Hench, 98 Cal. App. 6, 276 P. 377.

[4] Question No. 11 propounded by the appellants is likewise outside of anything presented by the record for our consideration upon this appeal. The pleadings having admitted that the defendants and appellants prevented the petitioner from performing her services under her contract with the appellants, no issue is raised as to whether there was or was not any delegation of authority. There seems to be nothing in the record to justify any contention that the petitioner was not able to perform her duties as a teacher in said district during substantially all the time covered by said school year. The fact that there is some testimony to the effect that she was ill for a period of one week is not sufficient to constitute an abrogation of the contract.

The appellants call our attention to the cases of Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Martin v. Fisher, 108 Cal. App. 34, 291 P. 276, and Buckman v. Ferguson, 108 Cal. 34, 40 P. 1057. None of these cases, upon examination, appear to be pertinent to any of the issues involved herein. The Kennedy Case is to the effect only that, where a teacher is employed to teach in a certain grade in a certain school, such teacher can be transferred to another school, but it must be of the same grade. The case of Martin v. Fisher went off on the question of there not being any school funds in the treasury available for the payment of the petitioner's salary for the year involved in the action. The Buckman Case relates only to the power of one street superintendent who succeeds another to complete a street contract partly initiated, but not completed, by a former street superintendent, and has no bearing upon the issues here involved.

In view of the admission in the pleadings as to the vital questions involved in this action, it does not seem to us necessary to set forth the testimony showing that the findings of the court are amply sustained, nor would it serve any useful purpose to review the many cases cited by counsel having to do with the wrongful discharge, or attempted wrongful discharge of either permanent or probationary teachers, as no new questions of law are tendered for our consideration.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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138 Cal.App. 66

NORTON v. BLENKIRON et al.

Civ. 9335.

District Court of Appeal, First District, Division 2, California.

April 13, 1934.

1. Fraudulent conveyances ⚷**271(1).**

Creditor seeking to set aside alleged fraudulent conveyances must show that indebtedness to him was not fully secured (Civ. Code, § 3442).

2. Fraudulent conveyances ⚷**295(4).**

In suit to set aside alleged fraudulent conveyances, creditor's mere showing that he purchased mortgaged property on foreclosure for amount inadequate to discharge indebtedness was insufficient to show that indebtedness was not fully secured.

3. Witnesses ⚷**262.**

In suit to set aside alleged fraudulent conveyances, refusal to permit plaintiff to recall defendant as witness *held* not abuse of discretion, where defendant had been examined at length and no new line of examination was proposed.

◆

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Action by Claude B. Norton against William L. Blenkiron and others, in which defendant Doris Louise Wolter filed a cross-complaint. From judgment of nonsuit and judgment in favor of cross-complainant, plaintiff appeals.

Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff brought this action seeking to set aside certain alleged fraudulent conveyances, which conveyances had been made by defendant Frederick C. Wolter to defendant Doris Louise Wolter, his sister. At the time of the filing of defendants' answer, defendant Doris Louise Wolter filed a cross-complaint seeking to quiet title to the property so conveyed. At the close of plaintiff's case, the trial court granted defendants' motion for a nonsuit. After taking evidence in support of the cross-complaint, judgment was entered in favor of the cross-complainant. Plaintiff appeals from the judgment of nonsuit and the judgment in favor of the cross-complainant.

It appears that in 1926 defendant Frederick C. Wolter executed his promissory note in the sum of $26,500 in favor of plaintiff, which note was secured by a mortgage on certain real property. In September, 1930, plaintiff herein commenced an action to foreclose said mortgage. In February, 1931, and while said action was pending, defendant Frederick C. Wolter conveyed practically all other property owned by him to defendant Doris Louise Wolter. Thereafter a decree of foreclosure was entered and the property was purchased by plaintiff on the foreclosure sale for the sum of $25,000. The deficiency judgment in favor of plaintiff amounted to $5,925.33. Execution on said judgment was returned unsatisfied, and this action was subsequently brought.

[1, 2] Upon the trial plaintiff testified on his own behalf and also called defendant Frederick C. Wolter as an adverse witness. From the testimony offered it appears that the main issue in the minds of the parties during the trial was whether the conveyances had been made, as claimed by defendants, in partial satisfaction of a pre-existing indebtedness owing by defendant Frederick C. Wolter to defendant Doris Louise Wolter or whether said conveyances were made without a valuable consideration. As we view the situation, however, we need not discuss these conflicting claims. We may assume that said conveyances were made without any valuable consideration, but plaintiff failed to introduce any testimony, other than the testimony of the defendant Frederick C. Wolter, showing the market value of the property covered by the mortgage at the time that the conveyances were made. Said defendant Frederick C. Wolter testified that said property had a market value of $31,000. In other words, plaintiff failed to show that the indebtedness to him was not fully secured, but, on the contrary, the evidence affirmatively showed that said indebtedness was fully secured. In the absence of the showing referred to, we believe that the nonsuit was properly granted and that the judgment was properly given in favor of the cross-complainant.

Many authorities are cited in the briefs of the parties, but practically all of the cases cited deal only with unsecured claims. Here the plaintiff, who was seeking to set aside the conveyances as fraudulent, was a secured creditor of the defendant Frederick C. Wolter. While plaintiff was nevertheless a creditor and entitled upon a proper showing to bring an action of this character, we are of the opinion that it was essential for plaintiff to show that defendant's indebtedness to him was not fully secured in order to establish his right to have the conveyances set aside as fraudulent. The mere showing that plaintiff purchased the mortgaged property on the foreclosure sale for an amount which was inadequate to discharge the indebtedness was insufficient.

In McMillan v. McMillan, 42 Idaho, 270, 245 P. 98, the court said, at page 99: "Whatever the general rule may be with respect to the burden of proof in actions to set aside conveyances alleged to be in fraud of creditors, it must be kept in mind that this action is by a secured creditor, one who held mortgage security for the payment of his debt. The transfer in no manner endangered the mortgage security. * * * The transfer was not fraudulent, if the husband had sufficient remaining property to pay his debt, and respondent was under no necessity at the trial to prove that H. T. McMillan's property was sufficient, when the gift was made, to pay the debt, in the absence of evidence on behalf of appellant that the property mortgaged to secure the payment of the debt was not sufficient for that purpose. That to satisfy a judgment for the debt, together with costs and attorney's fees, the property was subsequently sold under foreclosure and bought in by the creditor for a sum less than the judgment, resulting in the deficiency judgment, is of no consequence, if the property retained by H. T. McMillan was, when the payments for the land and its gift were made, sufficient to satisfy the then existing debt. The validity of such a transfer does not depend on subsequent events. 27 C. J. p. 498, § 160; Van Wyck v. Seward, 6 Paige (N. Y.) 62, affirmed, 18 Wend. 375; Polk County National Bank v. Scott, 132 F. 897, 66 C. C. A. 51; Crandall v. Lee, 154 P. 190, 89 Wash. 115; Wagner v. Law [3 Wash. 500, 28 P. 1109, 15 L. R. A. 784, 28 Am. St. Rep. 56], supra; and Kain v. Larkin [131 N. Y. 300, 30 N. E. 105], supra." In addition to the authorities cited in the foregoing opinion, see, also, Craig v. Partridge, 48 Idaho, 471, 282 P. 940.

Plaintiff apparently concedes that there was no evidence of any actual intent to defraud, but he cites section 3442 of the Civil Code, and contends that under certain circumstances no actual intent to defraud need be shown. We do not believe that said section is helpful to plaintiff in the instant case;

there being an entire absence of any showing of the insufficiency of the security at the time that the conveyances were made.

[3] The further claim is made that the trial court erred "in failing to permit plaintiff to introduce further testimony." An examination of the record shows that the only request made by plaintiff was to recall the defendant Frederick C. Wolter. Said defendant had been examined at length, and, as no new line of examination was proposed, we find no abuse of discretion in the refusal of said request.

The judgment of nonsuit and the judgment in favor of the cross-complainant are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

138 Cal.App. 70

PEOPLE v. NORTON.

Cr. 1343.

District Court of Appeal, Third District, California.
April 13, 1934.

1. Criminal law 🔑693.

Objection to competency of person appointed by court to determine sanity of defendant must be timely interposed in order that trial court may correct any error therein, notwithstanding statute providing for appointment of two alienists, one of whom must be from staff of state hospital, appears to be mandatory (Pen. Code, § 1027).

2. Criminal law 🔑479.

That physician appointed to determine sanity of defendant had for some years ceased to make special study of mental disorders or treatment of insane *held* not to disqualify him as alienist (Pen. Code, § 1027).

3. Criminal law 🔑479.

"Alienists," within statute requiring appointment of alienists when defendant pleads not guilty by reason of insanity, means persons qualified by experience, knowledge, and previous opportunities to express opinion as to defendant's mental condition at a particular time (Pen. Code, § 1027).

Since the statute specifies that one of the persons appointed shall be a member of the staff of one of the state hospitals, it necessarily excludes the idea that the other person appointed shall at the time of the appointment be engaged in the exclusive study of mental cases or in their treatment, but means that, if such other person has by previous experience acquired sufficient knowledge to enable him to examine into and determine the mental condition of a defendant, he may properly be appointed.

[Ed. Note.—For other definitions of "Alienist," see Words & Phrases.]

4. Criminal law 🔑1158(4).

Whether physician appointed to determine sanity of defendant possessed qualifications necessary to testify as alienist *held* for trial court (Pen. Code, § 1027).

5. Criminal law 🔑570(1).

Evidence sustained verdict that defendant charged with lewd and lascivious conduct was sane (Pen. Code, § 1027).

6. Criminal law 🔑48.

Low mentality is not "insanity" and does not excuse one who otherwise is able to distinguish between right and wrong.

[Ed. Note.—For other definitions of "Insane; Insanity," see Words & Phrases.]

7. Criminal law 🔑419, 420(12).

In prosecution for lewd and lascivious conduct, correspondence or records of chapter of Red Cross as to mental condition of defendant *held* properly excluded as hearsay (Pen. Code, § 1027; Code Civ. Proc. § 1940, subd. 2).

8. Criminal law 🔑829(16).

Refusing instruction that jurors might consider professional standing and experience of witnesses testifying as to defendant's sanity, in arriving at verdict, *held* not error, where jurors were instructed that experts might give opinions on questions in controversy to assist jury, but that jury was not bound to accept expert opinion as conclusive, but should give to it proper weight or disregard opinion which appeared unreasonable (Pen. Code, § 1027).

9. Criminal law 🔑494.

Mere opinion of affiant without setting forth tangible facts showing that defendant was insane *held* insufficient to justify holding that defendant was insane (Pen. Code, § 1027).

10. Criminal law 🔑981(2).

Statute providing that jury should be impaneled if "doubt" arises as to defendant's sanity at time of pronouncing judgment means that such doubt must be entertained by trial judge and not merely based upon opinion of affiant who gives no substantial reasons therefor (Pen. Code, § 1368).

[Ed. Note.—For other definitions of "Doubt," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

George W. Norton was convicted of lewd and lascivious conduct, and he appeals.

Affirmed.

John W. Ross, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant in this action was, on the 16th day of January, 1934, arraigned upon an information charging him with lewd and lascivious conduct, etc. To the information the defendant entered a double plea—"guilty," and "not guilty by reason of insanity." Following this plea, a trial was had to determine the mental condition of the defendant at the date of the commission of the act to which he had pleaded guilty. The defendant having been found sane, this appeal is taken from the order of the court denying the defendant's motion for a new trial, and the judgment pronounced upon the plea of guilty and the finding of the jury that the defendant was sane at the date of the commission of the act alleged.

The first reason assigned for reversal is based upon the contention that the court did not follow the provisions of section 1027 of the Penal Code, wherein it is specified that, where a defendant pleads not guilty by reason of insanity, two alienists must be appointed, at least one of whom must be from the staff of a state hospital.

The record shows that upon the entry of the plea of not guilty by reason of insanity, the court appointed Dr. Margaret H. Smyth, superintendent of the state hospital for the insane at Stockton, and Dr. E. M. Wilder, of Sacramento. No objection appears in the record to have been made as to the competency of either of the persons appointed by the court to examine into, report, and testify as to the mental condition of the defendant.

[1] The chief point of attack upon this appeal in this particular is directed against Dr. Wilder, in that the doctor, upon his cross-examination, in open court, stated that he was not an alienist; that is, he was not a person, at the present time, giving special attention to the treatment of mental disorders. While the language of section 1027, supra, appears to be mandatory in form, we think it is incumbent that the objection as to the competency of the person appointed by the court should be timely interposed in order that the trial court may correct any error therein, if error there be. This appears to be the holding of this court in the case of People v. Wiley, 111 Cal. App. 622, 295 P. 1075.

The testimony of Dr. Wilder shows that the following foundation was laid for its introduction (we quote from the record as follows):

"Q. Of what medical institution are you a graduate? A. University of California Medical.

"Q. Have you made any special study of mental disorders or mental diseases? A. Well, I began in the Napa State Hospital for two years when I was a young man; since that time I have studied it and been qualified as an expert in some of the counties of the State and in the Federal court.

"Q. That presupposes, does it, examination of persons whose mental condition is under question? A. Yes, sir, that presupposes it."

The witness further testified that there had come under his observation, and for him to pass upon, between 300 and 500 cases where the mental condition of the patient was in question. The physician further testified that he was giving special attention, and had been for some time, to other diseases. Upon cross-examination the doctor further testified: "Q. Now, Doctor, as a matter of fact you are not a specialist in insanity, are you? A. No, I am not a specialist in insanity; I do not treat the insane. The courts have been kind enough to qualify me as an expert in the examination of the insane—that is the distinction."

[2-4] Undoubtedly, so far as the record goes, it shows that the doctor has had abundant opportunity to acquaint himself with the mental condition of innumerable persons, and necessarily acquired sufficient skill in observation and accuracy of judgment to enable him to testify as an expert in insanity cases. That the doctor had for some years ceased making any special study of mental disorders or treating the insane would not, we think, constitute sufficient grounds for holding him an incompetent witness. Just what constitutes an alienist under the terms of section 1027, supra, appears not to have

been decided by any of the cases called to our attention. Nevertheless, we think the language means some persons qualified by reason of experience, knowledge, and previous opportunities to examine and give his opinion as to the mental condition of a defendant at a particular time. Having specified that one of the persons appointed shall be a member of the staff of one of the state hospitals of the state, it necessarily excludes the idea that the other person appointed shall, at the time of the appointment, be engaged in the exclusive study of mental cases or in their treatment, but that, if such other person has, by previous experience, acquired sufficient knowledge to enable him to examine into and determine the mental condition of a defendant, then and in that case we do not see how it can be urged that the court has erred in the appointment of such a person, especially in view of the fact that no objection was raised as to the testimony of such person, and no motion made to strike out his testimony on the ground that it was given by one not properly qualified. In other words, under the circumstances here presented, we think it was for the trial court to determine whether Dr. Wilder did or did not possess the qualifications necessary to testify under the provisions of section 1027, supra, as an alienist, even though he did not in fact designate himself as such. It appears to be more a difference in name than in substance.

[5, 6] The second ground alleged for reversal is that the testimony is insufficient to support the verdict. While there is considerable testimony in the record that the defendant was of low mentality and acted queerly in a great many instances, the record shows, in coming back to the basis of his action, the jury might very well have attributed all of such peculiar acts to the long-continued inebriety of the defendant. The record shows that the defendant was addicted to the excessive use of intoxicants; that he was sent to the Napa state hospital, and there confined for six months on account of alcoholism. The testimony of Dr. Wilder and of Dr. Smyth is to the effect that, while the defendant was of low mentality, he knew the difference between right and wrong, was, in their opinion, sane, even though he had suffered from alcoholism, and perhaps had come very close to having delirium tremens. The jury, we think, might very well have concluded that many of the strange acts testified to by the different witnesses as performed by the defendant were the result of alcoholism, and not of insanity. Low mentality is not, in law, insanity, and does not excuse one who otherwise is able to distinguish between right and wrong.

[7] We find no error in the rulings of the court as to the admission and exclusion of testimony. While appellant assigns the exclusion of certain correspondence or records of the Sacramento chapter of the Red Cross, it clearly appears that the offered testimony was merely hearsay, not authenticated in any manner. The record does not disclose anything that would justify the introduction of the correspondence referred to under the provisions of subdivision 2 of section 1940 of the Code of Civil Procedure, as claimed by the appellant. The correspondence at best would only be hearsay testimony as to the mental condition of the appellant.

[8] It is further contended by the appellant that the court erred in its instructions to the jury, particularly calling our attention to proposed instruction No. 9 offered by the defendant. The substance of the proposed instruction, however, was given by the court in the following words: "Duly qualified experts may give their opinions on questions in controversy on trial. To assist the jury in deciding such questions the jury may consider the opinion, with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion if it should be found by them to be unreasonable."

The only difference between the instruction given and the offered instruction was that the jury might consider the professional standing and experience of the witnesses in arriving at their verdict. It is almost commonplace to say that such matters would be considered by the jury, as well as the appearance of the witnesses and the manner in which they testified.

[9, 10] It is finally contended that the court erred, not only in denying the defendant a new trial, but also in refusing to impanel a jury and determine the question of the defendant's sanity at the time of pronouncing judgment. In behalf of such contentions, the appellant presented several affidavits, all of which are similar in form and substance, and therefore the setting forth of one will answer for all. The affidavit of Clara Berry, sworn on behalf of the defendant, is in these words:

"That she has known the defendant herein, George W. Norton, intimately, for the ten years last past; that by reason of such intimate acquaintance she has had exceptional opportunities to observe, and has so observed the acts, conduct and conversations of the defendant herein; that affiant herein believes that the acts, conduct and conversations of defendant herein, George W. Norton, is not normal, and therefore believes, and is of the opinion that the said defendant, George W. Norton, is now insane." No facts are set forth; nothing appears in the affidavit upon which the trial court could conclude that the opinion of the affiant had any real basis. This is true of all of the affidavits. The court had, during the trial of the action, abundant opportunity to observe the acts and conduct of the appellant, and the mere opinion of an affiant, without the setting forth of any tangible facts on which it is based, is not sufficient to justify this court in holding that the trial court was in error, or that its conclusions were not absolutely correct.

As against the affidavits to which we have referred, the prosecution presented two affidavits, of which we make special mention of that of Dr. Wilder. After setting forth his qualifications relative to his ability concerning mental disorders, Dr. Wilder's affidavit reads: "That affiant did, on the 23rd day of January, 1934, examine one George W. Norton, defendant herein; that he talked with said defendant; that he made a physical examination of said defendant, determining therefrom that his reflexes and coordinations were normal, and that there was no evidence of injury or physical deterioration of the brain or central nervous system; that he made a mental examination of said defendant from which he determined that said defendant was properly oriented as to time and place; that his memory was not impaired; that he was without evidence of hallucinations, illusions or delusions; that while said defendant is of a low degree of mentality and intelligence, having progressed only a short distance in formal schooling by reason thereof, still he has apparently improved somewhat in intelligence with increasing years; that instead of having become disordered in mind, he is intelligent and rational; that he is capable of working under direction; that he has a history of excessive and periodical use of alcohol, but presents none of its characteristic mental deteriorations; that by reason thereof affiant believes, and it is his opinion that said defendant, George W. Norton, is now sane."

In support of this contention that the court should have impaneled a jury to determine the question of the appellant's sanity at the time of pronouncing judgment, the case of People v. Vester (Cal. App.) 26 P.(2d) 685, 690, is called to our attention, wherein appears a quotation from a Texas court (Guagando v. State, 4 Tex. 626) as follows: "When an affidavit is made by a respectable person that a defendant charged with crime has become insane, a jury should be impaneled to try the issue of insanity before proceeding with the cause, and this though the party making the affidavit is unknown to those in attendance on court." This abstract statement is not a complete setting forth of the law relative to the questions here presented. The fact that an affidavit is made by a respectable person, of course, entitles the affidavit to consideration, but, unless the affidavit sets forth facts showing that the affiant has some basis for his conclusions, it presents nothing for the court upon which to determine the merits of the application.

While section 1368 of the Penal Code provides for determining the question of the sanity of a defendant at the time of pronouncing judgment, and provides that, if a doubt arises in relation thereto, a jury should be impaneled and a trial had to determine such issue, it means that such doubt must be entertained by the trial judge, and not merely based upon the opinion of an affiant who gives no substantial reasons therefor. The correct rule is stated, we think, in 8 California Jurisprudence, p. 196, as follows: "While ordinarily a doubt should be raised when statements under oath are made by a credible person, that the defendant is insane, a court is not constrained to entertain this doubt simply because counsel entertained such a belief proceeding from some conversations with the defendant, or because a witness testifies that he believes the defendant to be insane. On the contrary, a trial court has ample opportunity to and should, as its duty, observe and note the defendant's mental condition from time to time, and in particular on the day when his present insanity is suggested. The knowledge so gained may contribute largely toward rebutting any possible inference of present legal insanity deducible from the facts stated in an affidavit of counsel, or by a witness. The mere fact that evidence as to the present insanity of a defendant is admitted in evidence does not show that the court entertains a doubt as to his present sanity, as such evidence is admissible to prove insanity at the time of the crime charged. * * * The code provides no procedure for creating a doubt of the present insanity of a defendant, and much must be left to the discretion of the trial court."

Finding nothing in the record justifying a reversal, it follows that the order and judgment of the trial court should be affirmed, and it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

137 Cal.App. 592

PEOPLE v. ROTH.

Cr. 2307.

District Court of Appeal, Second District, Division 2, California.

March 29, 1934.

As Modified April 16, 1934.

Hearing Denied by Supreme Court April 26, 1934.

1. Embezzlement 🔑47.

Defendant's guilt of embezzlement under evidence as to conversion by defendant's company of customer's certificate of stock by selling it contrary to customer's orders, and not accounting for full sale price, but falsely reporting sale at less than amount received, *held* for jury (Pen. Code, §§ 484, 507).

2. False pretenses 🔑51.

Defendant's guilt of grand theft under evidence as to sale of stock under installment contracts, back of which provided in fine print that relation established was that of debtor and creditor, and showing that time for delivery of stock had not been reached on certain contracts when doors of one of defendant's corporations were closed, *held* for jury (Pen. Code, § 484).

3. Criminal law 🔑814(2).

Instruction that as to certain counts defendant could not be convicted of embezzlement, and question was whether jury believed crime, if any, was shown to have been committed by larceny or by fraudulent representations and pretenses, *held* proper under evidence respecting sales of stock under installment contracts (Pen. Code, § 484).

4. Criminal law 🔑805(2).

In prosecution for grand theft and for violating Corporate Securities Act, instruction following instruction involving contracts issued by certain corporation, that jury should consider same as though repeated with respect to succeeding counts, substituting numbers of counts, *held* not prejudicial error because two of succeeding counts involved contracts issued by another company (Pen. Code, § 484; St. 1917, p. 673, as amended).

5. Criminal law 🔑785(12).

Instruction that jury should consider fact that indictment found against witness had been dismissed prior to witness' taking stand as tending to show desire on part of witness to seek favor at hands of prosecution *held* properly refused, where court gave usual instruction regarding credibility of witnesses.

6. Criminal law 🔑800(2).

In prosecution for grand theft and for violating Corporate Securities Act, refusing instruction regarding when person or firm is considered solvent, where court used word "solvent" in another instruction, *held* not error, since word is in common use (Pen. Code, § 484; St. 1917, p. 673, as amended).

7. Criminal law 🔑1167(4).

Where case was tried on theory that information charged offense of acting as broker without proper certificate, permitting amendment of information to charge such offense, *held* not prejudicial (St. 1917, p. 673, as amended).

8. Criminal law 🔑1167(5).

Overruling demurrers and objections where crime of acting as broker without proper certificate was defectively charged *held* not prejudicial, where defendant knew at all times of crime attempted to be charged, and amendment was permitted (St. 1917, p. 673, as amended).

9. Constitutional law 🔑265.
Indictment and information 🔑156.

Statute relating to amendment of indictment or information does not deprive a defendant of due process of law and his right to due notice in violation of Federal Constitution (Pen. Code, § 1008; Const. U. S. Amend. 14).

10. Licenses 🔑42(5).

In prosecution for violating Corporate Securities Act, whether defendant, claiming to be acting as investment counselor, acted as broker, by engaging in solicitation of sales, and making contracts for sale within statute as it existed at time of acts involved, *held* for jury (St. 1929, p. 1251, § 2 (a), subds. 8, 10).

11. Licenses 🔑18½.

Corporate Securities Act required investment counselor, prior to 1931 amendment, to obtain a certificate as a prerequisite to transaction of investment business, and included installment purchase contracts, in view of amendment recognizing existence of installment method of selling securities as already covered by the act (St. 1929, p. 1251, § 2(a), subds. 8, 10; St. 1931, p. 938, § 2(a), subd. 12).

12. Criminal law ⚷1169(3).
In prosecution for grand theft and for violating Corporate Securities Act, permitting expert accountant to testify from summaries made by him from books of defendant, where original records were introduced, *held* not prejudicial (Code Civ. Proc. § 1855, subd. 5; Pen. Code, § 484; St. 1917, p. 673, as amended).

13. Criminal law ⚷1023(8).
No appeal lies from order denying defendant's motion in arrest of judgment (Pen. Code, § 1237).

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Appeal from Superior Court, Los Angeles County; B. Ray Schauer, Judge.

Jules H. Roth was convicted of grand theft and of violations of the Corporate Securities Act, and he appeals.

Affirmed.

Richard H. Cantillon, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., and Buron Fitts, Willard Burgess, and John W. Loucks, all of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

From judgments of conviction entered on verdicts of guilty returned by the jury on seventeen counts charging grand theft and four counts charging violations of the Corporate Securities Act (St. 1917, p. 673, as amended), and from orders denying his motions for arrest of such judgments and for new trials, defendant has appealed.

The evidence shows that defendant at the age of twenty-one made a business connection with C. C. Julian and continued in such business until December, 1924, at which time they transferred to S. T. Lewis 51 per cent. of the voting stock of the Julian Petroleum Corporation, providing Lewis would pay to such corporation within ninety days the sum of $3,000,000. The corporation named was indebted to Julian and defendant in the sum of approximately $1,300,000, which indebtedness was finally settled for $300,000. In February of 1927 defendant organized a Nevada corporation named J. H. Roth & Co., which was licensed to conduct a brokerage business in California. Such license was revoked July 27, 1929, and after that date no certificate to act as a broker was issued to such corporation or to defendant. The company leased space at No. 651 South Spring street, Los Angeles, and spent some $37,000 in improving the premises, opening for business on April 12, 1927. Mr. James C. Battle was introduced to defendant by Julian, and became secretary-treasurer and attorney at a salary of $1,000 per month, of which he was to use $400 per month in the purchase of stock of the corporation. Battle remained with the company some time, but none of the corporate stock so purchased was ever issued to him. Two other men were induced to put in $13,000 and $25,000, respectively. The first was never able to secure the stock or to see the stock book; the second was issued 500 shares. Both withdrew and brought suit to recover the amounts so invested. Defendant was made president of the concern, but no stock was issued to him, and the qualifying shares in the names of the incorporators were indorsed in blank and remained at all times in the stock book, which was kept in the possession of defendant.

After about two years, defendant and his private secretary were the only active directors present on the few occasions a meeting was deemed necessary by defendant, and the latter was apparently the only one having any voice in the management of the concern. In June of 1929 the company began selling stock under what is known as the 20-payment plan. It did not have a seat on any exchange. but opened accounts with houses which did. under the names of the cashier, Miss J. Jadwin, and O. S. Witherall, defendant's secretary, who was not connected officially with the corporation. Mr. Conway Beavans was bookkeeper, and Mr. William J. Howell the sales manager. The company did not prosper, and attachments were being run by one of the suing stockholders. Another serious complication was the taking of the books of the corporation by the district attorney under a search warrant and subpœna duces tecum in November, 1929. In December of that year defendant caused a new corporation to be organized under the laws of Nevada, called "Security Investment Counselors, Inc.," with a capital investment of $500. This company was to pay the former corporation $25,000 for the lease at 651 South Spring street, $12,500 for the fixtures, and $30,000 for the assignment of contracts to purchase stock. On December 21, 1929, three hundred and sixty-three of such contracts were assigned to the new corporation, with balances due from the purchasers of $207,859.88. The market value of the stocks called for by such contracts on that day was $213,759.76, and dividends had accrued of $2,286.35. In other words, the obligations assumed by the new corporation on such contracts amounted to $8,186.22 more than the total amounts that would be paid in by the contract holders if they completed their payments, and the securities transferred to the new corporation aggregated in value but $1,334.75. The financial condition of the corporation at the outset, considering the obligations assumed and its capital, was bad.

Defendant did not appear as a director or officer of the new corporation for very obvious reasons, but the bookkeeper and cashier were the same as before, and Mr. Howell, sales manager of the former concern, was made vice president and general manager, leaving the corporation, however, about four months after its organization because of a disagreement with defendant. Apparently defendant's was the only voice of authority in this corporation from its organization, although to the public at large he seemed to have no interest in it. The income of the concern in 1930 was $49,477.16, and its expenses $101,655.72. The items of expense do not include the sum of $35,387.10 paid defendant for his personal use, nor the portion of the so-called "suspense" account aggregating $38,550, which was withdrawn in cash and given defendant by his private secretary or the cashier. The income in 1931 to the date in March when a transfer was made to another corporation, as hereinafter mentioned, was $8,618.66, with expenses of $20,318.02.

The new corporation, like its predecessor, had no broker's license or certificate, nor any trading account with brokerage houses, but in its dealings with two or three such concerns it used the name of its cashier, a Miss Engle, and the fictitious name of Nickle. About the middle of 1930, defendant attempted to dispose of the remaining accounts of J. H. Roth & Co. and also of the Security Investment Counselors, Inc., but without success. The lease above referred to was finally disposed of for approximately $7,000 and the use of the premises while alterations on the building were in progress. About March 20, 1931, the remaining accounts of the Security Investment Counselors, Inc., were transferred to the Coast Investment Corporation, Limited, which had been doing a similar line of business and had a broker's license, some twenty-five accounts, and the sum of $2,605.94 cash in bank. The deal for the three issued shares of the capital stock of the Coast Investment Corporation was made by one J. H. Williams, who was a salesman and had been acquainted with defendant for ten or twelve years. There is evidence supporting the conclusion that the suggestion to make the deal came from defendant, that he was the one interested in it, and that Williams had no interest other than the salary he drew, which was fixed by defendant. The owners of said three shares of stock were paid the sum of $2,625, or but $19.06 more than the cash in bank of said Coast Investment Corporation. Williams testified that such shares were indorsed in blank by the former owners and placed in the minute book, or with the papers, and that it was his understanding that defendant "held it all"; that he had no agreement with defendant as to a division of the same.

There were 366 contracts transferred by Security Investment Counselors, Inc., to the Coast Investment Corporation. The latter concern was to make collections and turn the money over to the former, which was to deliver the stock to the Coast Investment Corporation to cover any contracts completely paid. The latter company received from Security Investment Counselors, Inc., to meet the undelivered stock value of $132,814.72, the following: Securities, $2,125.52, collateral securities deposited by customers, $4,700.39; and balance due on customers' contracts, $70,699.65, or $55,289.16 less than the amount required to make deliveries if all contracts were completed. Miss Jadwin was cashier, secretary, and treasurer of the Coast Investment Corporation, and Mr. Williams the nominal president—but, as he says, without any interest in it—and the brokerage accounts were handled in the name of defendant's private secretary. Leonard Ross, who was "special messenger" for J. H. Roth & Co. and also for Security Investment Counselors, Inc., acted in the same capacity for Coast Investment Corporation. Just prior to the filing of an involuntary petition in bankruptcy against this latter concern, Mr. Williams, on the instruction of defendant who told him the company "was in jeopardy, and to protect the assets of the company," took everything that was left in the office of the company in the way of stocks, bonds, and securities, put them in a suitcase, and sold them for approximately $500, which he delivered to defendant. The trustee in bankruptcy of the defunct corporation realized from the remaining assets $105, which was claimed by holders of lease contracts.

When the case was first called for trial on May 3, 1932, defendant was missing, and his bail was promptly forfeited. The evidence shows that he had walked out of the courtroom through the judge's chambers, got into a cab, and made his way to Canada; that he was arrested there on telegraphic warrant, but was later released; that he was discharged "because the secretary of state did not inform the Canadian officials that he was wanted as a fugitive from justice"; that he subsequently walked across the international line into the United States dressed as a farmer and drove with some friends to New York, where he was arrested and extradited to California. Both in Canada and in New York defendant lived under assumed names, dyed his hair, and wore a mustache and glasses to disguise himself. Police officers of Los Angeles called on defendant before the Coast Investment Corporation failed and told him they were hearing complaints about the companies above mentioned and that some day some one would have to answer them. Defendant at that time informed them that he "was just working there, * * * not signing any checks and not an officer of the company."

Count I of the information charges the felonious taking of $300 *in money*, the property of Mrs. R. F. S. Wurdemann. Mrs. Wurdemann testified that she left fifty shares of Southern California Edison Company stock owned by her with J. H. Roth & Co. for sale when ordered by her. The agent she saw tried to interest her in buying stock on the 20-payment plan, without success. She indorsed her certificate and left it with the agreement that it would not be transferred out of her name or used, but was to be kept in the company's safe. Defendant caused this stock to be left with the Commonwealth Securities Company the next day as additional security for a loan of $1,500, and later $300 more was advanced. The shares were sold without instructions from Mrs. Wurdemann on October 16, 1929, at $79.25 per share, or a total of $3,962.50. The stock was entered on one ledger sheet as "collateral." Another ledger account was kept identical with the first, except as to the sale. This latter shows a sale on October 29th at $55 per share. This account was not found in the books of the Roth Company, but in an envelope taken from defendant's private desk at the time of his arrest. The stock advanced to $90 a few days after it was left by Mrs. Wurdemann, and she telephoned Mr. Howell of the Roth Company, with whom she had dealt, to sell it. He urged her not to do so, as he expected it would go to $100, and she did not order it sold. Later it began to decline, and on October 16 she visited the office and asked for her stock. Howell then tried to interest her in the purchase of some other stock, with her stock as collateral, until the price was paid. She told him she would consider the proposition and to retain the stock (already sold, unknown to her) until further notice. On October 17, Howell telephoned Mrs. Wurdemann and told her the market was stiffening, urging her to complete the deal he had theretofore proposed. At that time she was assured that her stock would not be transferred, and that it was being kept in the safe as agreed. Mrs. Wurdemann again declined to accept the deal. Two hours later she was again called and urged to accept. This time she agreed to do so and consented to have her stock posted with the company as security for the new purchase. No purchase on margin was intended by her, as she thought she was making an investment. No margin was requested until October 28th at 7:30 p. m., when Howell telephoned her. She went to the office the next morning and was told her account was short $703.18, and that the condition of the market did not warrant putting up additional collateral. On October 30th, Mrs. Wurdemann received confirmation of the sale of all her stock, including the Edison certificate, which was purported to have been sold at the rate of $55 per share. The ledger sheet of the company accounting for the sale at $55 shows a debit balance due the company of $726.21. It will be seen that, if she had been credited with the amount at which the stock actually was sold, the company would in fact have owed her $607.54, in spite of her disastrous bargain.

[1] As to count I the court instructed the jury that defendant could be found guilty only on the theory of embezzlement. Appellant urges that the evidence may show an embezzlement of the stock, but that it does not show the embezzlement of money. In our opinion, the jury might have found an embezzlement of the stock, which, however, was not alleged, but we think it also supports the charge made in the information. Under the evidence the Roth Company was intrusted with the certificate of Edison stock to be sold for Mrs. Wurdemann when she was satisfied with the market price. It was her agent for that purpose. Not only was the certificate converted by selling the same contrary to her orders, but, having done so, the company did not account to her for the full sale price, but

attempted fraudulently to convert a part of the proceeds realized on such sale by falsely reporting a sale at $55 per share. In our opinion a case of embezzlement of such proceeds was made under both sections 484 and 507 of the Penal Code. "All former elements of this offense are perpetuated and contained in section 484 as amended." People v. Myers, 206 Cal. 480, 483, 275 P. 219, 220.

The remaining counts charging grand theft upon which verdicts of guilty were returned involve sales to ten different customers under the 20-payment plan. Two of the counts, VII and XX, involve contracts issued by J. H. Roth & Co., and thirteen of them, IV, V, VI, VIII, IX, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, contracts issued by Security Investment Counselors, Inc., and count X, the cash buy order given to Coast Investment Corporation. Several of the contracts were signed by defendant, and, in addition to that already set out, there is other evidence which in our opinion amply supports the implied finding which the jury must have made, viz., that the three corporations were owned, controlled, and directed by defendant, and were in fact the instrumentalities through which he did business.

[2] Appellant urges that there is no evidence to support the charge of grand theft, and points to the purchase of stock by him through various corporations and the completion of some contracts by the delivery of stock, as well as certain printed matter set out on the back of the contracts, as evidence thereof. Such printed matter is contained in 21 paragraphs consisting of 81 lines of small five-point type, covering the entire back of the 7¼-inch by 8½-inch sheet, with the exception of narrow margins at the top, sides, and bottom. Such printed matter provides in part that actual delivery of the securities contracted for is contemplated; that the relation established between the "seller and buyer" is that of debtor and creditor and not that of principal and agent, and that all payments made by the "buyer" and any securities deposited with "seller" shall immediately become the property of the latter, as well as containing many other provisions skilfully designed for the protection of the seller and which we cannot take the space to mention, let alone set out in full. The face of the contract, in ten-point type, addressed to the selling corporation, recites the initial payment made on the described security "in accordance with the terms set out on the reverse side hereof for a total of $———," which price includes 5 per cent. of the total purchase price added "as your Investment Counsel fee," which the company was authorized to deduct out of the first payment. The contract then provided: "I agree to pay the balance in 20 equal installments, *plus 7% carrying charge on deferred payments*, due and payable * * * on the ——— day of each month. This instrument (including printed matter on the reverse side hereof) which the undersigned has read and agrees to and hereby makes same a part hereof, constitutes the entire agreement between us." (Italics ours.) Then follows a place for signature and address of "buyer," and an acceptance to be signed for the company.

We have found in the record testimony of but one contract holder to the effect that he read the fine printed matter on the back, which he did "at or about the time" he signed it. This same witness testified he was informed at the time the initial payment was made "that the stock would be bought, and when I had finished my contract it would be delivered to me. That was why I was paying my seven per cent interest on the money I was paying in." Other witnesses testified to the same understanding, and the contract on its face certainly would lead the buyer to believe that such was the intention of the seller, regardless of the printed matter on the back which they apparently did not read. In our opinion the printed matter on the back, relied on by appellant, at the most simply created a conflict for the jury to determine, not only with the testimony of the purchasers and other testimony challenging the good faith of defendant, but with the faces of the contracts which they signed. The evidence shows that the payments made by the purchasers were not used to buy the stocks contracted for, and that none of such purchasers received any stocks, although several had completed their payments and the others testified that they kept their payments up until the receiver in bankruptcy closed the office of the Coast Investment Corporation, and none of them received any of their money back. Nor do we see any merit in the claim of appellant that, as the time for delivery had not been reached on these latter contracts when the doors of the Coast Investment Corporation were closed, there is no evidence to show that defendant had no intention of performing such contracts. That was a circumstance for the jury to consider with the other evidence indicative of such an intent.

Richard R. Nance gave an order to the Coast Investment Corporation to buy 200 shares of Standard Oil of California stock at $42.50 per share on March 26, 1931, making a deposit of $7,500 with the agreement that the stock would be delivered within twenty-four hours. He later called the office on the telephone and talked with Mr. Williams, the nominal president of the company, who told him there was delay in the delivery from New York. On the 16th of April he was told that the company had the stock and would deliver it upon payment of the balance due. Mr. Nance paid the balance by check dated April 17, 1931, and talked with Mr. Williams again later, who said "it will be here in a day or so now." April 18th he left for Nevada on business and when he returned he went to the office of Coast Investment Corporation, but Mr. Williams was not in. Two or three days thereafter he called again and found the receiver in charge. The evidence shows that Miss Jadwin, the cashier, bought a cashier's check with Mr. Nance's $7,500, cashed it, and put the money in the office safe, paying it out on the direction of either defendant or Mr. Williams.

The evidence also shows that out of 835 closed contracts on only 110 was stock delivered; that, with 69 contracts for the purchase of 5,190 shares of Fox Theatre stock, Security Investment Counselors, Inc., purchased 750 shares, and, with 65 contracts for the purchase of R. K. O. stock, but 45 shares were bought. The jury might well have found that just enough was purchased to keep up a fairly respectable front and create a feeling of security, or to satisfy insistent dissatisfied purchasers who could not be persuaded to reinvest; that there was no intention at any time on the part of appellant to furnish stock to any of the purchasers, but that it was his plan, when a buyer had about completed a contract, to get him to purchase other stock, applying the book credits then accrued as first payment and thus to keep the payments coming in, as far as possible, by high-pressure salesmanship, in the hope that the constantly falling market would eventually wear out the discouraged purchaser and make it unnecessary for appellant to buy stock even at the greatly depreciated prices, and that he only settled with buyers like the witness Baumgartner, who had paid some $600 into the Security Investment Counselors, Inc., on his contract when he received notice of the transfer to the Coast Investment Corporation. Baumgartner ordered his stock sold and demanded the difference. They tried to prevail upon him to hold the stock, but he insisted on a settlement. They said it would take a week or ten days to deliver the stock in New York and get the money back. He then called up the office and told them, if they did not settle, he would notify the district attorney, and in a day or so he received his money.

The evidence in our opinion justified the implied finding of the jury that the respective corporations, doing business in luxurious offices, with the easy payment contracts, afforded appellant a very attractive device for drawing customers without adequate means who wanted to start saving by investing in stocks that seemed to assure profit and security, and who under the contracts were willing to pay 7 per cent. interest on the money they expected appellant would lay out to buy the stock for them, and that he intended to use the payments made in so securing said stock and in reducing the amount he advanced and upon which they were paying interest, whereas in fact he had no intention of buying such stock at the time, or at any time, unless he was forced to do so by insistent suspicious customers, but intended to use such payments for his own purposes and not for the purposes for which the customers paid in their money.

[3] The court instructed the jurors, in substance, that, as to counts IV to IX and XI to XX, inclusive, under the pleadings and evidence a verdict of guilty upon the theory of embezzlement would not be justified, and that there was left as to such counts for their consideration the question as to whether they believed, beyond a reasonable doubt, that the crime, if any, was shown to have been committed by means of larceny or by means of false and fraudulent representations and pretenses. Appellant urges that the record does not in any way support the theory of obtaining money by false pretenses, and that the court erred in giving such instruction. In our opinion the provisions of the contract, leaving out of consideration the fine print on the back thereof and the testimony of some of the witnesses as to what use was to be made of their money, furnish a basis for such theory, and we see no error in the giving of such instruction.

[4] Appellant also urges that an instruction as to count IV, which involved a contract issued by Security Investment Counselors, Inc., was followed by another which told the jury to consider the same as though repeated at length, with respect to the succeeding counts to and including count XX, substituting wherever the number IV appears the number of the particular count under consideration; that, inasmuch as counts VII and XX involve contracts issued by J. H. Roth & Co., the failure to advise the jurors to trans-

pose the name of such corporation in such two counts in effect told them that any criminal intent found as to Security Investment Counselors, Inc., would apply retroactively to the earlier transactions of the Roth Company. It is inconceivable that any jury would so reason. We must assume that that body was composed of intelligent beings, and any such would see at once, under the instructions given, that the counts involving the Roth Company contracts would require substitution, not only of the number of such count, but of the name of the corporation that issued the stock there involved as well.

[5] The court refused to give an instruction requested by defendant which told the jurors that in considering the credibility of a witness and in deciding what weight to give to his testimony it was their duty to consider, if it was a fact, that an indictment found by the grand jury against such witness had been dismissed by the district attorney prior to the latter's taking the stand on behalf of the prosecution, "all as tending to show a desire on the part of said witness to seek favor at the hands of the prosecution by aiding in the conviction of defendant." The court gave the jury the usual instruction as to the credibility of witnesses, which in our opinion sufficiently covered the matter without using particular phraseology desired by a party, which latter had the vice of applying to one witness only, and draws the conclusion that is for the jury alone to make, as to what the effect of such dismissal might be on the witness.

[6] The court refused to give an instruction requested by defendant advising the jury that a person, firm, or corporation is considered solvent "so long as such person, firm or corporation can from their current assets" pay their debts as they become due and payable. An instruction was given by the court to the effect that, if the jury believed that the corporation was controlled by defendant and was held out to the complaining witness as being a company that was then solvent, etc., and that in truth and in fact said company was not then solvent, etc. Appellant urges that by reason of such use of the word "solvent" it was error to refuse the instruction above mentioned, inasmuch as the court did not in any other instruction define the meaning of solvent or insolvent. In our opinion, such words are in common use and as such were within the knowledge of the jurors, and we fail to see how appellant could have been prejudiced by such refusal.

[7] Appellant was found guilty of violating the Corporate Securities Act under counts XXI, XXVI, XXVII, and XXXIX. Count XXI, as originally filed, charged such violation, in "that the said Jules H. Roth, on or about the 21st day of December, 1929, * * * did wilfully, unlawfully and feloniously offer for sale and sell to one Mrs. Mary M. Campbell twenty-five (25) shares of the capital stock of Packard Motors, for value, without said defendant, or anyone, having applied for, or obtained, a permit so to do from the Corporation Commissioner of the State of California." A demurrer to such counts was filed and overruled. At the beginning of the trial defendant demurred to the introduction of evidence on such counts and objected to the jurisdiction of the court to proceed thereunder, without avail. At the conclusion of the trial he objected to the case going to the jury on such counts and to amendments thereto being permitted. Such objections were all overruled and an amendment by interlineation was permitted by the court, which properly stated a violation of section 5 of the Corporate Securities Act, as it then existed, in acting as a broker without the required certificate authorizing defendant so to do. Counts XXVI, XXVII, and XXXIX were identical with count XXI, except for the difference in the names of the persons and the securities involved, and the same amendments were made as to such counts.

It appears that the transcript of the testimony taken at the preliminary hearing was introduced in evidence before the court to prove that the amendment in question would charge an offense there shown to have been committed by the defendant. This is not before us, but the record discloses that the court found that the showing warranted the allowance of the amendment. The record further discloses that the case before us was tried on the theory that the information charged the offense of acting as a broker without the proper certificate; and in our opinion the amendment, as the trial court found, did not prejudice appellant, as he knew at all times of the crime attempted to be charged, though defectively stated. We conclude that on the record before us there was no error in permitting such amendments.

[8] For the same reason there was no substantial right of appellant on the merits prejudiced, even though the demurrers and objections were erroneously overruled. Nor was there error in denying defendant's motion for arrest of the judgments.

[9] Appellant contends that section 1008 of the Penal Code violates the provisions of the

Fourteenth Amendment of the Federal Constitution, in that it deprives him of due process of law and his right to due notice. The record shows that appellant had notice from the information as originally filed of what was charged therein as violative of the Corporate Securities Act, and that the case was tried on that theory. Moreover, an amendment cannot be made under the section if it prejudices the substantial rights of a defendant; and, inasmuch as he is furnished with a copy of the transcript of the proceedings at the preliminary hearing, he has notice of any charge that under the section may be placed against him by amendment of the information. The section itself preserves the substantial rights of the party to a trial on a charge of which he has had due notice, and that is all the Constitution requires.

[10, 11] It is urged also that the evidence shows that appellant was acting as an "investment counsellor" and not as a broker in the transactions mentioned, and that the Corporate Securities Act did not require an investment counsellor to obtain a certificate as a prerequisite to transacting such business, or refer in any way to installment purchase contracts, until it was amended in 1931, and that in consequence the evidence fails to show any violation of the act as it existed at the time of the transactions of which complaint is made.

Subdivision 10 of section 2 (a) of the act as it then existed says: "The word 'broker' includes every person or company, other than an agent, who shall, in this state, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security not exempt under the provisions of this act issued by others * * * or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public." St. 1917, p. 673, § 2, as amended by St. 1929, pp. 1251, 1252. "Sale" or "sell," under the act, then included "every disposition, *or attempt to dispose*, of a security or interest in a security for value," and included also "a contract of sale * * * an attempt to sell * * * a solicitation of a sale * * * directly or by an agent." Subdivision 8, § 2 (a). The evidence clearly shows that appellant, through his companies and agents, was engaged in the solicitation of sales, making contracts for sale, and, within the meaning of subdivision 10 of section 2 (a) of the act as it then existed, was engaged in the business of selling, offering for sale, and negotiating for the sale of, securities, and was a broker within the meaning of such act. He was exercising the functions of a broker, not of an investment counsel, which designation under the amendment of 1931 applies to one (other than a broker) who for compensation engages in the business of advising others as to the value of securities or the advisability of investing in or purchasing securities, or who issues analyses or reports concerning securities. Stats. 1931, p. 938, § 2 (a), subd. 12. The amendment does not include the function of selling, and the broker who sells, as did appellant, necessarily advises; but his broker's certificate is all that is required of him. An examination of the amendment as to installment contracts (Stats. 1931, p. 946, § 8) shows that it does not bring such contracts, as a means of sale, within the purview of the act for the first time, but it in effect recognizes the existence of that method of selling securities, as already covered by the act, and requires the broker to submit the form used by him for the approval of the corporation commissioner, and requires that it contain a clause specifying the time within which the purchase of the securities involved is to be made by the broker, as well as another showing the time within which delivery is to be made "after such deposit." In our opinion the act, prior to the amendment, covered the transactions here involved.

[12] An expert accountant testified at length from summaries made by him from the books of defendant. It is very evident that the original books and accounts from which the summaries were made could not have been examined and the facts contained therein thus shown to the jury without great loss of time. We think this was properly done under subdivision 5 of section 1855, Code of Civil Procedure. The original records themselves were introduced in evidence, but both sides apparently used the summaries without reference to the originals. The summaries were received in evidence by the court "for convenience only and not to vary the terms of the original exhibits themselves." We see no possible way appellant could have been prejudiced.

[13] There is no appeal from an order denying a defendant's motion in arrest of judgment (section 1237, Pen. Code). If any error is committed by such order, it would be reached on an appeal from the judgment.

Appeal from orders denying motions for arrest of judgment dismissed. Judgments and orders affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

PER CURIAM.

Inasmuch as the motion for new trial as to count X of the information herein was granted, no reference to such count is necessary in a decision of the case. The opinion heretofore filed is therefore modified by striking the word "eighteen" preceding the word "counts" in the first paragraph thereof and inserting instead the word "seventeen," and by changing the first two sentences of the third paragraph appearing on page 67 of the printed report [31 P.(2d) 817] to read as follows: "The remaining counts charging grand theft upon which verdicts of guilty were returned involve sales to ten different customers under the twenty-payment plan. Two of the counts, VII and XX, involve contracts issued by J. H. Roth & Company, and thirteen of them, IV, V, VI, VIII, IX, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII, contracts issued by Security Investment Counselors, Inc."

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138 Cal.App. 174

PEOPLE v. HOLLOWWA.

Cr. 100.

District Court of Appeal, Fourth District, California.

April 20, 1934.

1. Kidnapping 🔑5.

Evidence that defendant by force and threats compelled another against her will to accompany him from place to place in county and forced her to give him bill of sale to her automobile before he released her *held* to establish kidnapping (Pen. Code, § 207).

2. Criminal law 🔑1130(5).

Where specifications of error concerning instructions and evidence rulings were not accompanied by argument or citation of authority, reviewing court need not search record to determine whether there was miscarriage of justice.

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Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Robert R. Hollowwa was convicted of kidnapping, and he appeals.

Affirmed.

P. E. Bingmam, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

Appellant was convicted of the crime of kidnapping. He has appealed from the judgment and from the order denying his motion for new trial, and has attempted to appeal from the verdict of the jury. He urges that the evidence is insufficient to support the judgment and that the trial court committed error in overruling his objections to questions asked by the district attorney and in refusing and modifying instructions proposed by him.

[1] It will add nothing to the case law of this state to detail the lengthy evidence contained in the reporter's transcript. It is sufficient to say that the evidence supports the conclusion that in the early morning of November 17, 1933, the defendant by the use of force and threats compelled Margaret Littlejohn, against her will and without her consent, to accompany him from place to place in San Bernardino county, and finally forced her to give him a bill of sale to her automobile before he released her from restraint. He took her and kept her under his control for about two and one-half hours. All of the elements of kidnapping were thus established. Section 207, Pen. Code; People v. Sheasbey, 82 Cal. App. 459, 255 P. 836; People v. Bruno, 49 Cal. App. 372, 193 P. 511.

[2] The various specifications of error concerning the instructions and the rulings on evidence are not accompanied by any argument or citation of authority. "Under a well-known rule of procedure we are not called upon, under such circumstances, to assume the burden of searching the record to determine whether there has been a miscarriage of justice." People v. Schlosser, 99 Cal. App. 593, 278 P. 898. We have, however, examined the entire record and are satisfied that there was no prejudicial error in the rulings of the trial court in the admission or rejection of evidence and that the jury was properly instructed on the law applicable to the case.

The attempted appeal from the verdict is dismissed.

The judgment and order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

138 Cal.App. 94

PEOPLE v. GEBBIA et al.

Cr. 2465.

District Court of Appeal, Second District, Division 2, California.

April 17, 1934.

1. **Homicide** ⚷282.

Weight of evidence that parties to homicide had been drinking and in quarrelsome mood *held* for jury in determining to what extent such factors operated as mitigating circumstances in killing.

2. **Criminal law** ⚷1172(8).

Where evidence would have justified verdict of guilty of greater offense, accused could not complain of conviction of lesser offense included within greater charge.

3. **Homicide** ⚷309(2).

In murder prosecution, where there was evidence justifying verdict of lesser degree of homicide than murder, giving instruction on manslaughter as part of general instruction on lesser offenses included within murder *held* proper.

4. **Homicide** ⚷304.

In murder prosecution, where evidence did not support theory that shooting of deceased was accidental, refusal of instruction offered by accused as to accidental killing *held* not error.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Louis Robles and others were charged with murder, named defendant was convicted of manslaughter, and he appeals.

Affirmed.

Joe H. Kirby and Patrick F. Kirby, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Defendant appeals from a judgment of conviction of the crime of manslaughter and order denying his motion for new trial, after trial by jury upon an information filed by the district attorney of Los Angeles county charging him with the crime of murder.

Appellant bases his argument for a reversal of the judgment upon the general assertion "that the verdict is without support in the evidence," and certain specified errors alleged to have been committed by the court in the giving of certain instructions, and also in the refusal to give certain instructions requested by defendant.

Appellant does not contend that the evidence fails to support the prosecution's claim that deceased came to his death as a result of revolver shots fired by him, but urges that if the story as told by the eyewitnesses for the prosecution is to be accepted, he should have been found guilty of murder instead of manslaughter. The evidence might well have supported a verdict of guilty of murder, had the jury so found. This fact, however, did not deprive the jury of its right to take into consideration the evidence that all of the parties present in the cafe had been drinking, while several were in a quarrelsome mood, insulting and threatening one another. Defendant testified that he himself was drunk and did not remember much about the shooting.

[1, 2] It was within the power of the jury to give such weight as it deemed proper to these factors in determining to what extent if at all they operated as mitigating circumstances in the killing. People v. Muhlner, 115 Cal. 304, 47 P. 128. One found guilty of a lesser offense included with a greater charged will not be heard to complain where the evidence would have justified a verdict of guilty of the greater offense. People v. Tugwell, 32 Cal. App. 520, 163 P. 508; People v. Muhlner, supra; People v. Black, 80 Cal. App. 605, 251 P. 321. The record so clearly stamps the defendant as guilty of an unjustified homicide that no useful purpose would be served by a detailed recital of the evidence supporting the verdict.

[3] As to the second ground urged for a reversal, errors of the court in giving and refusing instructions, we find no merit in this contention. The instruction on manslaughter, given as a part of the general instruction advising the jury as to the lesser offenses included within the greater charged, was given in the form that is generally used and has long had the approval of our courts. Cases cited by appellant in support of his contention that no instruction should have been given as to manslaughter are not in point, for the jury had a right to have this definition of all of the degrees of homicide, and, as already pointed out, there is evidence in the record that might have been considered as justifying their verdict of the lesser degree of homicide, to wit, manslaughter.

[4] As to the instruction offered by defendant and refused by the court, relating to the

matter of "accidental killing," there is nothing in the evidence to justify the theory that the shooting of deceased was accidental. So far as this theory may be involved in the element of self-defense, the right of self-defense was fully covered in other instructions.

We find no merit in the points raised by appellant in his argument for a reversal of the judgment.

Judgment affirmed and order denying motion for new trial affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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138 Cal.App. 101

BURRILL v. ROBERT MARSH & CO., Inc.

Civ. 9235.

District Court of Appeal, Second District, Division 2, California.

April 18, 1934.

Rehearing Denied May 18, 1934.

1. Bills and notes ⇨125.

Waiver of interest from June 17, 1927, to June 17, 1928, *held* not to include interest from April 1 to June 1, 1927, becoming due and payable on October 1, 1927.

2. Guaranty ⇨47.

Under guaranty of payment of notes "at maturity," suit on guaranty *held* not premature when brought after acceleration of notes, since term "maturity" should be construed to mean date when holder of note had legal right to begin action to force payment thereof.

[Ed. Note.—For other definitions of "Maturity," see Words & Phrases.]

3. Appeal and error ⇨173(9).

Issue of waiver of right to accelerate due date of notes because of delay in bringing suit can only be raised by pleading it in answer, and is not available for first time on appeal.

4. Bills and notes ⇨129(2).

Holder of note did not waive right to accelerate due date by delay in bringing suit, where acceleration clause gave holder right to declare principal due at "any time thereafter" after 30 days after default.

5. Guaranty ⇨91.

In action on guaranty of notes, prima facie case was made out by plaintiff on introduction of notes and stipulations as to nonpayment.

6. Appeal and error ⇨1011(1).

Reviewing court may not set aside trial court's fact finding on conflicting evidence.

◆

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by A. W. Burrill, as trustee in bankruptcy of the estate of United Finance Company, against Robert Marsh & Company, Inc., and another, to recover upon a guaranty of certain promissory notes. From an adverse judgment, defendants appeal.

Affirmed.

Harmel L. Pratt, of Los Angeles, for appellants.

West & Andrews, of San Francisco, and Reuben G. Hunt and Fred N. Arnoldy, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

Two cases involving the same questions are before us on appeal, one brought by A. W. Burrill, as trustee in bankruptcy of the estate of United Finance Company, a corporation, and the other by Herman C. Smith, 31 P.(2d) 826. Robert Marsh & Co., Inc., and Robert Marsh were named defendants in each action. In the Smith Case, A. W. Burrill, as trustee in bankruptcy, appeared as intervener.

In the discussion that follows reference will be made to the one case wherein Burrill, as trustee, is plaintiff.

The controversy arises over a contract of guaranty made a part of each of twenty-five promissory notes executed by the Utah Land & Cattle Company, which guaranty, signed by Robert Marsh & Co. and Robert Marsh, reads as follows: "For value received, we severally guarantee the payment of the within note at maturity, or any time thereafter, and hereby waive presentment, protest, demand and notice of demand, and nonpayment, and suit, against the maker, and consent that the payment of this note may be extended from time to time without affecting our liability, and hereby waive diligence on the part of any holder hereof in collecting the said note and any defense arising out of lack of diligence in enforcing the collection thereof." The notes in question were each dated April 1, 1925, for the principal sum of $3,200, with semiannual interest coupons attached, and by their terms were payable April 1, 1930.

From judgments in favor of plaintiff Burrill, as trustee in bankruptcy, in one action, and in his favor as plaintiff in intervention in the other, defendants have appealed.

It appears from the record that for some weeks prior to July 6, 1925, one J. H. Scales was engaged in promoting the Blodgett Finance Company, which corporation, when organized, was to acquire the business of several going concerns engaged in financing automobile loans and issuing automobile insurance. During this period Scales had several conferences with Robert Marsh concerning these promotion plans and a proposal that Marsh acquire a block of stock of the Blodgett Finance Company. Marsh, who through his company owned forty-eight mortgage notes of the Utah Land & Cattle Company, each for the principal sum of $3,200, finally agreed on or about July 6, 1925, that he and his company would exchange the notes in question, guaranteed by them, for 1,286 shares of the capital stock of the Blodgett Finance Company and the promissory notes of the Blodgett Finance Company for the principal sum of $25,000. The twenty-five notes here involved, being a portion of the forty-eight notes transferred by defendants to the Blodgett Finance Company, passed into the possession of the United Finance Company some time prior to November 4, 1927, on which date the United Finance Company was adjudged a bankrupt and A. W. Burrill appointed trustee of the bankrupt estate. Having come into possession of these notes as such trustee, and the interest coupons due and payable on October 1, 1927, and April 1, 1928, not having been paid, on July 17, 1928, plaintiff filed suit against defendants on their contracts of guaranty to enforce payment of the principal and accrued interest on the notes.

Plaintiff presented his prima facie case by the introduction of the notes and the guaranty contract written on the back of each note, and with the stipulation by counsel for defendants that no part of the principal of any note, and no part of the interest falling due after April 1, 1927, had been paid, rested his case.

Thereupon defendants moved for a nonsuit on the following grounds: "1. That the evidence of the plaintiffs was insufficient to constitute a cause of action against defendants or either of them. 2. That the action was filed prematurely in that the defendants 'guaranteed payment of the within note at maturity or any time thereafter', and that 'at maturity' meant the first day of April, 1930, regardless of the acceleration of payment provided for in the note. 3. That the plaintiffs by failing to file their action for more than a year after default in the payment of interest, waived the right to accelerate the maturity of the notes for nonpayment of interest; thus the notes had not matured when the action was filed." Upon denials of their motion for nonsuit, defendants offered evidence in support of their defense. Upon submission of the case, judgment and findings were ordered for plaintiff.

Appellants in their brief urge as errors committed by the court:

First, denial of their motion for nonsuit.

Second, insufficiency of the evidence to support the findings or judgment.

Under their first point, appellants contend that the action was prematurely brought because: (a) There was no default in the payment of any interest on the notes that would give the holder the legal right to accelerate the due date of the principal; and (b) the defendants were not liable on their guaranty until after April 1, 1930; this on the theory that the term "maturity," as used in the contract of guaranty, means the due date specified in the note.

[1] The complaint in the action contains the following allegation: "That interest was waived from June 17, 1927, to June 17, 1928." This waiver it is claimed by appellants includes all interest represented by the coupons falling due between those dates. The language of the waiver does not justify this construction. The period for which interest was waived is very definitely fixed. It does not include the interest from April 1 to June 1, 1927, which became due and payable on October 1, 1927.

[2] The second point urged in support of the contention that the action was prematurely brought depends upon the meaning of the word "maturity," as used in the contract of guaranty. If its meaning is limited to the due date specified in the note, as urged by appellants, then their point is well taken. If, on the other hand, it means any date after which, according to the terms of the note, the holder had the legal right to sue upon the note, then the suit was not prematurely brought.

The notes in question contain the following clause: "If default be made in the payment of any interest coupons or any portion thereof, for the space of thirty days, the principal sum and all unpaid interest shall, any time thereafter, at the option of the holder of this note, become immediately due and collectable without further notice." Counsel in their briefs cite no case where the term "maturity" has been construed in its application to circumstances such as are here involved.

Bouvier's Law Dictionary defines the word "maturity" as "the time when a bill or note becomes due," and Webster's International Dictionary as "a becoming due; termination of the period a note or other obligation has to run." In the case of Ardmore State Bank v. Lee, 61 Okl. 169, 159 P. 903, 905, it was held that " 'maturity,' when applied to commercial paper, means the time when the paper becomes due and demandable; that is, the time when an action can be maintained thereon to enforce payment."

In the case of San Francisco Theological Seminary v. Monterey County Gas & Elec. Co., 179 Cal. 166, 175 P. 693, the court had under consideration a contract of guaranty which read as follows: "For value received, Monterey County Gas & Electric Company, a corporation, agrees, to and with the holder of this bond and the attached coupons, that if the several sums of money agreed to be paid hereby are not paid in the manner therein stated, as they severally become due, then and in that event the Monterey County Gas & Electric Company will pay the same." The defendant there, as here, contended that the action against it as a guarantor of the bonds was prematurely brought, because under the terms of the contract of guaranty it was not liable until after the expiration of the due date specified in the bond. The court in refusing to accept defendant's interpretation of the contract makes this observation: "The bond not only promises to pay the principal on July 1, 1937, but it makes express reference to the mortgage in such manner as to incorporate the provision of that instrument for accelerating the maturity of the principal upon default in the payment of interest. * * * In effect, the bond does not merely bind its maker to pay the principal upon the 1st day of July, 1937. By referring to the provisions of the mortgage, it qualifies the promise to pay, and declares that in certain contingencies the principal may become due at an earlier date. When, then, the guarantor bound itself to pay the several sums of money agreed to be paid by the bond if they were not 'paid in the manner therein stated, as they severally became due,' it made itself liable for the payment of the principal of the bonds whenever such principal should become due, whether on the 1st day of July, 1937, or at such earlier time as might be fixed under the mortgage provisions incorporated in the bond."

The considerations stated and conclusions arrived at in the case above quoted from would seem applicable to the situation here involved. Counsel for appellants point out the comment of the writer of that opinion where he says, "if the agreement of the appellant went no further than to guarantee that the principal of the bonds should be paid on July 1, 1937, it could not be called upon to pay this amount at any time prior to such due date," as supporting their contention that the term "maturity," as used in the contract of guaranty herein involved, may only be construed to mean April 1, 1930, the due date specified in the note. We do not believe the quoted comment justifies this conclusion. The term "maturity," as here used, when read with the acceleration provisions of the note and the considerations that may be fairly said to have entered into the making of the contract, would seem to justify a broader interpretation than that urged by appellants. Conceding, as we must, that persuasive argument may be advanced in support of each of the views presented, we are of the opinion that the term "maturity," as here used, should be construed to mean the date when the holder of the notes had a legal right to begin action to force payment thereof.

[3, 4] Appellants next urge that respondent waived his right to accelerate the due date of the note because of his delay in bringing suit. Respondent has two answers to this proposition, both of which have merit: First, that the issue of waiver can only be raised by pleading it in their answer; and inasmuch as no such plea was made it is not now available to appellants. Wienke v. Smith, 179 Cal. 220, 176 P. 42; Hewitt v. Dean, 91 Cal. 5, 27 P. 423; Patten v. Pepper Hotel Co., 153 Cal. 469, 96 P. 296. Second, that in the acceleration clause in the notes here involved the holder is given the right at "any time thereafter," after a period of thirty days after default, to declare the principal due, while in the cases cited by appellants, particularly the case of Crossmore v. Page, 73 Cal. 213, 14 P. 787, 2 Am. St. Rep. 789, the right to declare the note due is "immediately" upon the default. The clause "any time thereafter" gives to the holder the widest possible latitude in time within which to act, while the word "immediately" denotes the most restricted period within which he must act.

[5, 6] In connection with appellants' third and last point, insufficiency of the evidence, appellants urge, first, that the court erred

in denying their motion for a nonsuit, for the reason that the evidence presented by the plaintiff in his case in chief failed to support the necessary and material allegations of the complaint; and, second, that the evidence shows such "palpable fraud" practiced on the defendants as an inducement to their transfer of the Utah Land & Cattle Company notes to the Blodgett Finance Company that the findings declaring against such alleged fraud and the judgment rendered thereon are not supported by the evidence. We find no merit in either of these contentions.

As to the first, a prima facie case was made out by the plaintiff upon the introduction of the notes and the stipulations as to nonpayment. As to the second, the evidence on the question of fraud was in marked conflict, and therefore this court may not set aside the trial court's findings of fact on that issue.

As the record discloses no error, the judgment must be affirmed. It is so ordered.

We concur: STEPHENS, P. J.; CRAIG, J.

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138 Cal.App. 774

Herman C. SMITH, Plaintiff, v. ROBERT MARSH & CO., Inc. (a Corporation), and Robert Marsh, Defendants and Appellants; A. W. Burrill, as Trustee of the Estate of the United Finance Company (a Corporation), Bankrupt, Intervener and Respondent.

Civ. 9234.

District Court of Appeal, Second District, Division 2, California.
April 18, 1934.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Harmel L. Pratt, of Los Angeles, for appellants.

West & Andrews, of San Francisco, and Reuben G. Hunt and Fred N. Arnoldy, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

The same questions presented in this appeal are involved in the case of A. W. Burrill, as Trustee of the Estate of the United Finance Company, a Corporation, v. Robert Marsh & Co., Inc., a Corporation, and Robert Marsh, 131 Cal. App. —, 31 P.(2d) 822, this day decided. Inasmuch as counsel are the same in each case, it will serve no useful purpose to set forth in this opinion the considerations and conclusions which are dealt with in detail in the opinion filed in Burrill v. Robert Marsh & Co., Inc., and Robert Marsh. For the same reasons therein set forth, the judgment in this case must be sustained.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 98

WANTZ v. UNION BANK & TRUST CO. OF LOS ANGELES et al.

Civ. 8080.

District Court of Appeal, Second District, Division 2, California.
March 28, 1934.

1. Pleading 🔑403(2).

Complaint which lacks averment of fact essential to cause of action may be so aided by averment of that fact in answer as to uphold judgment thereon.

2. Pleading 🔑403(2).

Defendant by answering may enlarge scope of relief to any extent consistent with pleadings and embraced within issue.

3. Fraud 🔑30.

Provisions protecting bank, holding legal title for others, from representations not contained within written contracts made by selling agents unknown to bank and employed by others, *held* not to protect others from effect of acts fraudulently committed by them in inducing purchase of realty (Civ. Code, § 1668).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 29 P.(2d) 882.

Walter M. Campbell, of Los Angeles (Loeb, Walker & Loeb, of Los Angeles, of counsel), for appellants.

Robert L. Hubbard and Mart Coles, both of Los Angeles, for respondent.

PER CURIAM.

Petition for rehearing denied.

Appellants Barteaux and Elliott urged in their petition for a rehearing as to them that under the rule laid down in McDonald v. Southern California Railway Co., 101 Cal. 206, 35 P. 643, and other cases cited, the allegations of rescission as a defense cannot be used as evidence of such fact; that, there being no other proof of such fact, there could be no recovery, and that the statement used in one defense cannot be used as evidence upon another issue, because to so hold would deprive the defendant of the benefit of his denials.

In our opinion such rule is not applicable to the situation disclosed by the pleadings and evidence in the instant case. The complaint here was in four counts, each of them duplicates of the other, except for the fact that a different contract to purchase was involved in each count and different amounts were paid on each contract. The allegations in each were sufficient to charge fraudulent representations by the defendants inducing the execution of such contract, exclusive of the paragraph charging the use of the name Calivalli Development Company by defendants. By each count it is sought to recover the payments made on account thereof, but none alleges that the contract was rescinded by the buyer. There is no allegation of a cause of action based on the common counts. The answer contains a specific denial of each paragraph of each count, except that the execution of the contract is admitted, and as an affirmative and separate defense alleges, first, that the Union Bank & Trust Company had no interest in the property "sold by the Calivalli Farms Company to the plaintiff," other than in its capacity as trustee; second, that plaintiff made an independent investigation before contracting to purchase; and, third, that plaintiff elected to rescind such contracts and served each defendant with a notice in writing of such rescission, together with a demand for the payment of all moneys paid by him thereof, and that defendants subsequent to the service of such notices of rescission, "relying upon plaintiff's election to rescind," sold the property covered by such agreements, etc. There is no defense set up in such answer of which defendants are deprived of the benefit.

[1, 2] The case made by the complaint is lacking only in showing that the damage done by the alleged fraudulent representations consisted of the money paid on the contracts alleged to have been fraudulently induced. Defendants by their answer supply such lack by showing that as a matter of fact there was a rescission of such contracts made by the plaintiff. That being the case, the only issue for the jury to determine was whether or not the contracts were fraudulently induced as alleged in the complaint and denied in the answer. Having so found, and it appearing without question, by reason of defendants' allegations that the damages consisted of the payments found to be made, it would seem to be a senseless thing to send the case back for a new trial when all the real issues between the parties were determined. The relief granted would seem to be clearly within the case made by the complaint and embraced within the issue (section 580, Code Civ. Proc.), and defendants would not appear to be in a position to complain that they themselves by their pleading made unimportant, by conceding it, what might have been a very important issue if it had not been conceded by them. "The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon." Daggett v. Gray, 110 Cal. 169, 172, 42 P. 568, 569. And it is equally well settled that a "defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and 'embraced within the issue.'" Woods C. I. Ditch Co. v. Porter S. Ditch Co., 173 Cal. 149, 153, 159 P. 427, 429.

[3] Nor in our opinion can petitioning defendants save themselves from the effect of the acts found by the jury to have been fraudulently committed by them, by pointing to the provisions inserted in the contract by the Union Bank & Trust Company for its protection from representations not contained within the written contracts, made by selling agents unknown to such company and employed by others. If such clause could be so construed, it would in our opinion be void under section 1668 of the Civil Code.

This is not an action for rescission, but one for damages for the alleged wrongful inducements, after rescission accomplished.

137 Cal.App. 672

BOYLE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9573.

District Court of Appeal, Second District, Division 2, California.

April 3, 1934.

Hearing Denied by Supreme Court May 31, 1934.

1. Trusts ⚷243.

Successor trustee who required original trustee to have audit made before successor's acceptance of trusteeship did not thereby assume liability for payment of accountants hired by original trustee.

2. Trusts ⚷243.

Expense of audit of trust made before change in trustees *held* not "charge or expense for preservation, maintenance or care of trust estate," within provision of declaration of trust for payment of such charges by trustee.

3. Trusts ⚷243.

Claim of accountants employed to audit trust before change of trustees *held* not converted into equitable claim or made chargeable against trust, even if successor trustee acquired claim against trust and paid itself with trust property.

4. Trusts ⚷243.

Promise of successor trustee, after assuming trust, to pay from trust funds claim of accountants hired by original trustee to make audit of trust created no personal liability on successor trustee's part.

◆

Original application by John M. Boyle and another, doing business as Boyle & Wood, for a writ of mandate to be directed to the Superior Court in and for Los Angeles County, Lester W. Roth, Judge.

Writ discharged.

Melville R. Adams, of Venice, for petitioners.

Everett W. Mattoon and Fred M. Cross, both of Los Angeles, for respondents.

CRAIG, Justice.

This is a proceeding in mandate to require the Superior Court to vacate an order made by it transferring a certain suit to the municipal court of the city of Los Angeles and to overrule a demurrer filed therein.

The essential facts are: Petitioners were hired by the Southern California Finance Corporation, trustee for a certain trust estate, to make an audit of the trust in anticipation of said trustee resigning and of the defendant in the action becoming the trustee. This audit was required by the defendant before accepting the trusteeship. It appears that after the audit had been made the change in trusteeship took place. Under the terms of the declaration of trust it was provided that the trustee should "pay, when due, all estate, inheritance, income and other taxes, insurance, interest, assessments, liens, incumbrances, charges and expenses of every kind and nature necessary or proper for the preservation, maintenance and/or care of the trust estate, including costs, charges and expenses of this trust; and in the event any or all of the foregoing costs, expenses, taxes, insurance, etc., are not paid when due by the beneficiaries and are subsequently paid by the trustee, authority for which is hereby given, all such money so advanced or paid shall bear interest at seven per cent. (7%) per annum and shall constitute a first and prior lien on the trust estate and any and all contracts evidencing the sale of any part of the trust estate in the handling of" said trust. Other facts are alleged which have no bearing upon the issues here involved; for example, that the finance company is insolvent, that the trustee was authorized to embark in trade and was so engaged when petitioners' claim was incurred, and that the defendant bank acquired a claim against the trust which it caused to be paid out of the trust property.

[1, 2] The work done by petitioners appears to have been required and performed in the ordinary course where one trustee is about to relinquish the trusteeship and a successor takes the place. There is no assumption of liability involved by the new trustee where under such circumstances and before accepting the position he requests that an audit be made. Nor can such an audit be said to be for the benefit of the trust estate. It is obviously for the advantage of the trustee who wishes to resign, and no prudent person would take over a trust unless his predecessor provided for such an audit.

There is no allegation that the beneficiaries of the trust expressly authorized the petitioners' work to be done. We find no provision in the declaration of trust above quoted and urged by petitioners as authorizing this expense, which includes it. As we have indicated, this audit cannot be said to be a "charge or expense for the preservation,

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maintenance or care of the estate," but one solely to facilitate the change of trustee.

[3, 4] It is alleged that the second trustee acquired a claim against the trust and paid itself with the trust property. This fact, if it be one, would not convert petitioners' legal claim into an equitable one or make a bill incurred for the benefit of the trustee who ordered the work one properly chargeable against the trust, or against a second trustee who did not order the work done. Also, no authority need be cited to support the proposition that the allegation that the bank, after becoming trustee, promised to pay petitioners' claim out of the trust funds, created no personal liability on the part of the bank, legal or equitable. Nor would such promise, if made, convert a previous legal right, if one had existed, into one in equity.

The writ is discharged.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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138 Cal.App. 118

NADLER v. NADLER et al.

Civ. 8967.

District Court of Appeal, First District,
Division 1, California.
April 19, 1934.

Hearing Denied by Supreme Court
June 18, 1934.

1. Appeal and error 🔑1011(1).
Trial court's finding on contradictory evidence as to time for redemption of property, conveyed as security for loan, prevails on appeal.

2. Mortgages 🔑38(1).
Allegation and proof that loan on security was intended by parties to deed, set up by grantee as sale for amount loaned, constitutes sufficient averment and proof of fraud to require equity court to hold deed to be mortgage (St. 1915, p. 1940, § 37).

3. Limitation of actions 🔑95(1).
Action, filed about two months after plaintiff learned of defendants' adverse claim of title to realty, to declare plaintiff's deed to one defendant a mortgage securing loan to plaintiff, *held* not barred by statute of limitations.

4. Equity 🔑13.
Equity court will grant relief against party taking unconscionable advantage of one lulled into false security.

5. Mortgages 🔑38(1).
Evidence *held* sufficient to support court's finding in action to declare deed a mortgage that instrument was given as security for debt with intent that it should be mortgage, that trust was created, and that defendants practiced fraud on plaintiff by setting up adverse claim of title to property conveyed (St. 1915, p. 1940, § 37).

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ben Nadler against Aaron Nadler and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Max Schleimer, of Los Angeles, for appellants.

Henry D. Lawrence, of Long Beach, for respondent.

JOHNSTON, Justice pro tem.

Plaintiff brought this action against the defendants for the purpose of declaring a grant deed given to defendant Aaron Nadler on March 1, 1917, to be a mortgage.

[1] The trial court made its findings and rendered judgment in favor of plaintiff and against defendants, declaring said grant deed to be a mortgage, and finding and decreeing that title to the property was held under a resulting trust, and ordered an accounting to be had between the respective parties. Plaintiff claims that at the time of the execution of said deed he was in arrears in the installment payments on a contract to purchase real property, and at the same time was involved in domestic difficulties with his wife. Plaintiff, it seems, was in danger of losing his equity in the property in dispute in this action, and, being desirous of making a property settlement with his wife, needed money, both for the purpose of saving his equity in the real property, and to settle his property differences with his wife. He appealed to his father, defendant Aaron Nadler, and the latter either had no money, or did not have sufficient to satisfy the needs of plaintiff, but stated that he would appeal to his intended bride, a Mrs. Harris, for the loan of the money, which was afterwards

done. When the money was secured from Mrs. Harris, plaintiff and defendant Aaron Nadler met in an attorney's office, Mrs. Harris not being present, and then and there agreed that the necessary moneys would be supplied, and that the registered owner of the real property would execute a deed to defendant Aaron Nadler. With that, plaintiff and his wife would execute a quitclaim deed to Charles Herman, the registered owner, and Aaron Nadler would supply certain moneys to plaintiff for the purpose of satisfying demands of plaintiff's wife in their property settlement; that said Aaron Nadler would execute a trust deed to the registered owner of the property in satisfaction of the balance of the purchase price. It was at that time understood between plaintiff and Aaron Nadler that the latter was to take title to said property and hold same as security for moneys advanced by him; that rentals of said property and payments by plaintiff were to be applied on said indebtedness until satisfied, after which the property was to be conveyed by Aaron Nadler to plaintiff. Defendant Aaron Nadler claims time of redemption was limited to one year. The evidence is contradictory on this point, and the finding of the trial court would prevail.

About July 14, 1917, the said Aaron Nadler, by grant deed, transferred said property to his wife, Amailie Nadler, formerly the Mrs. Harris heretofore mentioned, upon her insistent demand; she making said demand by reason of the fact that she had advanced the moneys which said Aaron Nadler had given to plaintiff. This grant deed was executed by Aaron Nadler to his wife, Amailie Nadler, without notice to plaintiff here, and it does not appear from the record that plaintiff knew of said transfer, as contended by plaintiff, until some time during the year 1925. From March 1st, when Aaron Nadler secured a deed and possession of said premises, up to and until the present time, he and his wife had the sole ownership and possession of said premises. During the greater portion of this time said premises were rented and the rents were collected exclusively by either Aaron Nadler or his wife. They paid all taxes, assessments, and repairs, and paid and satisfied the promissory note and trust deed of the original owner, Herman.

The trial court found that the title taken by defendant Aaron Nadler was in effect a mortgage, and ordered and decreed that an accounting be had, which said accounting was had, and the trial court found that there was due from said defendants to plaintiff the sum of $341.98 in excess of the amount necessary to redeem, and made and entered its judgment decreeing that the same be paid by defendants to plaintiff, and further found that the title to said property should vest in plaintiff, Ben Nadler. From this judgment defendants have appealed.

[2] The first matter presented to the court is the question of jurisdiction. Section 37 of the Land Title Law (Stats. 1915, p. 1940) holds that in case of fraud the person defrauded has all the rights and remedies that he would have had if the land were not registered under said act. The question then arises: Was the plaintiff in this action defrauded? Under the testimony held sufficient by the lower court, Aaron Nadler and Amailie (Harris) Nadler both took record title to the property in dispute as security for moneys advanced for the use and benefit of plaintiff herein, title to be held until reimbursement was made. In Russell v. Southard et al., 12 How. (53 U. S.) 139, 147, 13 L. Ed. 927, Mr. Justice Curtis, in delivering the opinion of the court, states in part: "But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear, both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised, under the shelter of any written papers, however precise and complete they may appear to be." And again: "But the inquiry still remains, what amounts to an allegation of fraud, or of some vice in the consideration—and it is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage. * * *"

This decision seems to prevail, and the evidence in the present case, as viewed in the light of that decision, would without question show that fraud was practiced herein; and in the same decision the above court cites with approval Edrington v. Harper, 3 J. J. Marsh. (26 Ky.) 353, 355, 20 Am. Dec. 145, in which it was held: "The fact that the real transaction between the parties, was a borrowing and lending will, whenever, or however it shall appear, show that a deed, absolute on its face, was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised."

[3] 16 California Jurisprudence, 427, and cases cited therein are authority to the effect that the statute of limitations in the present case does not begin to run until the "cestui que trust" has learned of the adverse claim. There is evidence to the effect that this date is fixed in the late summer of 1925, and his action was filed within a period of approximately two months thereafter; hence the statute of limitations has no application and the action is brought within the period allowed by law.

[4] Courts of equity will relieve where unconscionable advantage has been taken and where a party has been lulled into false security. Odell v. Cox, 151 Cal. 70, 75, 90 P. 194; 12 Cal. Jur. 720, and cases cited therein.

[5] The evidence in this case establishes the fact that, at the time when the initial proceedings were had, defendant Aaron Nadler stated that it was not necessary for him to sign any written instrument promising reconveyance, but "that he was plaintiff's father, and plaintiff should trust him," which apparently plaintiff did.

From the testimony in the case and the rulings of the trial court, it is apparent that the trial court found there was sufficient evidence to establish the fact that the instruments of conveyance were in fact mortgages, and that the confidence of the "cestui que trust" had been misplaced; and this finding of the trial court is borne out by perusal of the transcript.

The trial court found, and we think with sufficient reason: First, that the instruments of conveyance were given as security for a debt, and that the parties thereto intended that the transaction should be a mortgage; and, second, that a trust was created, and that defendants by setting up an adverse claim practiced fraud upon the plaintiff.

In reading the numerous cases cited by respondent from foreign jurisdiction where a similar law exists, we are of the opinion that the judgment of the trial court should be sustained. In our judgment, the other points raised by appellants are not sufficiently established to warrant a reversal. The judgment is therefore affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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140 Cal.App.(Supp.) 745

PEOPLE v. HALL.

No. 65.

Appellate Department, Superior Court, City and County of San Francisco, California.

March 27, 1934.

1. Criminal law 🔑1139.

Upon appeal in criminal cause, appellate department of superior court cannot receive for purpose of sustaining conviction material evidence which accused had no opportunity to meet when on trial (Pen. Code, § 1469).

2. Trade-marks and trade-names and unfair competition 🔑68(1).

Prices for barber industry under code of fair competition, ascertained by full fact-finding investigation, would require written approval of corporation commissioner, since, without commissioner's approval, there could be no amendment or modification of code (St. 1933, pp. 2632, 2637, and p. 2633, § 3).

3. Trade-marks and trade-names and unfair competition 🔑68(1).

Requirement that 80 per cent. of employing barbers in given area must substantiate minimum price under code of fair competition *held* not satisfied by schedule of prices recommended by subgoverning board after having circularized barber industry and having voluntarily secured signatures of more than 80 per cent. of employing barbers, since fact is "substantiated" when it is established by competent evidence, and "circularizing" is not substantiating (St. 1933, pp. 2632, 2637, and p. 2633, § 3).

[Ed. Note.—For other definitions of "Substantiate," see Words & Phrases.]

4. Trade-marks and trade-names and unfair competition 🔑68(1).

Corporation commissioner's approval of price list under code of fair competition, submitted by subgoverning board of San Francisco area of barber industry, could not be implied because he wrote that, in absence of disapproval in writing, schedule should become effective, since commissioner's duty to approve should have been affirmatively expressed upon the record (St. 1933, pp. 2632, 2637, and p. 2633, § 3).

Word "approve" means to sanction officially, to ratify or confirm, and such word is to be considered in connection with the action to which it relates. It does not necessarily import the exercise of discretion. Presumptively, however, when the approval of a distinct officer is made necessary to validate or consummate the act of another, it is the intention of the Legislature that he should be invested with the option to sanction officially or to disapprove the act submitted to him. It involves the idea of discretion and adjudication, and means more than the unexpressed mental acquiescence of the individual in the propriety of what has been done.

[Ed. Note.—For other definitions of "Approve," see Words & Phrases.]

5. **Trade-marks and trade-names and unfair competition** ⚿51.

In prosecution for violation of code of fair competition for barber industry, criminality could not be presumed because barber charged 35 cents for haircut instead of 65 cents, as determined by subgoverning board, where there was no proof of what cost of haircutting in defendant's shop was, and where code of fair competition contained no schedule of prices (St. 1933, pp. 2632, 2637, 2633, § 3).

6. **Trade-marks and trade-names and unfair competition** ⚿51.

Barber who charged 35 cents for haircut, and price fixed by governing board of fair competition for barber industry was 65 cents, could not be convicted for violation of code, where corporation commissioner did not approve schedule of prices, and code was not amended or modified so as to include therein any schedule of prices, and there was no proof that defendant's charge was less than cost to him of service performed plus not less than 15 per cent. (St. 1933, pp. 2632, 2637, 2633, § 3).

◆

Appeal from Municipal Court, City and County of San Francisco; George J. Steiger, Judge.

M. J. Hall was convicted of violating the code of fair competition for the barber industry, and he appeals.

Reversed.

R. B. Westlake, of Alameda, for appellant.

Matthew Brady, Dist. Atty., and John R. Golden, Asst. Dist. Atty., both of San Francisco, for the People.

PER CURIAM.

This is an appeal from a judgment of conviction of the defendant on a charge of violation of the code of fair competition for the barber industry adopted in this state under the authority of the supplement to the California Industrial Recovery Act (Stat. 1933, p. 2632). The specific accusation is that on January 11, 1934, the defendant unlawfully made a charge of only 35 cents for cutting the hair of an adult instead of 65 cents, alleged to be the legally established price under said code for such service in the San Francisco area.

The California Industrial Recovery Act (Stat. 1933, p. 2637) is designed to make codes and trade agreements established under the National Industrial Recovery Act (48 Stat. 195) applicable to intrastate commerce, and the supplement, with a view to promoting the rehabilitation of trade and industry and eliminating unfair competitive practices in this state, establishes rules in relation to the structure, approval, and enforcement of codes of fair competition to be adopted by trade or industrial groups or associations.

The general administrative control over such codes is reposed in the chief of the division of corporations, ordinarily called the corporation commissioner; and codes framed in conformity with the law may be approved by him, provided he finds, among other things, that the codes are not designed to promote monopolies or to eliminate or oppress, or discriminate against, small enterprises, and that they will tend to effectuate the policy of the act. The commissioner is authorized in his discretion to impose conditions for the protection of consumers, competitors, employees, and others, as well as to amend codes on application from time to time; and also to make and promulgate rules and regulations in furtherance of the administration of the law for accomplishment of the purposes contemplated. It is expressly provided, however, that the commissioner shall not approve any code, or make or promulgate any rule, and likewise that no code shall become effective, without the concurrence in writing of the director of the Department of Industrial Relations.

It is made unlawful for any person subject to a duly approved code to fail of compliance with its terms; and any person violating any provision of the act, or any rule or regulation promulgated by the commissioner thereunder, is chargeable with a misdemeanor, and becomes subject for each violation to punishment by fine or imprisonment or both.

The act is specifically declared to be an emergency measure, with its life limited to a period of two years from the date of its enactment, unless the emergency should sooner be declared at an end in a proclamation by the Governor.

No question is raised here as to the constitutionality of the law.

Under the act, a code of fair competition for the barber industry of the state was submitted to the commissioner; and, after being approved by him, and concurred in by the director of the Department of Industrial Relations, the code became effective on November 2, 1933.

To establish an agency for supervising and promoting the due operation of the code, provision is made therein for a governing board of five members, whose powers and duties are specified, and whose regulations are to be subject to the approval of the commissioner. The board is made the representative of the industry to confer with the commissioner in matters pertaining to the code, and to consider and initiate amendments to be submitted for approval. The commissioner, on his own motion, however, may call a hearing for the purpose of determining whether an approved code shall be modified, suspended, or revoked. In like manner, the supplement itself in section 3 authorizes the commissioner upon application to amend a code, when the amendment is in the public interest and in accord with the purposes of the act.

The code embodies also declarations concerning the rights of employees together with regulations regarding wages and hours. There are likewise specifications of unfair trade practices; and in this connection article X deals with the subject of "Services Below Cost." That article provides as follows:

"Section 1: It shall be an unfair method of competition and a violation of this code for any owner or operator of a barber shop to allow the performance of services in his shop or perform such services for a price less than cost plus not less than 15% thereon for each service performed on a patron or customer.

"Section 2: 'Cost' as used herein shall be defined as the actual costs of each service rendered by a barber to patrons as ascertained from considering every item of overhead expense, plus labor expense, plus depreciation on equipment and plus interest on the capital invested.

"In computing 'cost' in the case of a 'one-man chair' barber shop, the proprietor shall include in such 'cost' a minimum of $20 per week as an item of wages."

By article VII it is made the duty of operators of barber shops, in order to provide data for administrative purposes, to keep adequate books of account exhibiting their gross income and the items entering into the cost of operation, such as wages, expenditures for supplies, all overhead charges, and the capital investment. Reciprocally it is made the duty of the governing board to collect, compile, disseminate, and distribute such data, trade information, and statistics as are reasonably pertinent to the effectuation of the act. To assist in procuring and disseminating such data, the board is authorized to adopt and establish a uniform accounting system for use in the shops.

Upon the approval of the code, a combined constitution and set of by-laws of the governing board was adopted by the board on December 9, and approved on December 26, 1933. The sections of the Code concerning collection of data and statistics and the establishment of a uniform accounting system are repeated in the constitution and by-laws, as is also the subdivision relating to amendments of the code.

In addition to the powers conferred by the code, the governing board is authorized to divide the state into such regions or local areas as will tend to facilitate the administration of the code; and power is given to establish in such subdivisions subcommittees or subgoverning boards, the action of which shall be submitted to the governing board for its approval subject to review by the commissioner. In regard to prices to be charged for service, section 2 of article X of the constitution and by-laws provides as follows: "The Governing Board, either through themselves, or the Sub-Committees provided for, shall make a full fact-finding investigation in the various trade areas for the purpose of determining a minimum price for the various services pertinent to the barber industry, said price to be such as to guarantee the hours, wages and working conditions as set up in the Code of fair competition for the employees of this industry and all legitimate costs pertaining to the industry, plus a profit of not less than fifteen (15) per cent., all subject to the approval in writing of the Administrator. Said price shall be determined in each area as a minimum for that area when at least eighty (80) per cent of the employing barbers in said area substantiate and approve such minimum price."

The combination of constitution and by-laws was approved by the director of the Department of Industrial Relations on December 23d, and was filed that same day with the corporation commissioner. On December 26th the commissioner approved what was so filed, but with certain conditions and reservations. One such condition was that nothing contained in his statement of approval should operate in any way so as to conflict with or vary "The Code of Fair Competition for the Barber Industry of the State of California, effective November 2nd, 1933."

He stated further:

"Any schedule of prices that may be adopted in any one or more trade areas in accordance with said Code shall be first established by a local committee in the area affected and thereupon submitted in writing to the Governing Board. Upon said schedule receiving the written approval of the Governing Board after an affirmative finding that said schedule will tend to effectuate the purposes of the Act and the Code, a verified copy of said schedule together with the said finding and approval shall be forthwith filed with the Administrator by the Governing Board. In the absence of disapproval by the Administrator in writing said schedule shall become effective at the date therein fixed. Upon so becoming effective said schedule shall apply to the industry within the area designated and shall, however, be at all times subject to the existing Code of Fair Competition.

"The Administrator expressly reserves the right to amend, modify or repeal said schedule in whole or in part without notice or hearing if it appears to him in the public interest so to do."

It will be observed that nowhere either in the code or the constitution and by-laws is any specific price named for any class of service. Both speak in general terms, stating that the price for each service performed shall represent the cost, plus not less than 15 per cent. thereon; and there is nothing in the record in this case to indicate that, when the commissioner approved conditionally the constitution and by-laws, he had before him any schedule of prices whatever.

However, on December 27th, the subgoverning board for the San Francisco trade area submitted to the governing board a recommendation in the following form:

"To the Governing Board, Code of Fair Competition For the Barber Industry of California

"We, the undersigned sub-committee for the San Francisco area, having circularized the barber industry for said trade area, and having voluntarily secured the signatures of more than 80 per cent of the employing barbers, hereby recommend that the Governing Board establish the following prices for the San Francisco trade area:

Shave	25¢
Haircut	65¢
Children's haircut (under 12 years of age)	50¢
Ladies' neck trim	40¢

"These prices to be in full force and effect on and after Friday, December 29, 1933."

This recommendation was signed by the members of the subgoverning board; and under date of December 27, 1933, it bears the signatures of the members of the governing board approving the schedule.

There was no evidence of any affirmative action by the commissioner at any time in relation to this schedule, nor was there any evidence at the trial that the schedule had received "the written approval of the Governing Board after an affirmative finding that said schedule will tend to effectuate the purposes of the Act and the Code."

After the appeal had been argued, a motion was made in this department on behalf of the people to admit a certificate of the secretary of the governing board, said to have been filed with the commissioner on January 9, 1934, two days before the offense charged against the defendant. This certificate (omitting the notarial jurat affixed below the secretary's signature) is in the following form:

"I, the undersigned, herewith certify that the Governing Board, Code of Fair Competition for the barber industry of California, has this day, Wednesday, December 27, 1933, verified the signatures secured by the subcommittee, appointed by the Board for the San Francisco trade area, and found that statistics show that the prices contained in the attached schedule will tend to effectuate the purposes of the act and the Code.

"Signed this 27th day of December, 1933

"[Signed] Ros Mannina
"Secretary to the Board."

It is doubtful whether a certificate in this form by the secretary would be deemed by the commissioner sufficient as the "affirmative finding" of the governing board with which he directed "a verified copy of said schedule" to be accompanied.

[1] Aside from that question, however, we are of the opinion that, upon an appeal in a criminal cause, this department has not the power to receive, for the purpose of sustaining a conviction, material evidence which the accused had no opportunity to meet when on trial. The extent of the power of the superior court on appeal in a criminal case is fixed by section 1469 of the Penal Code, and is much more restricted than on an appeal in a civil case, wherein, pursuant to section 988i of the Code of Civil Procedure, addition-

al evidence may be received. The motion to introduce new evidence is therefore denied.

At the same time, we are of the opinion that, even with such additional evidence, the judgment of conviction could not be sustained.

Under the code of fair competition a violation of law in respect of service charges results only when the price charged by the individual barber is "less than cost plus not less than 15% thereon for each service performed on a patron or customer"; and the method for determining the minimum price for each owner or operator is defined. Furthermore, the constitution and by-laws contain a mandate to the governing board to conduct, or cause to be made, "a full fact-finding investigation in the various trade areas" for the purpose of determining "all legitimate costs pertaining to the industry plus a profit of not less than fifteen (15) per cent, all subject to the approval in writing of the Administrator." Such price in each area is to be determined "when at least eighty (80) per cent of the employing barbers in said area substantiate and approve such minimum price." That provision is not altogether in accord with the code itself, which in article X makes the standard of fair competition the cost of the particular service to the individual barber, plus the prescribed profit.

[2, 3] If the provision in the constitution and by-laws was meant to be a modification of the code, it never became effective as such, because the commissioner expressly reserved approval of anything therein that would in any way conflict with, or vary the terms of, the code itself. And without the commissioner's approval there could be no amendment or modification of the code. For practical purposes it may be conceded that a figure closely approximating the cost of each class of service in any particular area could be ascertained by a "full fact-finding investigation"; but the prices fixed on such basis would still require the written approval of the commissioner. And we conceive that the establishment of a minimum price, when at least 80 per cent. of the employing barbers in a given area substantiate and approve such minimum price, is to be predicated on the data and statistics to be compiled from the accounts kept according to the system prescribed by the governing board. In other words, the regulation is not satisfied by a schedule of prices recommended by a sub-governing board after "having circularized the barber industry in said area and having voluntarily secured the signatures of more than 80 per cent of the employing barbers." A fact is substantiated when it is established by competent evidence; and circularizing is not substantiating.

According to the code, the minimum charge for each service is the cost plus at least 15 per cent. In the schedule, the price for a shave is set at 25 cents and for a haircut at 65 cents. Whether the statistics contemplated would show those prices to be in accord with the rule of the code as to each such service, or would objectify a design to offset a loss in one sort of service by an extra profit in another, must be left to conjecture. But, whatever the statistics might show, the adoption of the schedule would constitute an amendment or modification of the code; and to effect such change the approval of the commissioner would be an indispensable requirement.

[4] It is urged, however, upon behalf of the people, that the approval of the commissioner is to be implied. And attention is directed to the passage in the commissioner's letter of approval of the constitution and by-laws, where, in reference to any schedule of prices submitted by the governing board with their required affirmative finding, he spoke thus: "In the absence of disapproval by the Administrator in writing; said schedule shall become effective at the date therein fixed. Upon so becoming effective said schedule shall apply to the industry within the area designated and shall, however, be at all times subject to the existing Code of Fair Competition."

It is quite clear from this declaration that no schedule tending to modify the code was intended to be treated as even constructively approved. Moreover, we are of the opinion that the commissioner's approval, when requisite, must be affirmatively expressed upon the records. The word "approve" means to sanction officially, to ratify or confirm. In Cosner v. Board of Sup'rs of Colusa County, 58 Cal. 274, 277, it is said: "The word 'approve' is to be considered in connection with the action to which it relates. It does not ex vi termini necessarily import the exercise of discretion. Presumptively, however, when the 'approval' of a distinct officer is made necessary to validate or consummate the act of another, it is the intention of the Legislature that he should be invested with the option to sanction officially or to disapprove the act submitted to him. It involves the idea of discretion and adjudication."

The duty imposed on the commissioner

under the statute is not a mere ministerial or clerical duty. He is set up as the chief administrator "for the protection of consumers, competitors, employers, and others, and in furtherance of the public interest." The patrons of the barbers as well as the master and journeyman barbers themselves have the right to the commissioner's best judgment on the data and statistics put before him, and to have that judgment expressed in definite and permanent form. Especially is formal evidence of approval essential, if approval is a factor determinative of guilt. With the change of a few words, the following passage from the opinion in New York & N. E. R. Co. v. City of Waterbury, 55 Conn. 19, 23, 10 A. 162, 163, might almost be said to have been written for the present case. The court there said:

> "Whenever, either by constitutional or legislative requirement, the president of the United States, the governor of a state, or the mayor of a city is required to approve an act of congress, or of a legislature, or of a court of common council, the word 'approve' means more than the unexpressed mental acquiescence of the individual in the propriety of what has been done. It means that the officer, in his official capacity, as the guardian of the interests of a community, having in view its welfare, and not his personal wish or advantage, shall consider the proposed legislation, and determine that it is proper, and make that fact known to all men with absolute certainty, by some visible, unmistakable, and enduring mark, to-wit, by written declaration attested by his signature. It is not enough that in the future, when the question is made, is such an act of congress, of legislature, or of common council binding upon the country, state, or municipality, that it should depend for decision upon the memory and testimony of an officer as to what was his unexpressed thought, at a former time, concerning it. Such uncertainty would be unendurable, and therefore we must assume it to be outside the meaning of any constitution or law."

[5] There is no proof of what the cost of haircutting in defendant's shop was; and, in the absence of any schedule of prices in the code of fair competition, there can be no presumption of criminality in the naked fact of a charge of 35 cents.

In Ex parte Rosenthal (Cal. App.) 27 P. (2d) 794, 795, the petitioner, who was released from custody by virtue of a writ of habeas corpus, had been arrested on a charge of violation of the code for the cleaning and dyeing industry, in that he charged only 75 cents for cleaning a man's suit when the price fixed by a vote of the trade association of Alameda county was $1.

In discharging the petitioner, the court said: "The statute in question contemplates that the commissioner of corporations shall approve all the provisions of the code, which approval is to be concurred in by the director of the department of industrial relations. There was no schedule of prices included in the code approved by the commissioner or director. There was, therefore, no violation of any of the provisions involved. Since the arrest of petitioner a code of fair competition which fixes the schedule has been approved under the act of Congress. From what we have said it follows that petitioner should be, and he is, discharged from custody and his bail exonerated."

[6] Being confronted with a similar situation here, we conclude that the judgment of conviction of the defendant must be reversed on the following grounds:

(1) There was no schedule of prices approved pursuant to law, whereby the price of a haircut for an adult in the San Francisco area was fixed at 65 cents.

(2) The code of fair competition was not amended or modified so as to include therein any schedule of prices.

(3) Inasmuch as no schedule of prices was incorporated in the code, or otherwise legally approved, and inasmuch as there was no proof that defendant's charge was less than the cost to him of the service performed plus not less than 15 per cent., the defendant was not guilty of the charge of violating the supplement to the California Industrial Recovery Act or the code of fair competition for the barber industry.

220 Cal. 546

EGAN v. McCRAY.

L. A. 14329.

Supreme Court of California.

April 20, 1934.

1. Dismissal and nonsuit 🔑81(5).

Superior court could vacate its order of dismissal of action involving money demand on ground of want of jurisdiction of subject-matter, before entry of judgment of dismissal pursuant to such order which was entered in minutes only (St. 1929, p. 837; Code Civ. Proc. §§ 581, 664).

2. Dismissal and nonsuit 🔑53(1).

Statute providing for manner of dismissal of actions on certain grounds cannot be extended to include another ground, since statute constitutes exception to general rule that judgment of dismissal is not effectual for any purpose until entered by clerk (Code Civ. Proc. §§ 581, 664).

3. Dismissal and nonsuit 🔑55.

Motion to dismiss action on ground of want of jurisdiction of subject-matter is, in legal effect, a demurrer to complaint on that ground.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

On rehearing.

Prior order affirmed. Prior opinion, 28 P. (2d) 18.

Henry G. Bodkin and Bodkin & Lucas, all of Los Angeles (G. Stuart Silliman and Bourke Jones, both of Los Angeles, of counsel), for appellant.

Frank Lober and D. Webster Egan, both of Los Angeles, for respondent.

IRA F. THOMPSON, Justice.

A rehearing was granted herein because we entertained a doubt concerning whether the order hereinafter mentioned dismissing the action was in fact void. For reasons hereinafter stated we have concluded that it is unnecessary to determine that question.

This action, instituted August 2, 1929, was at issue and on for trial on April 29, 1930. It involves a money demand for $1,346.08. At the time the case was called for trial, the court, acting under the mistaken belief that it had been bereft of jurisdiction thereof by the provisions of the statute of 1929 (Stats. 1929, c. 477, p. 837, in effect August 14, 1929), gave an order, which was entered in the minutes only, purporting to dismiss the action. Later, and on October 16, 1930, on motion of the plaintiff after due notice, the court vacated said order of dismissal and restored the cause to the calendar. From this last-mentioned order defendant has appealed, asserting that the order of dismissal became final and remained in full force and effect and the trial court was without power to interfere with it.

[1-3] In response to appellant's contention, the respondent says, among other things, that the order of dismissal had not become effective and final, for the reason that no judgment had been entered. We think the respondent's position is well taken. The general rule expressed in section 664, Code of Civil Procedure, is that no judgment shall become "effectual for any purpose until so entered." When provision is made, as it is, with respect to certain grounds for the dismissal of an action of which this is not one, in section 581, Code of Civil Procedure, it constitutes an exception to the general rule, and cannot be extended beyond the strict letter of the statute. This thought is confirmed when we bear in mind that a motion to dismiss on the ground of want of jurisdiction of the subject-matter is in its legal effect a demurrer to the complaint on that ground. 9 Cal. Jur. 523. Hence to dispose of the action a judgment is necessary. We are not without precedent to support this conclusion. In McCallum v. Stull, 59 Cal. App. 572, 211 P. 466, 467, the District Court of Appeal was confronted with a somewhat similar situation. True, in that case the court says that the order of dismissal "was undoubtedly inadvertently made," yet the fact remains that the question was settled upon the ground that no judgment had been entered. It was there said: "As recited above, the purported dismissal was ordered by the court, but the dismissal did not fall within the provisions of subdivision 3, subdivision 4, or subdivision 5 of section 581 of the Code of Civil Procedure. Such being the case, the rule governing the procedure is that provided in section 582 of the Code of Civil Procedure. If the clerk had proceeded to enter a judgment of dismissal pursuant to the order made May 11, 1916, the appellant's contention might have had some merit. However, as we have shown above, no judgment of dismissal was entered and the court had full power on the 19th day of February, 1919, to prepare and sign findings and judgment disposing of the case on its merits." Again we find persuasive language

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in the case of Consolidated Const. Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 P. 238, 240, wherein we read: "In fact, strong reasons may be urged why the effective character which an order of dismissal under section 581 assumes, upon its mere entry in the minutes, is an exception to the general rule that judgments must be entered in the judgment book before they become effective as judgments (Code Civ. Proc. §§ 664 and 668), and that the exception should not be extended beyond the particular case provided for by the statute."

The conclusion to which we have come renders discussion of other points unnecessary.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

PRESTON, Justice (concurring).

I concur in the result announced, but I think the reasoning employed may lead to confusion respecting the rule as to when a judgment of dismissal is required and when a minute order will suffice.

The judgment is so palpably void on the ground that as a matter of law the court could not divest itself of jurisdiction by the order in question that I think it should be so declared. Declarations respecting rules of law should, where possible, be clear and positive. Otherwise complications are bred and the application of law made more difficult, if not more doubtful. Here no proof is required and no finding of fact outside the face of the record is necessary. As a plain mandate of the law, the court had jurisdiction, and could not, by a mistaken order, divest itself thereof.

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STONEBURNER v. THEODORATOS et al.

Civ. 4827.

District Court of Appeal, Third District, California.

April 20, 1934.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

On rehearing.

Prior opinion, 30 P.(2d) 1001.

Irving D. Gibson, of Sacramento, for appellants.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondent.

PER CURIAM.

The petition of the appellants for a rehearing herein is granted for the sole purpose of reconsidering the question whether the testimony supports the verdict finding George Theodoratos, as the driver of the automobile, guilty of gross negligence at the time of the accident.

It is further ordered that the cause be submitted upon the briefs already on file, with the privilege to the respective parties to file additional briefs, typewritten if preferred, covering the question to be reconsidered, within twenty days from the date of this order.

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138 Cal.App. 222

PECK v. SUPERIOR COURT OF COLUSA COUNTY et al.

Civ. 5156.

District Court of Appeal, Third District, California.

April 23, 1934.

Constitutional law 🔑280.
Eminent domain 🔑70.

Constitutional provision relating to eminent domain *held* not to violate Federal Constitution in providing for immediate taking of possession of property on giving security in way of making deposits to cover damages in such sum as court may determine (Const. Cal. art. 1, § 14; Const. U. S. Amend. 14).

Application by James F. Peck for a writ of prohibition prayed to be directed to the Superior Court of Colusa County; Ernest Weyand, Judge, and Arthur Coates, Judge pro tem.

Writ denied.

Alva A. King and E. Vayne Miller, both of Colusa, for petitioner.

PER CURIAM.

The application of the above-named petitioner for a writ of prohibition is hereby denied upon the authority of section 14 of article 1 of the Constitution, and the cases of Marblehead Land Company v. Superior Court, 62 Cal. App. 408, 217 P. 536, and Stone v. Cordua Irrigation District, 72 Cal. App. 331, 237 P. 554.

In the Marblehead Land Company Case it was held that the court might fix the amount of the security upon an ex parte showing, and that such proceeding did not violate the Fourteenth Amendment of the Federal Constitution.

In the Stone Case it was held by this court that section 14 of article 1 does not violate any of the provisions of the Federal Constitution in providing for the immediate taking of possession of property upon giving security in the way of making deposits to cover damages in such sum as the court might determine. See list of cases cited on page 337 of 72 Cal. App., 237 P. 556, supra.

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138 Cal.App. 180

KEELING CORPORATION, Limited, v. PACIFIC PRODUCTS, Inc.

Civ. 9121.

District Court of Appeal, First District, Division 1, California.
April 21, 1934.

Rehearing Denied May 21, 1934.

1. Corporations 🔑247.

Constitutional liability of stockholders of corporation for its debts is released by full performance of voluntary composition agreement between corporation and its creditors (Civ. Code, § 322).

2. Corporations 🔑215.

Statutory liability of stockholder of corporation is dependent upon actual existence of indebtedness (Civ. Code, § 322).

3. Corporations 🔑248.

Assignee of creditors of insolvent corporation could not recover from corporation's stockholders on stockholders' alleged statutory liability, where creditors had entered into composition settlement and accepted payment thereunder in full satisfaction of their claims against insolvent corporation (Civ. Code, § 322).

"Composition settlement" is distinguishable from "discharge in bankruptcy" in that a composition with creditors partakes of the nature of a contract in a measure superseding and outside of the bankruptcy proceeding, and is an offer and acceptance whereunder the respective rights of the bankrupt and the creditors are fixed by the terms of the offer upon its confirmation.

[Ed. Note.—For other definitions of "Composition" and "Discharge in Bankruptcy," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Keeling Corporation, Limited, formerly known as Keeling Collection Agency, against the Pacific Products, Inc. From a judgment for plaintiff, defendant appeals.

Reversed.

Humphrey, Searls, Doyle & MacMillan and Torregano & Stark, all of San Francisco, for appellant.

Goodman, Bachrack & Brownstone, of San Francisco (George M. Naus, of San Francisco, of counsel), for respondent.

TYLER, Presiding Justice.

Action on a stockholders' liability.

Plaintiff, as assignee of the creditors of Taits, Incorporated, a corporation, sued certain stockholders of such corporation to recover from them amounts allegedly due on account of a stockholders' liability under the provisions of section 322 of the Civil Code, since repealed (St. 1931, p. 444). Defendant and appellant, Pacific Products, Inc., denied that there was any stockholders' liability. The total of the alleged indebtedness as sued for was the sum of $282,946.30, of which amount plaintiff sought to recover from defendant the sum of $2,244. Taits, Incorporated, was an involuntary bankrupt, and in the course of the bankruptcy proceedings made a composition with its creditors of 25 cents on the dollar. Thereafter this action was brought, as heretofore stated, to recover from certain stockholders on their primary liability to pay an additional 75 cents on the dollar under their alleged statutory liability. Judgment was rendered in favor of plaintiff and against defendant. This is an appeal from the judgment.

As ground for reversal it is claimed that, as plaintiff's assignors entered into the contract of composition with the corporation under which they agreed to and did accept 25 cents on the dollar in full satisfaction of their claims against the corporation, they cannot now proceed against the stockholders of the corporation under their statutory liability to compel them to pay the additional sum, as such claims were satisfied and extinguished, and all stockholders' liability terminated. It appeared in evidence that the creditors whose claims are here involved were parties and signatories to the composition agreement above referred to, and that such agreement was approved by the federal court. The composition agreement provided in express terms that the payment made should be in full satisfaction of creditors' claims against the insolvent corporation.

[1-3] Respondent contends in support of the judgment that the discharge in bankruptcy of a corporation does not extinguish the statutory liability of its stockholders for the reason that the remedy only is destroyed and not the debt; that the debt of an insolvent bankrupt is due in conscience, notwithstanding his discharge, and is a sufficient consideration to support a subsequent promise to pay. This may all be true, but whatever effect a discharge in bankruptcy may have with reference to the debt is of no consequence so far as the present case is concerned, for there was no discharge in bankruptcy here and none in fact was sought by the company. There is a distinction between a discharge in bankruptcy and a composition settlement and the consequences which flow therefrom. A composition with creditors partakes of the nature of a contract, in a measure superseding and outside of the bankruptcy proceedings; it is an offer and acceptance, and the respective rights of the bankrupt and the creditors are fixed by the terms of the offer upon its confirmation. Myers v. International Trust Co., 273 U. S. 380, 47 S. Ct. 372, 71 L. Ed. 692. Whether, therefore, a discharge in bankruptcy merely bars the remedy or completely extinguishes the legal obligation is a matter of academic interest as the composition agreement by its express terms provided that the sum paid was "in full of such creditors' claims" against the corporation. The stockholders were released therefore not by a discharge in bankruptcy but under an express contract. This agreement completely extinguished and wiped out the entire legal obligation of the company. It has been universally held that the constitutional liability of stockholders of a corporation for its debts is released by the full performance of a voluntary composition agreement between the corporation and its creditors. San Jose Savings Bank v. Pharis, 58 Cal. 380. Whatever satisfies or extinguishes the debt as to the corporation extinguishes also the liability of the stockholders, for the reason there can be only one satisfaction of the debt. Young v. Rosenbaum, 39 Cal. 646, 654; 6A Cal. Jur. 1018; O'Donnell Shoe Co. v. Benson Co-op. Mercantile Co., 175 Minn. 382, 221 N. W. 426. The statutory liability of a stockholder is dependent upon the actual existence of an indebtedness. Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335. Here, as above indicated, the entire indebtedness has been discharged, satisfied, and wiped out. There was, therefore, no debt upon which the alleged statutory liability could be based.

Counsel for respondent have cited us to the cases of Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150, and E. S. Parks Shellac Co. v. Harris, 237 Mass. 312, 129 N. E. 617, as supporting their contention. The cases are not in point. Neither one involved the question of stockholders' liability, but were based upon the common-law liability of stockholders to the corporation for the balance due the corporation as unpaid subscriptions to the stock. The amount due on unpaid subscriptions to the capital stock of corporations constitutes, upon the insolvency of the corporation, a fund for the benefit of corporate creditors. This liability is one separate and apart from the statutory liability of stockholders.

The conclusion we have reached renders unnecessary a discussion of other questions presented.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

138 Cal.App. 151

SHIELDS v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9449.

District Court of Appeal, First District, Division 2, California.
April 20, 1934.

1. Divorce 🔑263.

Enforcement by execution of interlocutory divorce decree providing for monthly payments for support *held* within trial court's discretion and not matter of right after lapse of five years from date of entry of decree, notwithstanding monthly installments had accrued each month after lapse of such five years (Code Civ. Proc. §§ 681, 685; Civ. Code, § 140).

2. Mandamus 🔑28.

Writ of mandate lies to compel exercise of discretion in particular manner only in rare instances.

Proceeding for a writ of mandate by Grace C. Shields against the Superior Court in and for the City and County of San Francisco and H. I. Mulcrevy, County Clerk of the City and County of San Francisco.

Alternative writ discharged, and petition denied.

Harold H. Price, of San Francisco, for petitioner.

Dean Cunha, of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel the respondent court and the clerk thereof to issue execution.

From the petition it appears that petitioner obtained an interlocutory decree of divorce in 1924 and a final decree of divorce in 1925. By the terms of said interlocutory decree, the husband was ordered to pay to petitioner the sum of $250 per month for the support of petitioner and the further sum of $150 per month for the support of the two minor children of the parties. The provisions of the interlocutory decree providing for the monthly payment to petitioner of the total sum of $400 have never been modified. Petitioner alleges that there is now owing and unpaid thereon a sum in excess of $12,000. On February 6, 1934, petitioner made a motion upon notice in the divorce action for the issuance of execution. Said motion was supported by an affidavit showing that the amount due was in excess of $12,000. A hearing was had, and thereafter the trial court denied said motion. Petitioner further alleges that the trial court and the clerk thereof have refused and still refuse to issue said execution.

From the answers of the respondents herein and from the stipulations of the parties at the time of the hearing in this court, it appears that petitioner had been previously brought before the trial court in August, 1932, in response to an order to show cause. After the hearing upon said order to show cause, no modification of the decree was made, but the trial court discharged the order, stating that, if the husband paid to petitioner the sum of $100 per month, it would be deemed that the husband had complied with the terms of the decree to the best of his ability. The affidavit filed in the trial court in opposition to the motion for the issuance of execution is attached to the answer herein. It appears therefrom that the financial condition of the husband materially changed after the entry of said interlocutory decree and that he had been unable to comply with the terms of the decree for more than three years further than to pay the sum of $100 per month. It also showed that execution had been issued on four previous occasions. Upon one of said occasions, the writ had been returned partially satisfied to the extent of $465.10 by the proceeds of the sale of an interest of the husband in a piece of real property. Upon the other three of said occasions, the writs were returned unsatisfied. It further appeared from the affidavit that the husband had no property subject to execution; that he and others had been examined before the trial court regarding his property; that a previous application in January, 1934, for the issuance of execution had been denied by the trial court; that the children of the parties had received estates by inheritance from the husband's father and had been adequately supported for more than two years out of the property of said estates; and that at the time of the application for the issuance of execution in February, 1934, there was pending in the trial court another order to show cause, which was set for hearing on February 16, 1934.

Petitioner contends that she was entitled to the issuance of execution as a matter of right, and that upon the denial of her motion she became entitled to a writ of mandate to compel the issuance thereof. Holtum v. Grief, 144 Cal. 521, 78 P. 11. In reply respondents urge several points. They claim that petitioner was not entitled to a writ of execution as a matter of right, but that at all times the enforcement by execution of the provisions of the decree providing for the monthly payments for support rested in the discretion of the trial court. In other words, respondents claim that said provisions for support were not enforceable by execution in the same manner as an ordinary money judgment under sections 681 and 685 of the Code of Civil Procedure, but that said provisions were enforceable only in the discretion of the court under section 140 of the Civil Code.

[1] As we view the situation in the present case, it is unnecessary to discuss these conflicting contentions. If the position taken by respondents is correct, then the issuance of execution was at all times a matter within the discretion of the trial court. If, on the other hand, the position taken by petitioner is correct, the question of whether she was entitled to the issuance of a writ of execution was to be determined by the provisions of sections 681 and 685 of the Code of Civil Procedure. The provisions of said section 681, relating to judgments generally, entitled the judgment creditor to a writ of execution as a matter of right "at any time within five years after the entry" of the judgment. Under said section 685, a writ of execution may be had upon a judgment only "by leave of court" after the lapse of five years "from the date of its entry." The decree here was entered in 1924, and the motion for the issuance of execution was made in 1934, approximately ten years after the entry of the decree. Under either view, petitioner was not entitled to a writ of execution as a matter of right at the time the motion was made, but only in the discretion of the trial court. While it is true that a monthly installment had accrued and become payable each month during the five-year period immediately preceding the making of the motion for the issuance of execution and while it is further true, as pointed out by appellant, that the decree could not be modified as to sums already accrued (Cummings v. Cummings, 97 Cal. App. 144, 275 P. 245; Bruton v. Tearle, 117 Cal. App. 696, 4 P.(2d) 623), we are here dealing solely with the question of the manner of enforcement of the provisions of the decree. Assuming that sections 681 and 685 of the Code of Civil Procedure are the sections providing for the manner of enforcement as contended by petitioner, she was not entitled thereunder to the issuance of execution as a matter of right after the lapse of five years from the date of the entry of the decree. This view finds support in Parker v. Parker, 203 Cal. 787, 266 P. 283, and Radonich v. Radonich, 130 Cal. App. 250, 20 P.(2d) 51.

[2] Petitioner stands upon her contention that she was entitled to execution as a matter of right and does not claim that the trial court abused its discretion, assuming that the motion for issuance of execution was one addressed to the discretion of the trial court. We may state, however, that, even if the motion was heard solely upon the affidavits referred to above, we find nothing to justify the issuance of a writ of mandate by this court to compel the trial court to issue the writ of execution. It is only in rare instances that the writ of mandate will lie to compel the exercise of discretion in a particular manner. Hilmer v. The Superior Court, (Cal. Sup.) 29 P.(2d) 175.

The alternative writ is discharged and the petition is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

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138 Cal.App. 78

SECURITY FIRST NAT. BANK OF LOS ANGELES v. J. G. RUDDLE PROPERTIES, Inc., et al.

Civ. 5061.

District Court of Appeal, Third District, California.

April 14, 1934.

Appeal and error ⚷612(2).

Record on appeal from order, entered subsequent to judgment, denying motion for extension of time to file cost bill which record contained no bill of exceptions or reporter's transcript certified by trial judge but merely transcript certified by clerk of court, *held* fatally defective (Code Civ. Proc. § 953).

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by the Security First National Bank of Los Angeles, a national banking association against the J. G. Ruddle Properties, Incorporated, Carl E. Wagner, and others. From an order denying motion for an extension of time to file cost bill against plaintiff, Carl E. Wagner appeals. On motion for dismissal of appeal or affirmance of judgment.

Appeal dismissed.

C. H. White and Louis Ferrari, both of San Francisco, for appellant.

O'Melveny, Tuller & Myers, of Los Angeles, and F. M. Ostrander, of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This matter comes before us on a motion for dismissal of appeal or affirmance of judgment. It appears from the record before us that an action was commenced by Security First National Bank of Los Angeles, a national banking association, against J. G. Ruddle Properties, Inc., Carl E. Wagner, et al. Judgment was entered by the trial court in favor of plaintiff, and upon appeal to the Supreme Court, 23 P.(2d) 1016, the judgment was modified in certain particulars and affirmed. Thereupon, in accordance with rule XXIII of the Supreme Court, costs on appeal were recoverable by appellant. Through an oversight the cost bill was not served upon respondent Security First National Bank, but was served upon Hunter-Dulin Company, one of the defendants therein. This error was not discovered until after the expiration of the time prescribed for the filing and service of the cost bill and appellant then moved the superior court for a hearing thereon, and for an extension of time to file its cost bill against the respondent. The motion for an extension of time was denied, and the cost bill, in so far as it affected respondent, was stricken from the files for lack of service. From that order appellant Wagner gave notice of appeal and in pursuance of his notice has filed in this court a transcript on appeal containing the various motions, affidavits, and orders relating to the matter of costs; such transcript being certified by the clerk of the court. Respondent here moves to dismiss the appeal on the ground the record on appeal contains no bill of exceptions nor reporter's transcript certified by the trial judge as required by section 953 of the Code of Civil Procedure, and on the further ground the question raised by the appeal is unsubstantial.

We believe the contention of respondent that the record on appeal is not properly before us and is defective in a material point is well taken. Barnabee v. Hunstock, 42 Cal. App. 659, 183 P. 951, is apparently controlling on the question here. In that case the court said: "Where the order appealed from is subsequent to the judgment, and arises on a record outside the judgment roll, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made. Thompson v. American Fruit Co., 21 Cal. App. 338, 131 P. 878; Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 P. 548; Totten v. Barlow, 165 Cal. 378, 132 P. 749; Richmond v. Julian Con. Min. Co., 176 Cal. 600, 169 P. 356."

To the same effect are Reed v. Clark, 57 Cal. App. 243, 206 P. 1018, and O'Banion v. California C. P. Growers, 111 Cal. App. 537, 295 P. 1041. In the latter case it is said: "A mere inspection of the record herein will show that the appellant did not perfect his appeal and is entitled to no relief upon that appeal. Rules of the Supreme and District Courts of Appeal 1, § 1, rules V and VI; sections 953a and 954, Code Civ. Proc."

Also to the same effect, see Gordon v. Beasore, 86 Cal. App. 343, 260 P. 824.

The appeal is therefore dismissed.

We concur: THOMPSON, J.; PLUMMER, J.

138 Cal.App. 158

PEOPLE v. ROBERTS.

Cr. 1779.

District Court of Appeal, First District,
Division 2, California.
April 20, 1934.

1. Incest 🔑14.

In prosecution for incest, evidence of prosecutrix as to commission of acts *held* not shown to be incredible (Pen. Code, § 285; Gen. Laws 1931, Act 3966).

2. Criminal law 🔑1036(1), 1044.

In prosecution for incest, admitting testimony of complaint of prosecutrix which was greatly delayed *held* not error, where accused made no objection or motion to strike testimony (Pen. Code, § 285; Gen. Laws 1931, Act 3966).

3. Criminal law 🔑1033(2).

In prosecution for incest, vague and general testimony as to place where alleged act was committed *held* sufficient where accused made no objection to its sufficiency (Pen. Code, § 285; Gen. Laws 1931, Act 3966).

4. Criminal law ⚿1169(5).

In prosecution for incest, permitting prosecutrix' sister to testify that she had intercourse with father *held* not reversible error, where testimony was stricken on objection and jury was admonished not to consider testimony (Pen. Code, § 285; Gen. Laws 1931, Act 3966).

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Lawrence Joseph Roberts was convicted of incest and of violation of the Juvenile Court Law, and he appeals.

Affirmed.

Roy A. Rogers, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The district attorney filed an information against the defendant which contained two counts. In the first count the defendant was charged with violation of section 285 of the Penal Code. In the second count he was charged with a violation of the Juvenile Court Law (2 Deering's Gen. Laws, Act 3966, p. 2075). The defendant pleaded not guilty to each count. After a trial before the court sitting with a jury, verdicts were returned finding the defendant guilty on each charge. The defendant made a motion for a new trial, which was denied, and he has appealed from the order denying his motion and from the judgment.

[1] The defendant claims that the decision and judgment of the court are contrary to law. He relies on the contention that the testimony of the prosecutrix was incredible. We think it sufficient to remark that the testimony contained in the transcript is such it might well have been contended before the jury that the testimony of the prosecutrix was incredible. However, a reading of the transcript presents a set of facts from which it is quite impossible for this court to say that her testimony was so incredible as to be entirely insufficient as a matter of law. The story told by her showed an involved state of facts. It showed acts covering a period of a year and a half, and that during that period of time the defendant and his family at various times occupied four different residences. In presenting the case, counsel for the people and counsel for the defendant at no time sought to develop the facts in chronological order. Both proceeded as though the case involved one act, one instant in time, and one particular room in one particular house. It is therefore quite clear that it is difficult for this court to say the testimony of the prosecutrix was incredible rather than that it is difficult to understand what was her contention as to the facts.

[2] In this same connection we understand the defendant to contend that the complaint of the prosecutrix was not made immediately, but was greatly delayed, and therefore that the testimony thereof should not have been received. It is sufficient to state that no objection was made at the time the testimony was offered, nor was a motion made to strike it out.

[3] The defendant complains because the evidence does not show the place where the alleged act was committed. He claims that the testimony on that subject is vague and general. Neither point has merit. Neither party was prevented from going into either subject, but neither party did so. No objection or ruling was made that in any way presents either point.

It is next contended that the evidence fails to show the commission of a crime. The most the defendant can claim under this head is that the evidence contained conflicts. Conceding that it did, this court may assume that the respective attorneys argued those conflicts to the jury. Disregarding the conflicts, the prosecuting witness told a story that made a complete case if the jury believed it, and from the nature of its verdicts we may assume it did.

It is further contended that there is a variance between the information and the proof. The point has no foundation. Whatever objection may be made to the record, there is no support for a claim of variance.

It is next asserted that there were errors in law occurring at the trial and excepted to by the defendant. None are specified. An examination of the record discloses no ruling against the defendant during the course of the trial. He does not specify any instruction which he claims to have been error. The point may not be sustained.

[4] During the course of the trial, the prosecution asked the sister of the prosecutrix whether her father had ever had intercourse with her. Before an objection was made, she answered, "Yes." When the objection was made, it was promptly sustained,

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the answer was stricken out, and the jury was admonished not to consider such testimony in their deliberations. Under these circumstances, we are not inclined to hold that the alleged misconduct was reversible error. 8 Cal. Jur. p. 618.

The order and judgment are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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138 Cal.App. 224

COMPTON INV. CO. v. HART et al.

Civ. 9298.

District Court of Appeal, First District, Division 2, California.
April 24, 1934.

Mortgages 🔑375.

Assignee of trust beneficiary's interest and persons to whom assignee assigned fractional interests *held* liable for deficiency on foreclosure of trust deed securing beneficiary's note.

Beneficiary conveyed lots to trustee under declaration of trust requiring sale thereof and application of proceeds to payment of note and obligating beneficiary to pay all indebtedness secured, taxes and assessments, costs of improvements, and other claims, liens, and incumbrances affecting title, and assignees accepted assignments of interests in, and approved, ratified, and confirmed trust agreement.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Compton Investment Company, a corporation, against A. Hart, the Fred Barman Company, a corporation, and others. From a judgment for defendants Barman Company and others, plaintiff appeals.

Reversed, with directions.

Edward T. Sherer and Wendell P. Hubbard, both of Los Angeles, for appellant.

Freston & Files, of Los Angeles, and Ralph F. Bagley, of Beverly Hills (Ralph F. Bagley, of Beverly Hills, of counsel), for respondents.

STURTEVANT, Justice.

The plaintiff commenced an action against numerous defendants to collect a deficiency accruing to the plaintiff on the foreclosure of a deed of trust. The trial court sustained the demurrers of certain defendants without leave to amend. From the judgment in favor of those defendants the plaintiff has appealed.

A. Hart, as beneficiary, conveyed to the Bank of America, as trustee, lands in Los Angeles county. The lands included a large number of lots as shown by a certain map. At the same time Hart executed a note in favor of this plaintiff, Compton Investment Company. By the terms of the declaration of trust the lots were to be sold and the proceeds applied to the payment of the plaintiff's note. The beneficiary also undertook to pay such charges as interest, taxes, and costs of improvement. Thereafter the beneficiary, A. Hart, assigned all of his interest under the declaration of trust to the Fred Barman Company. Later the Fred Barman Company assigned fractional interests to Alex Williams, Marguerite Brown, Fred Barman, and Lester L. Robinson.

In the declaration of trust, among other provisions, are the following: "Third: The beneficiary hereunder hereby covenants and agrees to pay all indebtedness secured hereunder, all taxes and assessments now a lien upon or hereafter levied or assessed against said property including second instalment of taxes for the year 1928-29 before the same become delinquent and to pay for any and all costs of said work or improvements of any kind whatsoever made or done by him or procured by him to be done on said property and that he will not permit the cost of any improvement to become a lien thereon; and said beneficiary further covenants and agrees to pay when due all other claims, liens and encumbrances affecting the title to the property covered hereby, all costs, charges, interest, penalties on account thereof. * * * The terms, provisions and conditions hereof shall bind and inure to the benefit of the respective parties hereto, their heirs, executors, administrators, successors and assigns respectively. * * * The undersigned named in the foregoing declaration of trust as beneficiary does hereby approve, ratify and affirm the same in all its parts and does hereby agree to be bound by all the terms thereof, and to do and perform all of the respective obligations therein provided to be paid, done or performed by him." In accepting the assignment to it, the acceptance of Fred Barman Company was in words and figures as follows: "Fred Barman Company, a corporation, does hereby accept the above assignment to it of said undivided entire interest in and to said declaration of trust No. 600–S–2003, and do also hereby agree to and do approve, ratify and confirm the said trust agreement in all particulars. Dated April 6, 1929." Excepting as to the names and fraction of interest, each of the other assignments was accepted by a written acceptance identical with the above.

Having called attention to the foregoing provisions, the plaintiff contends that each of the assignees assumed the burdens of their assignor and therefore they are responsible to the plaintiff. The defendants reply that the present action does not involve a trust deed, but does involve a subdivision trust which differs in form, effect, and theory, and they cite and rely on Ward v. Waterman, 85 Cal. 488, 24 P. 930; Estate of Walkerly, 108 Cal. 627, 648, 41 P. 772, 49 Am. St. Rep. 97; Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 P. 59; Craven v. Dominguez Estate Co., 72 Cal. App. 713, 237 P. 821; and Finnie v. Smith, 83 Cal. App. 707, 257 P. 866. No one of those cases involved the legal effect of documents such as were executed by the defendants in this action. The plaintiff cites and relies on Weidner v. Zieglar (Cal. Sup.) 23 P. (2d) 515. It is closely in point. The facts in many respects are nearly identical. We think the doctrine there stated is determinative of this case. It follows that the trial court erred in making the order sustaining the demurrers. Before closing, it should be noted that the trial court rendered its decision July 13, 1931, and the Weidner Case was not filed until June 20, 1933.

The judgment is reversed, and the trial court is directed to overrule the demurrers and allow the defendants time to answer.

We concur: NOURSE, P. J.; SPENCE, J.

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138 Cal.App. 155

ANDERSON v. MENZEL et al.

Civ. 9318.

District Court of Appeal, First District,
Division 2, California.

April 20, 1934.

1. Schools and school districts 🔑141(5).

Evidence that, at some time during hearing of charges against teacher, one member of school board was absent from board table, *held* insufficient to show that such board member was not present throughout entire hearing within statute disqualifying absent members from voting, especially where proceedings were had de novo on member's reappearance (Pol. Code, § 1609, subsec. 3 (j), as amended by St. 1927, p. 1913).

2. Appeal and error 🔑901.

Appellant must bring up record showing affirmatively that trial court erred and nature of error.

3. Appeal and error 🔑907(4).

Where evidence contained in bill of exceptions is incomplete, reviewing court will presume that there was other evidence to support trial court's ruling.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceedings by John F. Anderson against Frank F. Menzel and others for writ of review. Judgment for respondents, and petitioner appeals.

Affirmed.

Fall & Fall and J. Gilbert Fall, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

STURTEVANT, Justice.

The petitioner applied to the trial court for a writ of review. The respondents appeared, filed a return, and a trial was had before the court sitting without a jury. The trial court rendered judgment in favor of the respondents, and from that judgment the petitioner has appealed and has brought up a bill of exceptions.

Theretofore the petitioner had been a permanent teacher in Lynwood elementary school district. On the 26th day of April, 1928, the trustees of Lynwood elementary school district served on the petitioner a notice that charges had been filed against him as a teacher and a notice that a hearing would be held by the board of trustees on May 12, 1928. On the date last mentioned a hearing was had, and thereafter the board of trustees entered an order that the charges preferred against the petitioner had been sustained on the ground of incompetence and evident unfitness for service, and ordered that the petitioner be dismissed from his position as a permanent teacher. The order was made by two members of the board, Charles G. Scranton and P. M. Higley. At the time of the hearing before the board the hearing was had before the full board consisting of Charles G. Scranton, P. M. Higley, and Mrs. J. H. Fadler, except as hereinafter noted. W. P. Ellsworth, the last witness called at the hearing, was called by the petitioner. In reply to questions propounded by Mr. Fall, the attorney for the petitioner, Mr. Ellsworth testified as follows: "I am a carpenter and have been so engaged close to twenty-three years and I am so engaged at the present time. If you show me certain pieces of carpenter work I think I can judge competently as to the manner of the construction of the work and the material used. I cannot see anything wrong with the table to which you call my attention. For a boy's work I think it is done exceptionally well. As to the additional specimen of work which you show me it looks like it is finished very neatly I would say. I do not see anything wrong with the workmanship or structural design of it." Then the proceedings were as follows:

"Q. Now you might look at this book trough. Just a moment, please. Let us note, Mr. Reporter, that Mr. Scranton isn't present at this portion of the hearing. He appears to be absent from the board table.

"By. Mr. Boller: Then, let us adjourn for a moment or two.

"By Mr. Fall: Very well. But I don't know when he took the liberty to adjourn. (At this point in the proceedings a recess was taken for ten minutes.)

"By Mr. Boller: Now then, for the purpose of record I would like to ask Mr. Scranton if he has been in attendance upon this hearing to the time of calling of the witness, Mr. Ellsworth, to testify. That is a fact, isn't it, Mr. Scranton?

"By Mr. Scranton: Yes, sir, that is a fact.

"By Mr. Boller: And I would like the record to show, well just a moment, please, Mr. Reporter, will you please read over to Mr. Scranton the testimony of Mr. Ellsworth on direct examination from the commencement of his testimony. (Reporter reads all testimony of the witness, W. P. Ellsworth, on direct examination thus far taken.)

"By Mr. Boller: And I would like the record to show that Mr. Ellsworth's testimony has been read over in this hearing from its beginning.

"By Mr. Fall: Q. Do you see anything wrong with this book trough, Mr. Ellsworth? A. No sir, I don't.

"By Mr. Fall: That is all. You may cross-examine. * * *

"By Mr. Fall: That is all. We will close our case with that.

"By Mr. Scranton: Now gentlemen, we can take this matter under advisement, can't we?

"By Mr. Fall: I wish to raise an objection, at this time, as to Mr. Scranton's voting in this matter.

"By Mr. Boller: Then I will ask you to state the basis of your objection so that we may have it clear in the record.

"By Mr. Fall: Subdivision 'J' of the third subsection of section 1609 of the Political Code of the State of California provides the manner of the trial and dismissal of permanent teachers under the Teachers' Tenure Law and a portion of which reads as follows: 'No member of the Board shall qualify to vote who has not been present throughout the entire hearing.' Mr. Scranton having been absent during a portion of the hearing, is therefore disqualified to vote in this matter.

"By Mr. Boller: Very well, then I presume the matter will stand submitted."

[1-3] The claim which the petitioner made in objecting to Mr. Scranton participating in the proceedings was presented to the trial court and is now presented to this court. Quoting subdivision (j) of the third subsection of section 1609 of the Political Code, as amended by St. 1927, p. 1913, as the statute was worded at that time, the petitioner emphasizes the language "present throughout the entire hearing" and contends that on the record which we have quoted above, Mr. Scranton was disqualified. The petitioner further contends that the statute should be construed strictly. Triplett v. Munter, 50 Cal. 644, and In re People ex rel. Purley, 2 Cal. 564. Considering for all of the purposes of this case that the rule of construction is as contended by the petitioner, we think it cannot be said that the record shows Charles G. Scranton was not "present throughout the entire hearing." The record discloses that at a certain time Mr. Scranton was absent from the board table. It does not show that he was out of the room. If out of the room, it does not show that he was without the hearing of what was going on. Furthermore, if he was without the hearing for a time when certain proceedings were had, he returned and those proceedings were had de novo when he was present at the hearing. Bearing in mind that this is an application to this court to review the ruling of the trial court, it was incumbent on the petitioner to bring up a record showing affirmatively that the

trial court erred and the nature of the error. The bill of exceptions which we have quoted from does not show any error. Moreover, it affirmatively appears that the material inserted in the bill of exceptions is only a part of the proceedings held before the board of trustees, all of which were transcribed and all of which were before the trial court. In support of the judgment of the trial court it will be presumed there was other evidence showing or tending to show that Mr. Scranton was "present throughout the entire hearing."

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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138 Cal.App. 251

CITY OF ALHAMBRA v. JACOB BEAN REALTY CO. et al. (GRAVES, Intervener).

Civ. 8602.

District Court of Appeal, Second District, Division 2, California.

April 24, 1934.

1. Parties 🔑40(2).

"Interest" which entitles person to intervene in action between others must be in the matter in litigation and of such direct and immediate character that intervener will either gain or lose by direct legal operation and effect of the judgment (Code Civ. Proc. § 387).

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

2. Eminent domain 🔑178.

In city's action to condemn reservoir site, adjoining owner claiming that, if city acquired site and constructed reservoir thereon, market value of adjoining owner's land would depreciate, *held* not entitled to intervene (Code Civ. Proc. §§ 387, 1246).

Adjoining owner was not entitled to intervene, since such owner had no direct interest in the litigation but only a consequential interest in probable use of the property if city was successful, and since there was no possibility of gain or loss from direct legal effect of any judgment that might be rendered.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the City of Alhambra against the Jacob Bean Realty Company and others, in which Alice H. Graves intervened. From a judgment dismissing the complaint in intervention, intervener appeals.

Affirmed.

Walter F. Haas and H. C. Johnston, both of Los Angeles, for appellant.

James B. Ogg, of Alhambra, for respondent.

ARCHBALD, Justice pro tem.

The city of Alhambra sought by its complaint to condemn for the purpose of a municipal reservoir part of a parcel of land owned by defendant realty company. Alice H. Graves was allowed to file an intervening complaint, which alleged substantially that she was the owner of a tract of land adjoining defendant realty company's tract upon which was located the reservoir site sought to be condemned, and "that if said plaintiff acquires said parcel of land * * * and devotes the same to reservoir purposes and constructs a reservoir thereon, this intervener will sustain damages by reason of the depreciation of the market value of said lands by the construction, maintenance and use by plaintiff of the lands sought to be condemned herein." A demurrer was interposed by plaintiff to such complaint in intervention and was sustained without leave to amend. From the judgment dismissing such complaint thereafter entered, said intervener has appealed.

[1, 2] It will be seen at once from the complaint in intervention that the intervener has no interest in the land sought to be condemned, or in the success of either party, or any interest against both parties. The only claim made is that she will ultimately be damaged if plaintiff is successful and some day builds a reservoir on the property taken.

"The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105. The complaint here showing no direct interest in the litigation, but only a consequential interest in the probable use of the property if plaintiff is successful, and no possibility of gain or loss from the direct legal effect of any judgment that might be rendered, we fail to see that any right to intervene is shown by the complaint (sections 387 and 1246, Code Civ. Proc.), or how it could possibly be amended to show such a right.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

138 Cal.App. 127

LUBENKO et al. v. SAN JOAQUIN BAKING CO. et al.

Civ. 1238.

District Court of Appeal, Fourth District, California.

April 19, 1934.

1. Automobiles 🔑**245(14).**

Negligence of defendant truck driver in automobile collision at intersection *held* for jury under conflicting evidence whether truck dragged other car after hitting it.

2. Automobiles 🔑**245(78, 80, 90).**

Contributory negligence of motorist at intersection, as regards driving on wrong side of street, failure to keep lookout, and excessive speed, and whether negligence, if any, proximately caused collision with truck, *held* for jury.

3. Automobiles 🔑**242(8).**

Presumption obtains that deceased motorist was exercising proper care for his own safety at time of automobile accident.

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Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Pearl Lubenko and others against San Joaquin Baking Company and another to recover damages for death resulting from automobile collision. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

H. A. Savage and W. D. Crichton, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages brought by the heirs of Martin Lubenko, who was killed in an automobile collision which occurred at the intersection of Butler avenue and Cedar avenue near the city of Fresno on September 20, 1931. A Reo truck about fifteen or sixteen feet long and weighing from 5,200 to 5,500 pounds, owned by the defendant corporation and driven by the individual defendant, was proceeding east on Butler avenue and came into collision with a Star automobile driven by the deceased, which was proceeding south on Cedar avenue. From a judgment in favor of the plaintiffs based upon the verdict of a jury, the defendants have appealed.

It is appellants' theory that this intersection is what is known as a blind corner in so far as one traveling south on Cedar is concerned, but is not a blind corner to one traveling east on Butler; that the impact of the two vehicles occurred in the southeast corner of the intersection; that this fact demonstrates that Lubenko was traveling on the wrong side of Cedar avenue; and that the only logical inference that may be drawn from the evidence is that Lubenko, while traveling at an excessive rate of speed on the wrong side of the road, entered the intersection without looking and crashed into the side of the bakery truck.

[1] It is first insisted that the evidence conclusively shows that the driver of the truck was free from negligence. This driver testified that his speed as he proceeded east on Butler was not more than thirty miles an hour at any time; that when he arrived at a point about one hundred ten or one hundred fifteen feet west of the intersection he looked to his left and saw no car coming; that when he was within one hundred feet of the intersection he could see "better than" two hundred feet north on Cedar; that after so looking to the north he looked to the south and saw an automobile coming north on Cedar; that he was watching this other car; that as he entered the intersection he again looked to the north and saw the Lubenko car almost entering the intersection; that he immediately put his foot on the brake but at the impact of the cars he lost control of his truck and drifted into the fence on the other side; that he did not think he was going more than twenty miles an hour as he entered the intersection; that it appeared to him that the other car was coming at about the same rate of speed or maybe a little faster; that the two cars came together on the southeast corner; and that after his car came to a stop he backed up from four to six feet and stopped.

On the other hand, there was evidence that the Lubenko car came to rest on Butler avenue about fifty feet east of the center line of Cedar avenue; that the truck first stopped about one hundred feet east from the center of the intersection; and that the driver thereof then backed the truck some forty-five or fifty feet and stopped between the Lubenko car and the curb. One witness testified that he lived about two blocks from the scene of the accident; that he heard the impact and ran to the alley, where he had a clear view of what had happened; that he went right over to the scene of the accident; that the Lubenko car was on Butler avenue about fifty feet east of the center line of Cedar; that the radiator and the front of that car were not damaged; that the side of that car was crushed in and the frame was bent and the front wheels were broken off at the hub; that there were marks on the oiled surface of Butler avenue beginning at a point about six feet south of the center line of Butler and about three or four feet east of the center line of Cedar and extending east about fifty feet; that along these marks the road was all chopped up like something had been dragged and shoved along the road; and that the front bumper of the truck was knocked off. Another witness, who lived in a house facing Butler avenue, being the first house west of Cedar avenue, there being a vacant lot or lots intervening, testified that just prior to the accident she looked out of her kitchen window and saw the Lubenko car approaching Butler; that at that time this car was opposite her kitchen window and was traveling about fifteen miles an hour; that she looked away an instant and then heard the crash; that when she looked up "they were just coming together and he was dragging the car down the road"; that it appeared to her that the collision occurred right in the center of the intersection; that the truck hit the other car on the side; and that the truck dragged the Lubenko car sideways twenty-five to fifty feet. Another witness testified that he was in the yard of his home, a block west and a block north of the intersection in question; that he looked across a vacant lot and saw the truck for a distance of about one hundred feet when it was about a block away from the intersection in question; that at that time the truck was traveling between fifty and fifty-five miles an hour; that he heard the impact and went to the scene of the accident; that the Star car was dented in back of the driver's seat and the front wheels were demolished; that the bumper on the truck was broken off and the left front wheel was bent or sprung; that he observed marks on the surface of Butler avenue; that these marks looked "just like a hoe dragged over it for a short ways"; and that these marks began at a point about six feet south of the center line of Butler avenue and about three or four, or maybe two, feet east of the center line of Cedar and extended east for about forty feet. A state traffic officer testified that there were no brake marks before the collision, or practically none, but that after the collision there were brake marks of the truck for about eight or ten feet; that the Star car was upside down on Butler avenue; that it was fifty-two shoe lengths from the first skid marks to the Lubenko car; and that his shoe was thirteen inches long. The appellant Hudson testified that the two front wheels of the Lubenko car were knocked off or crushed but that he did not think that car was dragged at all. When asked how he thought it got to the point where it came to rest he replied, "It bounced down there."

While the appellants maintain that this intersection was not a blind corner so far as they are concerned, the evidence would justify the jury in finding that a driver's view to the north as he approached from the west was not unobstructed for the required distance. They rely on certain evidence given by one witness who testified that at a point one hundred feet west on Butler he could see two hundred and ten feet north on Cedar and on the testimony of the appellant Hudson that when he was within one hundred feet of Cedar he could see better than two hundred feet north on that street. The first of these witnesses did not testify that his view north would be unobstructed as he came nearer than one hundred feet to the intersection of Butler with Cedar, and the testimony of Hudson is not very clear that he could see more than two hundred feet north on Cedar at all times when he was within one hundred feet of that street. In any event, there is other evidence to the effect that there were several trees on the north side of Butler and to the west of Cedar, and that the foliage on these trees came to within five or six feet of the ground. One witness testified that he could look through these trees and could at all times see some part of a car approaching on Cedar from the north, and that the matter of whether the view is obstructed or unobstructed would depend upon the height of the man looking and how high he was sitting at the time he looked.

It is unnecessary to comment further on the evidence to which we have referred. We regard the entire question of negligence on the part of the appellants as one of fact for the jury, with ample evidence in the record to sustain its implied finding.

[2] The only other point raised is that it conclusively appears that the deceased was guilty of contributory negligence. It is argued that the marks on the ground demonstrate that the accident occurred in the southeast corner of the intersection, that the appellant Hudson so testified, and that there is no evidence to the contrary. If it were conceded that the accident happened in the southeast corner of the intersection, it would not necessarily follow that the deceased was negligently driving on the wrong side of the road. The inference might reasonably be drawn from all of the evidence that the deceased got to the east of the center line of Cedar avenue, if in fact he was over that line, by swerving to the left at the last moment in an effort to get away from the on-coming truck. There is also evidence justifying the conclusion that the Lubenko car was not over the center line of Cedar avenue up to the moment of the impact. It is a reasonable inference from the evidence that the marks on the surface of Butler avenue, which have been referred to, were caused by the Lubenko car after its front wheels were broken off at the hub. There is evidence that these marks began from two to four feet east of the center line of Cedar avenue. Where a car is struck on the side with sufficient force to demolish the front wheels, the force of the blow might naturally result in the front end dropping to the ground several feet from the point of impact, and the marks on the pavement justify the inference that the Lubenko car was not to the east of the center line of Cedar avenue at the time it was struck. In addition, the appellant Hudson testified that when he first saw the Lubenko car it was entering the intersection and on a map which appears in the record he placed the car at that time well to the right of the center line of Cedar avenue. Later, in his testimony, this witness stated that at the time of the impact the right-hand side of the Lubenko car was ten feet west of the center line of the traveled portion of Cedar avenue. This evidence, in itself, disposes of the argument that the record shows without conflict that the Lubenko car was on the wrong side of the road at the time of the impact.

[3] It is next contended that Lubenko was guilty of negligence in not looking to his right before entering the intersection. Lubenko was killed and there is no evidence as to whether or not he looked. There is a presumption that he was exercising proper care for his own safety and it might well be that he looked but misjudged the speed of the approaching truck. Whether or not he was negligent in this respect was, under the circumstances, a question of fact. It is further argued that he was negligent in that he entered the intersection at a speed greater than fifteen miles an hour. The appellant Hudson testified that his own speed in entering the intersection was twenty miles an hour and that when he first saw the Lubenko car entering the intersection he thought it was proceeding at about the same rate of speed. A disinterested witness testified that the Lubenko car was traveling about fifteen miles an hour just before entering the intersection.

It not only appears that each claim of negligence on the part of Lubenko presents a question of fact, but a further question of that nature arises as to whether his negligence, if any, was a proximate cause of the accident. Under the evidence indicated it cannot be held as a matter of law that he was guilty of contributory negligence.

It is unnecessary to consider the authorities cited by the respective parties, as the principles and rules involved are well established. Both of the points raised come down to questions of fact, with sufficient evidence in the record to sustain the verdict and judgment.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

138 Cal.App. 336

PETROSINO v. WAKEFIELD.

Civ. 1226.

District Court of Appeal, Fourth District, California.
April 26, 1934.

1. **Executors and administrators** ⚷221(5).

In action for services against administrator of estate, evidence supported finding that plaintiff rendered services from June 1, 1924, to April 7, 1930, of reasonable value of $125 per month.

2. **Account stated** ⚷4.

"Account stated" means acknowledgment of debt with express or implied agreement to pay, which acknowledgment relates to definite and fixed amount either specifically stated or so referred to as to make amount definitely ascertainable.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

3. **Account stated** ⚷4.

Rule that account stated requires acknowledgment of definite and fixed amount by debtor would not be relaxed merely because evidence as to amount was not available because of death of one of parties and statutory limitation upon testimony of other as to transaction with decedent.

4. **Account stated** ⚷19(3).

In action on account against administrator of decedent's estate, evidence *held* not to support finding that deceased admitted debt to plaintiff on account in exact amount of $10,000, and hence recovery on account stated was denied.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Tony Petrosino against C. K. Wakefield, administrator of the estate of Gerardo Sica, deceased. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellant.

W. H. Stammer, of Fresno, for respondent.

BARNARD, Presiding Justice.

In 1921 Gerardo Sica bought a vineyard in Fresno county, consisting of 160 acres, and at the same time engaged in the business of shipping grapes from California to eastern markets, having packing houses in several cities in this state. He resided at all times in the state of New Jersey although, up to the time of his death on April 7, 1930, he spent a short period during each year in California in connection with this business. During practically all of this time the plaintiff was employed by Sica in a supervisory capacity on this ranch and in connection with the shipping of grapes to eastern markets.

A claim filed by him with the administrator of Sica's estate having been rejected, the plaintiff brought this action; the complaint setting up two causes of action. In the first of these he sought to recover $12,154.16 for services rendered between March 1, 1922, and April 7, 1930, at the agreed and reasonable value of $125 per month. In the second cause of action he asked for $10,104.14 upon an account stated for moneys loaned by him to the deceased during his lifetime. Findings and judgment were in his favor on both causes of action, and the defendant administrator has appealed.

[1] The court found that the claim for services prior to June 1, 1924, was barred by the statute of limitations, and further found that services were rendered by the respondent to Sica between that date and April 7, 1930, that the reasonable value of said services was $125 per month, and that the sum of $8,775 was due, owing, and unpaid on account thereof. It is appellant's contention that the findings upon which this part of the judgment is based are not supported by the evidence. It is first argued that the complaint should be interpreted as alleging an agreed value for these services rather than the reasonable value thereof. Without objection the case was tried upon the theory of reasonable value for the services rendered and this point may not now be maintained. It seems to be contended that the evidence would have justified a finding that the claim for services for some period after June 1, 1924, was also barred by the statute of limitations. Be that as it may, the evidence as to the times or periods during which Sica was absent from the state during these years sufficiently sustains the finding made as to the running of the statute. The main contention is that the evidence is not sufficient to show that the respondent worked for Sica continuously between June 1, 1924, and April 7, 1930. Several witnesses testified that they knew the appellant during all of this period; that during this time his business had been the taking care of Sica's ranch and assisting in the shipping of grapes; that he was on the ranch all of the time; that he was there "pretty continuously"; and to other facts of

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a similar nature. A son of the deceased testified that the respondent had been connected with his father's business in Fresno county from the year 1921 until the day of his father's death; that during this time he acted as a sort of a supervisor of the ranch work and also assisted in the shipping of fruit and at the packing houses. Without further reviewing the evidence, it may be said that the same, with the reasonable inferences therefrom, is entirely sufficient to sustain the finding that the services were rendered during the period in question. Some contention is made that the evidence is not sufficient to sustain the finding that these services were of the reasonable value of $125 a month. This contention is without merit and the record amply sustains that finding. We are unable to find any respect in which the evidence and findings do not support that portion of the judgment which covered the services rendered and which amounted to $8,775.

Upon the second cause of action, the court found as follows: "Within four years prior to the death of said Gerardo Sica said Gerardo Sica became indebted to the plaintiff in the sum of $10,000.00 upon an account stated for moneys loaned and advanced by the plaintiff to said Gerardo Sica at the special instance and request of said Gerardo Sica. No part of said sum has been paid except the sum of $215.00 paid on April 1st, 1925, the sum of $525.00 paid on January 15th, 1929, and the sum of $300.00 paid on September 30th, 1930; and the sum of $8,960.00, with interest on the sum of $9,785.00 from August 1st, 1927, to January 15th, 1929, interest on the sum of $9,260.00 from January 15th, 1929, to September 30th, 1930, and interest on the sum of $8,960.00 from September 30th, 1930, all at the rate of 7% per annum, is now due, owing, and unpaid from the estate of Gerardo Sica and the defendant herein to the plaintiff."

This finding is attacked by the appellant as not being supported by the evidence.

The complaint alleged that within five years prior to the death of Sica he had become indebted to the respondent in the sum of $10,104.14 upon an account stated for moneys loaned and advanced by the respondent. In this connection the court found that an account had been stated in the sum of $10,000 within four years prior to the death of Sica. In support of this finding the respondent relies upon the following evidence: Louis Sanzini testified that, in 1927, he had a conversation with Sica in which he asked him why he did not let the respondent go and that Sica replied that he could not do so as he owed him some money. In reply to a question as to how much he owed him he said, "About $8000." He also testified that in another conversation, in 1928, Sica told him that he would like to pay the respondent because the respondent once loaned him $5,000 and at another time they had a joint deal in which the respondent's share of the profit was $3,000, and that he owed him $8,000 altogether. Frank Marta testified that, in 1928, Sica told him: "If I don't have to pay Mr. Severini some money I would give Petrosino some." Ralph Fickett testified that, in 1928, he had a conversation with Sica in which Sica told him that he had borrowed $5,000 from the respondent, and that he could get no more from him as he had no more. Thomas Sica, a son of the deceased, testified that in 1929 his father told him that "he would like to make some money to pay Mr. Petrosino." E. Morello testified that in July, 1927, he had a conversation with Sica at which the respondent was present. With reference to this conversation, he testified as follows:

"A. I wanted to sell him the crop and I wanted $65 a ton F. O. B. loaded, and we argued the price, and he offered me only fifty-seven and a half, the highest price he could pay, and in the meantime he was eating, and he was saying he cannot afford to pay a higher price because he has to make money to pay Mr. Petrosino.

"Q. And did he say anything about how much he owed Mr. Petrosino? A. He make a number around $10,000.

"Q. Around $10.000? A. Yes.

"Q. Well how much money did he tell you he owed Petrosino? A. Around $10,000.

"Q. Around $10,000. Well I want to know how much? A. He mentioned $10,000. Now I didn't ask him exactly or more or less."

[2, 3] An account stated is something different from a mere acknowledgment that a party knows himself to be indebted to another in some amount. In Bennett v. Potter, 180 Cal. 736, 183 P. 156, 160, the court said: "The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a cer-

tain sum is due from him on such account, together with an express or implied promise to pay the same. The action is based on the promise to pay, thus established; and, if it is not expressly made, facts from which such promise will be implied must be proven."

In American Mutual Liability Insurance Company v. Building Corporation, 88 Cal. App. 300, 263 P. 297, we find: "Our courts have uniformly held that: '"An account stated presupposes an absolute acknowledgment or admission of a certain sum due or adjustment of accounts between the parties, the striking of a balance, or an assent, express or implied, to the correctness of the balance. If the acknowledgment or admission is qualified and not absolute, or if there is but an admission that something is due without specifying how much, there is no account stated, nor does an account stated exist if there is but a partial settlement of accounts without arriving at a balance, or if there is a dissent from the balance as struck." 1 C. J. p. 695, par. 287; Coffee v. Williams, 103 Cal. 556, 37 P. 504.' Craig v. Lee, 36 Cal. App. 335, 171 P. 1089."

In Ough v. Ansonio Oil Company, 99 Cal. App. 769, 279 P. 481, 482, it is said: "An account stated presupposes, not only an acknowledgment or admission of a certain sum due on adjustment of accounts between the parties, but the striking of a balance, or an assent, express or implied, to the correctness of the balance."

And in Outwaters v. Brownlee, 22 Cal. App. 535, 135 P. 300, 301: "There must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained. (Citing cases.)"

We take it from the rules laid down in these and other cases that the stating of an account requires not only an acknowledgment or admission of a debt with an agreement to pay the same, either express or to be implied, but also that the acknowledgment and agreement to pay shall relate to a definite and fixed amount, which is either specifically stated or referred to in such a manner that the exact amount due can be definitely and certainly ascertained. We see no reason why this rule should be here changed or relaxed merely because the lips of both parties are sealed, one by death and the other by a statutory limitation upon his testimony. These very conditions and the general policy of the law with regard to claims against a deceased person would seem to justify and warrant a strict adherence to the established rules.

[4] In examining the evidence, with these rules in mind, we are of the opinion that it fails to establish an agreement to pay a fixed and definite sum with sufficient certainty to be held to constitute an account stated. The respondent argues that such an account need not cover all matters between the parties but that they may, if desired, state an account upon one portion of their business only. Assuming that this is true, there is nothing in the evidence here to indicate that the amounts Sica admitted he owed were only a part of his obligations to the respondent and not intended to cover all amounts then owed to him. According to the findings nothing was paid on this account between 1927 and 1928, and the evidence of Sica's admission in detail, in 1928, of items totaling $8,000, as loans or advances, indicates that the sum "around $10,000" mentioned by him in 1927, if anywhere near correct, must have included something more than these loans. Again, the court found that an account was stated between these parties within four years prior to April 7, 1930, or, in other words, at some time after April 7, 1926. From the fact that the court found that the account was stated in the sum of $10,000, it would appear that this finding was based upon the testimony of Morello, which related to a conversation held in July, 1927. But while the court held that an account was then stated in the sum of $10,000, there is also the unique finding that a part of the account then stated, to wit, the sum of $215, had been paid on April 1, 1925, or more than two years before the account was stated. These findings not only illustrate the uncertainty and indefiniteness that existed with reference to the amount due, but, in themselves, negative the idea that an account was stated in the exact sum of $10,000. And it would seem that even the respondent had a different idea of the amount agreed upon as he alleged in his sworn complaint that it was $10,114.14. With the exception of the testimony of the last witness, all of the conversations above referred to, relied upon by the respondent as establishing an account stated, were held when the deceased was not present, and certainly none of them could be held to be sufficient to establish that an account was stated in the sum of $10,000. The last witness referred to testified that the matter came up while he was attempting to sell some grapes to Sica. While the witness testified that Sica admitted a debt to the respondent and that he named a figure around $10,000, he

was unable to make it any more definite than that he "mentioned $10,000," and stated that he "didn't ask him exactly or more or less." If the finding that an account was stated between these parties is to be upheld, it must be sustained upon the testimony of this witness. In our opinion, this testimony is entirely too general, vague, uncertain, and indefinite to meet the requirements of such a showing. While it disclosed an admission that something was owing to the respondent, it neither shows that this was something separate and apart from another amount then owed for personal services, nor does it show the making of a new contract for the payment of a definite sum, or an amount that can be definitely and certainly ascertained.

The judgment was for $20,834.44, and it appears from the findings and conclusions of law that this was made up of the $8,775 found to be due upon the first cause of action, plus $10,000 found to be due upon an account stated, with credit for various payments made thereon, and with interest from August 1, 1927, on the respective balances after deducting the payments upon the account stated. For the reasons given, the judgment should be modified by striking therefrom all in excess of the sum of $8,775 which was found to be due upon the first cause of action.

The judgment is modified by reducing the amount thereof to $8,775 and, as so modified, the same is affirmed.

We concur: MARKS, J.; JENNINGS, J.

138 Cal.App. 324

SEIFERT v. ARNOLD BROS., Inc.

Civ. 4994.

District Court of Appeal, Third District, California.

April 26, 1934.

Hearing Denied by Supreme Court June 25, 1934.

1. Master and servant 🔑30(1).

Employment based on a consideration can be rightfully terminated by employer only under conditions which render it reasonably just and proper to do so.

2. Master and servant 🔑21.

Contract to give plaintiff steady employment at definite salary as long as services were satisfactory, in consideration of plaintiff's purchase of automobile, *held* binding on defendant employer and terminable only under conditions rendering it reasonably just and proper so to do.

3. Master and servant 🔑21.

Where defendant, in consideration of plaintiff's purchase of automobile, contracted to give plaintiff steady employment at fixed monthly salary as long as services were satisfactory, and court found plaintiff's work was satisfactory, discharge of plaintiff after about three months rendered employer liable, though business had suffered considerable sales depreciation.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Albert Seifert against Arnold Bros., Inc. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

H. Nelson French and Chauncey H. Dunn, both of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff entered into a conditional sales contract to buy an automobile from appellant, and in consideration of the purchase thereof by plaintiff, defendant agreed to give plaintiff employment as evidenced by a letter as follows:

> "* * * In consideration of your purchasing an Essex Coupe we are offering you employment at the rate of $80 per month. This employment is to be steady as long as your services are satisfactory.
>
> "Yours very truly,
>
> "Arnold Bros., Inc.
>
> "By H. D. Arnold."

Plaintiff was given employment for approximately three months in the used car department of defendant and was then discharged. One of the officers of the corporation testified the business had suffered a sales depreciation of approximately 80 per cent. during the three months' period that plaintiff was employed by defendant and it became necessary to discharge several employees, including plaintiff. As to whether or not plaintiff did his work satisfactorily, the court found: "Plaintiff properly and carefully performed all of the duties assigned to him, and said services were performed to the entire satisfaction of said defendant."

Plaintiff brought this action to recover damages for his wrongful discharge, and the court, finding in his favor to the effect that the hiring was for a reasonable time, entered judgment, from which defendant appeals.

[1] The employment of plaintiff was in consideration of the purchase of an automobile by him from appellant, and the rule is clear that an employment based upon a consideration can be rightfully terminated only under conditions which render it reasonably just and proper to do so. Boehm v. Spreckels, 183 Cal. 239, 191 P. 5.

[2, 3] Appellant claims the trial court was in error in finding that the employment was for a reasonable time, the contract of employment being silent upon a definite length of service; however, the contract was subject to termination on the happening of a contingency, that is, the contingency of dissatisfaction, and the courts and text-writers have held such to be for a definite length of time. Harrington v. Kansas City Cable R. Co., 60 Mo. App. 223; Yellow Poplar Lumber Co. v. Rule, 106 Ky. 455, 50 S. W. 685; Ex parte Bryant, 24 Fla. 278, 4 So. 854, 12 Am. St. Rep. 200. Labott, Master and Servant, § 178, at p. 566, states the rule as follows:

"A contract of hiring which does not by its explicit terms cover any specific period, but which provides that the employment is to last during the continuance of a certain state of things, cannot be terminated by the employer, except for good cause, as long as that state of thing subsists."

Appellant has cited four cases which he claims support his contention that the employer had a right to discharge the employee at any time if he became in good faith dissatisfied. The first of these is Tiffany v. Pac. Sewer Pipe Co., 180 Cal. 700, 182 P. 428, 6 A. L. R. 1493, where a glazeman was employed for a period of three years to perform services as an expert satisfactory to the defendant. The court in upholding his dismissal before the expiration of his term of employment held in contracts involving matters of fancy, taste, or judgment where one party agrees to perform to the satisfaction of the other, that party becomes the sole judge of his satisfaction without regard to the justice or reasonableness of his decision. The facts in this case do not bring it within that rule.

In Langenberg v. Guy, 77 Cal. App. 664, 247 P. 621, the contract of employment limited the term thereof to one year "as our business warrants." In the instant case defendant did not limit the employment to such time as the business might warrant.

In Lord v. Goldberg, 81 Cal. 596, 22 P. 1126, 15 Am. St. Rep. 82, the employee secured his position on the representation he could bring a certain amount of business to the store. He did not bring in the promised business and the court held defendant was justified in reducing his weekly salary in proportion to the business controlled and introduced by him.

Shuler v. Corl, 39 Cal. App. 195, 178 P. 535, is not applicable, as plaintiff was there suing for wages already earned.

It is therefore apparent that the contract in question, being based on a consideration in addition to services to be rendered, is a binding contract and can only be terminated under conditions which render it reasonably just and proper so to do. The trial court upon sufficient evidence found that the work of plaintiff was satisfactory and the contract in question could not therefore be terminated prior to its expiration without liability to plaintiff.

The judgment is therefore affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

BEACH v. FAUST et al. *

Civ. 1303.

District Court of Appeal, Fourth District, California.

April 21, 1934.

Rehearing Denied May 21, 1934.

Hearing Granted by Supreme Court June 19, 1934.

1. Vendor and purchaser 🔑220.

One to be "bona fide purchaser" must purchase in good faith and without notice of anything wrong with title.

[Ed. Note.—For other definitions of "Bona Fide Purchaser," see Words & Phrases.]

2. Vendor and purchaser 🔑224.

Quitclaim deed given by one who stated he had no recollection of owning land was notice of its own weakness, as regards grantee's claim as bona fide purchaser.

3. Vendor and purchaser 🔑229(1).

Grantor's belief and statement that he did not own land *held* sufficient to put gran-

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*For subsequent opinion see 40 P.2d 822.

tee, claiming as bona fide purchaser, on notice, where grantor's title had passed to trustee in bankruptcy.

4. Deeds ⟹8.

Grantee under quitclaim deed who acquired no title had none to convey and his grantee could acquire none from him under later quitclaim deed, regardless of whether there was consideration.

5. Judgment ⟹707.

Persons not parties to quiet title action were not bound by judgment therein.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action to quiet title by F. A. Beach against Frank F. Faust and others, in which Frank C. Ayars was substituted as plaintiff. From an adverse judgment, defendants appeal.

Affirmed.

Kemp, Partridge & Kemp and Thomas C. Ridgway, all of Los Angeles, and Herbert C. Kelly, of San Diego, for appellants.

Powell & Powell and Hubert F. Laugharn, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This action involves the title to a one-third interest in 30 acres of unimproved and unoccupied land in Kings county. The respondent claims under a court sale in a bankruptcy proceeding while the appellants claim under quitclaim deeds from the bankrupt and another party.

The land was conveyed by deed in 1910 to B. W. Marks and two others, each holding an undivided one-third interest. Prior to the commencement of this action, the appellant Faust acquired the interests of the other two parties and this controversy relates only to the one-third interest formerly owned by Marks. Marks was adjudicated a bankrupt on January 28, 1929, in the United States District Court for the Southern District of California, Central Division, which district includes Kings county. Marks failed to include this property in the schedule of assets filed and the trustee in bankruptcy did not learn of its existence until late in 1929, at which time proceedings were taken to sell it as the property of the bankrupt estate and the same was sold to F. A. Beach, the sale being confirmed on January 7, 1930. A deed from the trustee and a certified copy of the order confirming the sale were recorded in Kings county on January 30, 1930, and it is admitted that prior to that time no document in connection with said bankruptcy matter had been recorded in that county.

In the meantime, one T. A. Slocum went to Marks and secured from him a quitclaim deed dated May 31, 1929, for which he paid him $100. With reference to what was said at the time he received the quitclaim deed, Slocum testified as follows: "I had a conversation with Mr. Marks prior to the execution of this deed to me. I found his name on the assessor's records here. At the time I had the conversation with him I thought that he owned all of this property. I thought I was getting the whole property. He said he didn't own anything. He said he had no recollection of owning any land in Kings County and that he didn't believe he did. He did not tell me why he didn't own any property in Kings County. He did not tell me that he was in bankruptcy or that bankruptcy proceedings were then pending. He didn't make it quite as strong as to say he didn't own any property in Kings County. To his recollection he didn't think that he did own—he had owned lots of land in the San Joaquin Valley but he didn't remember owning any in Kings County. He didn't represent to me that he owned any land in Kings County." Another witness testified that within three or four days after June 10, 1929, Slocum showed him this quitclaim deed and he informed Slocum that Marks had gone into bankruptcy and that the paper was worthless. Early in July the appellant Faust called on Marks with reference to this property and was informed by him that he had conveyed the same to Slocum. On September 4, 1929, Faust secured a quitclaim deed from Slocum, paying him $250 for the same.

It is the contention of the appellants that since a certified copy of the order adjudicating Marks a bankrupt, with a certified copy of the order approving the trustee's bond were not recorded in Kings county until after the recordation of the quitclaim deeds referred to, and since both Slocum and Faust paid a consideration for the respective quitclaim deeds, Slocum was a bona fide purchaser for value for a good consideration and without notice, and that Faust is similarly a bona fide purchaser and is protected by the provisions of the recording acts of this state. While an exhaustive brief has been filed by the appellants, the entire argument therein is based upon the assumption that Slocum and Faust were bona fide purchasers in good faith and without notice, and we are given no assistance upon the important question as to whether these parties were in fact such bona fide purchasers. Apparently, the appellants rely entirely upon the fact that a consideration was paid.

In House v. Ponce, 13 Cal. App. 279, 109 P. 161, 162, the court said:

> "Defendant called Gordon as a witness, and he testified that about February, 1906, said Farley came to the witness' house claiming to represent some one else, and wanted to get a deed to the lots; that Farley presented a bargain and sale deed, which witness declined to sign, but he finally, after some conversation, signed a quitclaim deed to Farley; that witness received no consideration for the deed; that witness at the time he made said quitclaim deed to Farley did not own the lots, but had conveyed two of them to W. J. Walsh in May, 1888, two of them to John Robinson in April, 1889, and the other two to Levi Van Fossen in 1893; that witness had disposed of all of said lots and given deeds to them prior to 1895. These deeds, although it does not appear that they were recorded, were good as to all persons save a subsequent purchaser or mortgagee in good faith and for a valuable consideration. Civ. Code, § 1214. The evidence of Gordon is not contradicted, and plainly shows that no title was in him when he conveyed to Farley. There is not a word of evidence even tending to show that plaintiff paid any consideration for the lots, or that he was a bona fide purchaser. The fact that Gordon refused to make any other than a quitclaim deed was notice to Farley, and sufficient to put him upon inquiry. The grantee in said quitclaim deed assumed all risks as to title. He took, and knew he was taking, only such title as was left in Gordon. There being no title in Gordon, nothing was conveyed. There is no explanation as to why the plaintiff procured the quitclaim deed. If he did it for the purpose of acquiring a standing upon which to come into court and attack the defendant's tax title, such purpose does not commend itself to a court of equity. The defendant, being in possession under a deed from the state, regular in form, for which he paid a valuable consideration, and thus enabled the state and county to collect the taxes which had been assessed upon the lots, cannot be disturbed for light or trivial reasons, or by a stranger who has nothing but a quitclaim deed from one who had no title. The law aims to do justice and prevent wrongs. One claiming its affirmative aid to quiet his title must prove such title, and not rely upon a mere piece of paper made without consideration by one who had no title."

[1-4] While in the instant case a consideration was paid, title had already passed from Marks by the operation of the bankruptcy laws and he was in no better position to convey a title by deed than he would have been had he previously deeded the property to others, as was the situation in the case just cited. While the evidence in the case before us shows a consideration, it fails to show another important element in constituting a party a bona fide purchaser. The essence of such a position is that the purchaser shall buy in good faith and without notice of anything wrong with the title he is purchasing. The evidence here does not show that Slocum was purchasing in good faith and without notice within the meaning of the rules in question. While ordinarily a quitclaim deed may be sufficient to pass a good title if the parties believe the vendor's title to be good, and act upon that belief without knowledge of anything to the contrary, we think that, under the circumstances here appearing, the quitclaim deed to Slocum was, in itself, notice of its own weakness. The undisputed evidence is that Marks told Slocum at the time that he did not own the land; that he had no recollection of owning any land in Kings county; and that he did not believe that he owned any there. His title had already passed to the trustee in bankruptcy for the benefit of his creditors and the facts show that he was correct both in his belief and in his statement that he owned nothing. This was sufficient to put Slocum upon notice. A proper investigation would have disclosed the situation, he was merely taking a chance, and by taking a quitclaim deed with such notice he obtained only such title as Marks still retained, which was nothing at all. Whether he purposely secured the quitclaim deed for the purpose of defeating the rights of the creditors of this bankrupt or whether he was merely negligent in failing to take the steps that a reasonable man would take in making a purchase in good faith, his position is not one that has a strong equitable appeal.

It is elementary that if Slocum acquired no title under his quitclaim deed from Marks, he had none to convey and Faust could acquire none from him under the later quitclaim deed.

[5] The appellants also contend that the respondent is bound by a judgment in a quiet title action which was entered on January 21, 1930, the action having been brought by one Walker against Marks, and Walker having

quitclaimed his interest to Faust. Neither the respondent nor the trustee in bankruptcy were parties to that action, and they are in no way bound by the judgment therein.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

138 Cal.App. 261

HOLLINGSWORTH v. PEMBERTON et al.

Civ. 4989.

District Court of Appeal, Third District. California.
April 24, 1934.

1. New trial 🔑71.

Under conflicting evidence as to whether truck owner paying for gasoline, oil, repairs, and maintenance of car and paid on percentage basis was servant of forwarding company so as to render it liable for his negligence, granting of new trial after verdict against forwarding company *held* not abuse of discretion.

2. Master and servant 🔑318(1).

Where employer has right to hire or discharge workman and right to direct and control manner of performing services, relationship is that of "servant" or "agent" and not "independent contractor."

[Ed. Note.—For other definitions of "Agent," "Independent Contractor" and "Servant," see Words & Phrases.]

3. Master and servant 🔑318(1).

In determining whether workman is servant or independent contractor, it is employer's right to direct and control manner of performing services and not actual interference which determines relationship.

4. Appeal and error 🔑977(1).
New trial 🔑69, 72.

On motion for new trial, judge has exclusive right to weigh evidence and determine credibility of witnesses, and except for clear abuse of discretion his order will not be disturbed.

◆

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Grace Hollingsworth against Al Pemberton, Moye Forwarding Company, and another to recover damages for personal injuries sustained in automobile accident. From an order granting a new trial after judgment on a verdict for plaintiff, plaintiff appeals.

Affirmed.

F. M. Ostrander and H. H. Griswold, both of Merced, for appellant.

M. F. Sylva, of San Francisco, and Andrew R. Schottky and C. Ray Robinson, both of Merced, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff has appealed from an order granting a new trial after judgment for damages for injuries sustained as the result of an automobile collision had been entered pursuant to a verdict which was rendered in her favor.

[1] The real question involved on this appeal is whether the trial court abused its discretion in granting a new trial on the theory that the plaintiff failed to prove that the driver of a truck, with which the plaintiff's automobile collided, was the agent or employee of the defendant Moye Forwarding Company, as distinguished from an independent contractor. Granting that there is ample evidence to have warranted a court in finding that the defendant Pemberton, who owned the truck with which the plaintiff's machine collided, was the employee of the Moye Forwarding Company, we are confronted with the question as to whether there is sufficient conflict upon that subject to hold there was not an abuse of discretion on the part of the court in granting a new trial.

The respondent, Moye Forwarding Company, is a private corporation which operates a freight trucking business between Los Angeles and San Francisco along both the coast and interior highways. It does not own the trucks with which the freight is transported. The company maintains offices and warehouses or freight platforms in both cities mentioned. It solicits the transportation of freight from merchants and others, which is collected at the warehouses or shipping platforms and periodically segregated and made up into truckloads under the direction of its employees. Its receipts are given to all shippers, and its waybills or bills of lading for each package are issued and delivered to the drivers of trucks who carry the freight. At the direction of the company, truck drivers frequently collect the packages from shippers, giving receipts therefor signed by the respective drivers as its agents. Such packages are delivered at the shipping platforms and consigned to specific trucks under the directions of the company. The trucks are routed and the packages conveyed and delivered under specific directions from the company. Privately owned trucks and their drivers are either hired or contracted for to convey the freight. The question as to whether these truck owners become the agents and employees of the company under the circumstances under which the business is conducted is the issue which is involved in this case. According to the agreement under which these truck drivers are employed, they furnish their own machines, and pay for all gas, oil, repairs, and maintenance of the cars.

Mr. Al Pemberton, who drove the truck with which the plaintiff's automobile collided at the time of the accident, was called by plaintiff as a witness under the provisions of section 2055 of the Code of Civil Procedure. He testified that he owned the truck which he was driving, having purchased it on a conditional sales contract from the defendant, Bank of America National Trust and Savings Association; that he was "employed" by the Moye Forwarding Company for a period of several months before the accident occurred and prior to its incorporation, and was paid by check from the company for the use of his truck and personal services a sum amounting to 75 per cent. of the receipts for the shipping of freight on each trip; that all collections made by him were promptly paid to the company; that it had the right to "hire or fire" him at any time; that he was informed by the manager of the company that if he carried any freight for himself or for any one other than the company he would be discharged; that he always worked under specific instructions of the manager; that his duties required him to collect packages in behalf of the company for shipment and deliver them at the shipping platforms for segregation and assignment to the respective trucks for transportation; that in so doing he acted under the directions of the manager and gave receipts to the shippers for such packages on forms furnished by the company, signed by himself as its agent; that each trip which he made between Los Angeles and San Francisco was superintended and routed under specific instructions from the company with a limitation of eighteen hours in which to complete the journey; that on the occasion when the accident occurred he was directed to take his load from Los Angeles and go by way of Beverly Hills to pick up a special package at that point for shipment, which he did; that in the collecting of packages, the handling, transportation, and delivery thereof, he was always under the control and direction of the manager of the company; and that he was instructed by Manager Malde that since the company was not regulated by the Railroad Commission, he had better look out en route for spotters representing the commission.

After the accident occurred, Pemberton was arrested in Merced county for driving his truck while intoxicated. A. L. Silman, the probation officer, investigated the facts of the case. He testified that he called at the office of the Moye Forwarding Company and was referred to Manager Malde, who informed him that Pemberton was "employed" in their company. When Malde learned of the charge of drunkenness against Pemberton, he said "he would not have a man in his employ that took liquor." There was no intimation in this conversation with the probation officer that Pemberton was driving the truck as an independent contractor.

In a telephonic conversation regarding that arrest, which occurred with Mr. Ostrander, who was then district attorney of Merced county, the manager said: "My name is Malde of the Moye Forwarding Company, and you have one of my drivers under arrest." The company did subsequently furnish a bond for Pemberton's release.

[2, 3] Tested by the well-established rule distinguishing between an employee and an independent contractor, the foregoing evidence standing alone leaves little doubt that Pemberton was an agent of the Moye Forwarding Company engaged in the line of his employment at the time of the accident. It has been frequently stated, and is the established rule of law distinguishing between a mere employee and an independent contractor, that when the employer has the right to hire or discharge the workman at pleasure, and also has the right to direct and control the manner of the performance of the services as distinguished from the mere result of such labor, the relationship is that of master and servant or principal and agent and does not constitute an independent contract. It is the right on the part of the employer to direct and control the manner of the performance of the services, and not the actual interference on his behalf, which determines the relationship between them. 39 C. J., p. 1316, § 1518; Hillen v. Ind. Acc. Comm., 199 Cal. 577, 250 P. 570; Tucker v. Cooper, 172 Cal. 663, 158 P. 181; Fearn v. Ralph Hamlin, Inc., 215 Cal. 211, 8 P.(2d) 1015; Eng-Skell Co. v. Ind. Acc. Comm., 44 Cal. App. 210, 186 P. 163; Behr v.

Ind. Acc. Comm., 126 Cal. App. 522, 14 P. (2d) 915; Press Pub. Co. v. Ind. Acc. Comm., 190 Cal. 114, 210 P. 820, 823. In the case last cited it is said:

> "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience * * * or misconduct."

Applying this test to the present action, as it was similarly applied in the Press Publishing Company Case, Pemberton was liable to be discharged for misconduct. The manager of the Moye Forwarding Company told the probation officer he would not have a man in his employ who "took liquor." Pemberton was in fact discharged by the company.

[4] On this appeal from the order granting a new trial, it is, however, not merely a question as to whether the record contains sufficient evidence to support a judgment that the accident occurred through the negligence of an agent of the defendant Moye Forwarding Company, for there is conflicting evidence upon essential facts necessary to consider in determining the relationship which existed between Pemberton and the company. Upon a motion for new trial the judge has the exclusive right to weigh the evidence and determine the credibility of witnesses. Except for a clear abuse of discretion in granting a new trial, the order will not be disturbed on appeal. 2 Cal. Jur., p. 905, § 533; Boness v. Helphinstine, 122 Cal. App. 677, 23 P.(2d) 420; Rosenberg v. Moore & Co., 194 Cal. 392, 229 P. 34.

In conflict with the preceding evidence, Mr. Lee Case, the present manager of the Moye Forwarding Company, testified regarding the relationship of Pemberton to the company that, "He being an independent contractor, he is one of the men who has been used at various times for hauling loads from Los Angeles to San Francisco and return, and he was a man standing in front of the office with his truck waiting for an opportunity to go to work; we offered him a load of merchandise at approximately so much weight and amount and so much money, and we asked him if he wanted to accept the load and take it through, and he agreed to do that." His compensation was "on a percentage basis. * * * Each load was an independent transaction, and it was settled as such. Q. Now when he loaded his truck, what directions did you give him in the manner of loading his truck? A. None, no direction. Q. In other words, he could load it as he seen fit? A. That was part of his responsibility as an independent contractor." Regarding the alleged instructions to pick up the package en route at Beverly Hills, Case said, "He was offered additional tonnage to be picked up at Beverly Hills * * * if he saw fit, and he agreed to stop on his way out of town and gather it up." Case testified there was "nothing compulsory" about Pemberton taking any particular load of freight from the company for delivery. Regarding the statement that Pemberton was directed to haul no freight except for the company, on penalty of being discharged, Case denied the charge, as follows: "Q. Was he required to haul for you exclusively? A. No, sir." Regarding the alleged instructions from the company requiring the truckman to pick up and transport packages along the way, Case declared that this was optional with the driver. Answering the question in that regard, he said: "Q. That is a transaction between the operators themselves? A. Yes, that is the transaction."

Mr. Malde, the manager of the company, testified that he had a conversation with Pemberton, in which he said, "I just pointed out to him that he was a contracting hauler, * * * that he had to maintain his own truck and take care of it and the expenses connected therewith, * * * and to receive the goods in good condition, and then if he delivered them in bad condition we expected him to pay that loss. * * * It was practically his business in a measure, he was working for himself." Malde then added that he did tell Pemberton how to handle the freight so as to avoid damage, and how to treat the customers so as to retain their good will. He also declared that each trip undertaken by the driver of a truck was a separate transaction which he was privileged to accept or reject. Malde also denied that he ever told Mr. Silman that Pemberton was an employee of the company. He said, "I told him he was a contractor." Regarding the claim on the part of the company that it lacked authority to direct or control the truck drivers with respect to particular loads to be hauled, Mr. Cass said, "Unless the volume they received was not enough, and they had the right to refuse to take it if the volume did not meet their particular earnings on their regular trip," they could refuse to haul it.

In view of the conflict of evidence regarding the issue as to whether Pemberton was acting as the agent of the Moye Forwarding Company at the time of the accident, or whether, upon the contrary, he was a mere independent contractor, we are unable to say there was an abuse of discretion on the part of the court in granting a new trial.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

138 Cal.App. 28

PEOPLE v. CANNIZZARO.

Cr. 2457.

District Court of Appeal, Second District, Division 1, California.

April 11, 1934.

Hearing Denied by Supreme Court May 10, 1934.

1. Criminal law 🔑535(2).

Corpus delicti is not required to be established to moral certainty and beyond reasonable doubt before extrajudicial statements, admissions, or confessions of defendant may be received prima facie proof of corpus delicti being sufficient.

2. Criminal law 🔑535(2).

In prosecution for possession of deadly weapons, testimony of conversation between police officer and defendant in apartment where weapons were found *held* properly admitted as against contention that corpus delicti had not been proved, where testimony had shown that defendant produced revolver from its place of concealment (St. 1923, p. 695; St. 1931, p. 2316, § 2).

3. Aliens 🔑17.
Weapons 🔑17(4).

Evidence sustained conviction of possession of deadly weapons (St. 1923, p. 695; St. 1931, p. 2316, § 2).

4. Criminal law 🔑706.

In prosecution for possession of deadly weapons, prosecuting attorney's question whether officers in taking defendant from witness' apartment said that they wanted defendant in connection with murder, which question was not answered because objection thereto was sustained *held* not misconduct, where defendant did not request instruction that jury disregard question (St. 1923, p. 695; St. 1931, p. 2316, § 2).

5. Criminal law 🔑730(12).

In prosecution for possession of deadly weapons, prosecuting attorney's argument alluding to defendant by several aliases and referring to his apartment as convenient place for bootleggers, describing flash-light as article used by thugs, gangsters, and hoodlums and that jury could turn loose on city one of greatest racketeers, hoodlums, and gangsters city ever had, *held* not misconduct where court admonished jury that arguments were not to be considered as evidence (St. 1923, p. 695; St. 1931, p. 2316, § 2).

6. Aliens 🔑17.
Weapons 🔑17(3).

In prosecution for possession of deadly weapons, index card for another apartment in same building as apartment wherein weapons were found *held* properly admitted, where card bore landlady's entries showing payments of rent, and card was part of business records of apartment house and in view of testimony that two telephones were installed and were registered as nonlisted numbers (St. 1923, p. 695; St. 1931, p. 2316, § 2).

7. Criminal law 🔑404(4).

In prosecution for possession of deadly weapons, flash-light with red lens found in apartment with weapons *held* properly admitted since jury could consider what was found in apartment, particularly where defendant said that he owned flash-light (St. 1923, p. 695; St. 1931, p. 2316, § 2).

8. Constitutional law 🔑42.

Alleged unconstitutionality of statute fixing burden of proving citizenship on individual charged, as alien, with having done acts prohibited to aliens, on ground that statute denied to person within state's jurisdiction equal protection of laws, could not be considered in prosecution of alien for possession of deadly weapons, where state offered affirmative evidence that defendant was alien (Code Civ. Prac. § 1983; Const. U. S. Amend. 14).

9. Aliens 🔑17.
Constitutional law 🔑210.

Deadly Weapons Act prohibiting aliens, among others, from possessing deadly weapons *held* valid exercise of police power and not unconstitutional as denying equal protection of laws (St. 1923, p. 695; St. 1931, p. 2316, § 2; Const. U. S. Amend. 14).

"Police power" is the power inherent in a government to enact laws within constitutional limits to protect the order, safety, health, morals, and general welfare of society.

[Ed. Note.—For other definitions of "Police Power," see Words & Phrases.]

10. Constitutional law 🔑210.

Deadly Weapons Act forbidding aliens or persons convicted of felonies from possessing deadly weapons *held* not unconstitutional on ground that classification adopted was arbitrary or unreasonable and not based on natural, intrinsic, or constitutional distinction (St. 1923, p. 695; St. 1931, p. 2316, § 2; Const. Cal. art. 1, § 11).

11. Aliens ⇒17.

Alien who was subject of Italy *held* properly prosecuted under Deadly Weapons Act prohibiting aliens from possessing deadly weapons notwithstanding treaties between United States and Italy provided that aliens in respective countries should enjoy same rights and privileges which are granted to nationals, since act was exercise of police power which did not become abortive because of treaties (St. 1923, p. 695; St. 1931, p. 2316, § 2; Const. U. S. art. 6, cl. 2; Treaty with Italy, Feb. 26, 1871 [17 Stat. 845]; Treaty with Italy, Feb. 25, 1913 [38 Stat. 1669]).

HOUSER, Acting P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Frank Cannizzaro was convicted of possession of deadly weapons, and he appeals.

Affirmed.

Cantillon & Medigovich, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

The defendant appeals from judgments of conviction on two counts; the first charging him with violating chapter 339, p. 695, St. 1923, by possessing on or about April 26, 1933, "an instrument and weapon commonly known as a black-jack and billy"; the second charging a violation of the same law, as amended in 1931, St. 1931, p. 2316, Act 1970, § 2, Deering's Gen. Laws 1931, and alleging that, on or about the date mentioned, defendant was not a citizen of the United States, and that at that time he had "in his possession and custody, and under his control, a certain firearm, to-wit, a revolver, * * * the said firearm having a barrel less than twelve inches in length." The act defines such a weapon as one "capable of being concealed upon the person" and the information so described it. This appeal is also grounded upon an order of the trial court denying defendant's motion for a new trial on both counts.

An unmarried woman, who testified that she was engaged to the defendant and that she had assumed the name of Pauline Durant, by which she will be known in this narrative, resided for some months prior to April 26, 1933, in apartment 407 of a certain apartment house in the city of Los Angeles. The defendant was seen passing through the lobby of this building on various occasions by the landlady, to whom Pauline Durant paid rent for apartment 407. On one occasion Mrs. Durant introduced the defendant, as Frank Hugo, to the landlady. About noon of April 26, 1933, three police officers called at apartment 407, defendant coming there about ten minutes later after Mrs. Durant had telephoned him. While awaiting defendant's arrival, the officers—according to one of them, Walter Schubert—searched the apartment and found there "a sap, a three-cell flashlight with a red lens; some buckshot, some revolver cartridges, some bird shot." This officer also testified that shortly after entering the apartment, defendant picked up a revolver from under a cushion on an overstuffed set in the living room, and handed it to him. This weapon Schubert described as a blue steel, Smith & Wesson, hammerless revolver with a barrel about 2½ or 3 inches long. The "sap" or "billy" referred to in this officer's testimony was then introduced in evidence, also the flash-light. At this point the district attorney undertook to elicit from the police officer a conversation which he claimed to have had with defendant in apartment 407 at the time the articles above named were found by the officers or produced by defendant. Counsel for defendant interposed an objection on the ground that the corpus delicti had not been proved; that therefore admissions or confessions by the defendant could not legally be introduced to supply the missing essentials of such proof. The trial court ruled that there had been sufficient proof of the corpus delicti to permit the conversation to be related. This ruling is assigned as error. We must therefore analyze the offenses charged. As to the first count, there are two elements of the corpus delicti: First, possession; second, a weapon prohibited by the statute. As to the second count, there are three elements: Possession, a proscribed weapon, and alienage of the defendant. In connection with this last element, we know that in addition to the testimony above narrated, the defendant was charged under the name Cannizzaro, and was present before the jury.

[1-3] People v. Selby, 198 Cal. 426, at page 438, 245 P. 426, 431, lays down the rule "that the corpus delicti is not required to be established to a moral certainty and beyond a reasonable doubt before the extrajudicial statements, admissions, or confessions of a defendant may be received in evidence—prima facie proof of the corpus delicti being sufficient for that purpose." Gauged by this standard, which has been approved repeatedly, and considering especially the testimony

which was before the jury that defendant produced the revolver from its place of concealment, we feel no error was committed by the trial court in admitting testimony of the conversations. This brings us to appellant's contention that the evidence produced was insufficient to support the verdict on either of said counts. Having read the transcript, we find that in this case, as in many others, the jury had before it, when the evidence was all in, two contrary theories, one developed and disclosed by the people and its witnesses; the other by defendant's witnesses. This conflict of evidence was resolved against the defendant by the jury, and we cannot say, after a review of all the testimony produced by the people and apparently accepted as true by the jurors, that there was anything so inherently improbable in it as to call for a reversal of either judgment.

[4, 5] Other assignments of error which are before us relate to misconduct charged to the prosecuting attorney by appellant, as follows: Asking Mrs. Durant if it were not a fact that the officers, when they took the defendant from the apartment house, "told Frank Hugo they wanted him in connection with a murder"; alluding to defendant in argument to the jury as "Frank Hugo or Frank Cannizzaro or Paul Durant, or whatever his name may be"; referring to the apartment as a convenient place for bootleggers to take orders; describing the flash-light with a red lens as "an article used by 'thugs' and 'gangsters' and 'hoodlums' * * * a light conveniently used by high jackers and hoodlums for the purpose of simulating police officers"; various other similar remarks, expressing the belief that the possession of such tools by the defendant (who, according to the police officer, stated that he lived in apartment 407 and owned them all), stamped him in his trade and profession "as truly as anything that could be placed in this court, and having thus stamped him as they do, you can go into your jury room, if you want to, and turn loose upon Los Angeles one of the greatest racketeers, hoodlums and gangsters, we have ever had in our midst."

As to the first item above: An objection to the question as to whether the officers told Frank Hugo they wanted him in connection with a murder charge was sustained, although defendant's counsel had opened up this avenue of inquiry on direct examination by asking Mrs. Durant these questions: "Q. Was the conversation that took place between the officers and the defendant in your presence after he arrived? A. Yes. Q. State what that was?" Upon the court's sustaining the objection, no answer was made to the inquiry. "Assuming it to have been an improper question, a mere mistake by a prosecuting officer relative to a rule of evidence cannot be regarded as misconduct." People v. De Vries, 69 Cal. App. 201, 206, 230 P. 982, 983. It may be noted also that no request was made by defendant's counsel to instruct the jury to disregard this conduct deemed objectionable on the part of the prosecutor as required under the rule of People v. Carson, 49 Cal. App. 12, 17, 192 P. 318. As to the other items of claimed misconduct occurring in the prosecuting attorney's argument to the jury, certain comments by the court in People v. Sieber, 201 Cal. 341, 355, 257 P. 64, 70, are apropos: "Appellant complains of what he terms the 'shocking conduct and shameful tactics' of the deputy district attorney who conducted the case for the people in the trial court. The prosecuting officer may have been overzealous at times, but we are not persuaded that he was so unmindful of the duty he owed both to the state and to the defendant as to use his office 'as an engine of persecution,' as charged by the appellant. We are unable to say that questions charged to have been asked by the deputy district attorney in bad faith were, in fact, improperly propounded. Neither are we convinced that during his argument to the jury that officer purposely referred to matters not in the record, or intentionally made misstatements of law, for the purpose of misleading the jury. The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. 8 Cal. Jur. p. 263." We may say in passing, and in disposing adversely of these assignments of error, based on claimed misconduct, that the court admonished the jury that the arguments of counsel were not to be considered evidence in the case.

[6, 7] Appellant contends that error arose from the admission in evidence of an index card for another apartment, 410, in the same building as apartment 407. Inasmuch as the card bore entries in the hand of the landlady showing payments of rent made to her shortly after April of 1933, although the card was made out in the names of Mr. & Mrs. Frank Hugo by some other person, and since such card was part of the business records of the apartment house, we do not feel that the trial

court erred in ruling that it might go before the jury as having some evidentiary value, especially in view of other testimony that was introduced in regard to occupancy of that apartment by Mrs. Durant, installation of two telephones there, registration of the same as nonlisted numbers and other incidental matters. As to an assignment of error predicated upon the admission in evidence of the flash-light with a red lens, we hold that it is not well grounded, for the jury, in determining who occupied apartment 407, had a right to consider what was found there, and particularly this flash-light, which defendant, according to officer Schubert, said he owned, having received it from a milkman.

[8] The remaining assignments of error on this appeal relate to the second count solely, claim being made that the Deadly Weapons Act upon which this count was based is repugnant to Amendment 14, Constitution of the United States, as well as to section 11, art. 1, Constitution of California, therefore that the enactment is unconstitutional; further, that it is in contravention of clause 2, art. 6, of the Federal Constitution. It is also claimed that section 1983, Code of Civil Procedure, fixing the burden of proving citizenship upon an individual charged, as an alien, with having done an act prohibited to that class, is unconstitutional within the terms of the Fourteenth Amendment, which prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." This last contention raises no question in the present case for the people did not rely upon this rule governing burden of proof, but offered affirmative evidence tending to show that defendant was an alien; that he had declared his intention to become a citizen; and that he had been denied the privilege of citizenship by order of the District Court of the United States sitting in New York in 1931. This showing was made by means of authenticated copies of court records properly admitted in evidence over defendant's objection.

[9, 10] We now consider the objection that the Deadly Weapons Act by its terms contravenes the provisions of amendment 14 of the Federal Constitution, and find that this objection, with others grounded upon divers constitutional provisions, was before our Supreme Court in Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A. L. R. 51, and there decided adversely to appellant's contention in an exhaustive opinion written by Mr. Justice Lawlor. The reasoning of that case, pages 649, 650 of 193 Cal., 226 P. 914, 921, seems applicable to the one at bar: " 'Police power is the power inherent in a government to enact laws within constitutional limits to protect the order, safety, health, morals and general welfare of society.' 12 C. J. 904. It is a well-recognized function of the Legislature, in the exercise of the police power, to restrain dangerous practices (Id. 916) and to regulate the carrying and use of firearms and other weapons in the interest of the public safety (Id. 917).

"In our opinion the legislation constitutes a proper exercise of the police power and is not invalid under the Fourteenth Amendment. The purpose of the act is to conserve the public welfare, to prevent any interference with the means of common defense in times of peace or war, to insure the public safety by preventing the unlawful use of firearms." See, also, comments of the court on pages 645, 646 of 193 Cal., 226 P. 914, quoting from the case of State v. Rheaume, 80 N. H. 319, 116 A. 758. Section 11, art. 1, Constitution of California, reads as follows: "All laws of a general nature shall have a uniform operation," and counsel for appellant argues that section 2 of the Deadly Weapons Act violates this rule, it being claimed, in effect, as it was in People v. James, 71 Cal. App. 374, 378, 235 P. 81, 83, "that the classification here adopted is arbitrary, unreasonable, and not based upon any natural, intrinsic, or constitutional distinction." In that case the claim is disposed of by reference to the Rameriz Case, supra, and to the case of Patsone v. Pennsylvania, 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539; see, also, Rose's U. S. notes, where Holmes, J., writing the opinion, said that " 'a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil * * * is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. * * * It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.' Miller v. Wilson, 236 U. S. 373, L. R. A. 1915F, 829, 59 L. Ed. 628, 35 S. Ct. 342; [see, also, Rose's U. S. notes;] Armour & Co. v. North Dakota, 240 U. S. 510, 517, Ann. Cas. 1916D, 548, 60 L. Ed. 771, 36 S. Ct. 440."

In People v. Smith, 36 Cal. App. 88, page 90, 171 P. 696, 697, it is said such a law "operates uniformly upon all persons in the same category, and there is a reasonable basis for the classification. Therefore it is not objectionable as class legislation." See, also, People v. Bertolani, 69 Cal. App. 137, 230 P. 675; People v. Dawson, 210 Cal. 366, 292 P. 267.

[11] The last remaining contention of appellant may be summed up as follows: By clause 2, art. 6, United States Constitution, judges in every state are bound by treaties negotiated by the national government, anything in the Constitution or laws of any state to the contrary notwithstanding. Therefore, taking cognizance of the provisions of the treaty of 1871 between the United States and the kingdom of Italy (17 U. S. Stat. 845) supplemented by treaty of 1913 (38 U. S. Stat. 1669), the courts in California should hold that section 2 of the Deadly Weapons Act (quoted below) prohibiting aliens from possessing revolvers can have no application to this defendant, an alien, a subject of the kingdom of Italy. As a basis for this argument, our attention is directed by appellant to the following language appearing in the treaty: "The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, * * * and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

Section 2 of the Deadly Weapons Act reads as follows: "On and after the date upon which this act takes effect, no person not a citizen of the United States of America and no person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state or any other government or county, or who is addicted to the use of any narcotic drug or drugs shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year or by fine not exceeding five hundred dollars, or by both fine and imprisonment."

"The question which here presents itself," to quote from appellant's brief, "is whether or not Section 2 of the Deadly Weapons Act conflicts with the provisions of the Treaty in effect between Italy and the United States; if it does, then clause 2 of article Six renders the Deadly Weapons Act unconstitutional, or at least inoperative as against Italian subjects during the existence and life of the treaty."

It clearly appears from the reasoning employed in Re Rameriz, supra, and State v. Rheaume, supra, also from People v. Camperlingo, 69 Cal. App. 466, 473, 231 P. 601, that the enactment by the California Legislature, of this statute, the Deadly Weapons Act, and particularly of section 2 thereof was an exercise of the police power and we are asked to determine whether in the instant case it becomes abortive because of the quoted stipulation of the treaty with Italy.

Such an inquiry involves a survey of a wide field heretofore explored during many years, by some of the greatest minds that have brought honor to the legal profession, a field fertile with argument, and one which has produced two schools of thought on the subject of how far, if at all, the treaty-making power of the national government may encroach upon or render nugatory police enactments of the states. For masterly presentations of divergent views on this question with discussion of cases, reference may be had to "Treaty-Making Powers of the United States," by Charles Henry Butler, and "Limitations of the Treaty-Making Power," by Henry St. George Tucker. A case involving a discussion of the treaty-making power and declaring emphatically that there are certain limitations upon it in relation to state legislation, appears in the first volume of California Reports—People v. Naglee, 1 Cal. 232, 247, 52 Am. Dec. 312, the reasoning of which has never been questioned in this state, so far as we know.

Respondent takes the position that the courts in determining questions raised by reliance upon treaty terms, may properly consider the nature and purpose of the treaty involved, and calls our attention to the following language appearing in the preamble, title, and opening phrases of the treaty with Italy:

" 'Whereas a treaty of commerce and navigation between the United States of America and His Majesty the King of Italy was concluded and signed by their respective plenipotentiaries, at the City of Florence, on the 26th day of February, One Thousand Eight Hundred and Seventy-One, which treaty, being in the English and Italian language, is word for word as follows:

" 'Treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

" 'The United States of America and His Majesty the King of Italy, desiring to extend and facilitate the relations of commerce and navigation between the two countries, have determined to conclude a treaty for that purpose * * *'

"(17 United States Statutes at Large, page 845.)"

It is argued that we have a right to consider that possession of a revolver concealed beneath a cushion of a davenport has nothing to do with commerce or navigation. Regardless of the correctness of such a view, we are not prepared to say that, under the language of the treaty, designed as it was to promote commerce between the two nations, every right enjoyed by citizens shall belong also to aliens. It will be noted that in the treaty privileges were placed on the same footings as rights; equality as to both is secured to the alien by the phrase "shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals"; but it has been held repeatedly that certain privileges which are extended by the state to nationals may be withheld from aliens. Patsone v. Pennsylvania, supra, which upheld the right of the state to prohibit aliens from killing wild game or owning weapons appropriate for that use, while placing no such restriction upon Pennsylvania citizens, is an illustration. A more recent case is Gizzarelli v. Presbrey (1922) 44 R. I. 333, 117 A. 359, 360. In both these cases defendant, a subject of Italy, invoked the identical language of the same treaty to secure his discharge, but without avail.

In the Gizzarelli Case it was stated specifically that "authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege." Since privileges may be withheld in the exercise of the police power without doing violence to the terms of the treaty, no good reason is apparent why certain rights may not, with equal justice and perhaps under more urgent necessity, be reserved by that same power exclusively for citizens. As is said in the Gizzarelli Case, "The test of such legislation is not whether there is a discrimination against aliens, but rather is there any proper basis for such discrimination." On this question we close by quoting Mr. Justice Lawlor, in Re Rameriz, supra, page 650 of 193 Cal., 226 P. 914, 921: "It cannot be assumed that the Legislature did not have evidence before it, or that it did not have reasonable grounds to justify the legislation, as, for instance, that unnaturalized foreign-born persons and persons who have been convicted of a felony were more likely than citizens to unlawfully use firearms or engage in dangerous practices against the government in times of peace or war, or to resort to force in defiance of law. To provide against such contingencies would plainly constitute a reasonable exercise of the police power."

The judgments and order appealed from are affirmed.

I concur: YORK, J.

I dissent: HOUSER, Acting P. J.

138 Cal.App. 290

MIX v. YOAKUM et al.

Civ. 5026.

District Court of Appeal, Third District, California.

April 25, 1934.

Hearing Denied by Supreme Court June 22, 1934.

1. Process 🔑**158.**

Court may quash service of summons by publication under order inadvertently or improperly directing such service.

2. Appeal and error 🔑**914(2).**

Appellate court must assume that court justifiably quashed service of summons by publication, where record does not contain order directing publication nor affidavit and proceedings constituting basis therefor.

3. Appeal and error 🔑**907(4).**

Where finding is attacked as unsupported and transcript is incomplete, appellate court must conclude that evidence before trial court justified finding.

4. Fraudulent conveyances 🔑**84.**

Assumption of mortgage on property conveyed is valid consideration for conveyance.

5. Fraudulent conveyances 🔑**269(1).**

Fraud is never presumed, and grantor's creditor has burden of alleging and proving inadequacy of consideration; grantee not being required to allege or prove adequacy thereof.

6. Appeal and error ⚷1058(1).

Error, if any, in excluding testimony *held* harmless, where substance thereof was covered in effect by testimony subsequently admitted.

7. Appeal and error ⚷1026.

Error warranting reversal must appear to be prejudicial to extent resulting in miscarriage of justice.

◆

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Charles M. Mix against Finis E. Yoakum and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Wm. Fleet Palmer and Newby & Palmer, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondents.

LEMMON, Justice pro tem., delivered the opinion of the court.

This action was brought to subject real property, alleged to have been fraudulently conveyed by a decedent to defendants, to a claim asserted by appellant against decedent's estate for money held by decedent during his lifetime, in trust for appellant.

Finis E. Yoakum, Jr., and Charles O. Yoakum, defendants, are the sons of Finis E. Yoakum, Sr. The father, on August 2, 1920, executed deeds to his two sons of all real property of which he was then seized, and on the same day executed his last will, in which he named the defendants as executors, and devised and bequeathed his estate to the executors in trust for the Pisgah Home movement. The Pisgah Home movement is an organization for religious purposes, in which the father was deeply interested, and for which he served as pastor. Fifteen days after the execution of the deeds and will, the father died. Thereafter, defendants filed the will for probate, and on April 4, 1921, the will was admitted to probate, defendants were appointed executors, qualified as such, and letters testamentary were issued to them.

Appellant presented to the executors a claim against the estate in the sum of $3,300, with interest thereon. No action having been taken thereon by the executors, appellant brought an action therefor against the defendants as executors. From a judgment dismissing the action an appeal was taken, and the judgment was reversed by the Supreme Court on March 16, 1927. Mix v. Yoakum, 200 Cal. 681, 254 P. 557. The cause was subsequently tried, and judgment was in favor of appellant in the sum of $6,184.31, to be paid in due course of administration. An appeal from that judgment was dismissed on motion by the Supreme Court on June 3, 1930.

The executors having failed to file an inventory in the estate proceeding, appellant caused them to be served with a citation, and in response thereto an inventory was filed by respondent Finis E. Yoakum on March 30, 1929, disclosing assets of $434.19 in cash. Claims, other than the claim of appellant, amounting to approximately the total sum of $30,000, were filed against the estate. The trial court found that the conveyances made by the decedent rendered him insolvent, and that the property of the estate is insufficient to pay appellant's claim.

[1, 2] Appellant attacks the action of the trial court in overruling his motion to enter the default of the defendant Charles O. Yoakum. It appears that service of summons upon this defendant had been sought by publication. Charles O. Yoakum appeared specially, and moved to quash the service of summons upon him. His motion was granted. When an order directing service of summons by publication is inadvertently or improperly made, the court may quash the service of summons had under such order. Wilson v. Leo, 19 Cal. App. 793, 127 P. 1043. Neither the order directing publication of summons nor the affidavit and proceedings which were the basis for that order are embodied in the record before us. In the absence of a record embracing these documents, we must assume that the order quashing the service of summons has sufficient justification.

[3] The value of the real property in question does not appear in the evidence. The testimony discloses, however, that a part of the real property was, at the time of the execution of the deeds, subject to a mortgage in favor of John Hesketh in the sum of $27,860.25, and interest. The court found that this debt was overdue at that time. This finding is attacked as unsupported by evidence. A claim based on this debt was presented and filed in the estate proceeding. The files and record in the estate were admitted in evidence, but the transcript is incomplete, in that it does not contain the claim. We must conclude that the claim disclosed the due date of the debt, and that the trial court there-

fore had before it evidence sufficient to justify the finding. Respondent testified that his father wished him to take charge of the property in order that respondent could protect the indebtedness against the property, with his own credit, and that he told his father he would do this. Respondent further testified that he paid the Hesketh claim after his father's death. We are thus confronted with the main issue in the case as to whether under the facts the deeds were supported by a valuable consideration.

[4, 5] A conveyance, in consideration of the assumption of a mortgage on the property, is based on a valid consideration. There is authority for the proposition that where the property conveyed is of value in excess of the mortgage, an agreement on the part of the grantee to pay the same is not a valuable consideration as against the grantor's creditors. It has been held in this state that the disparity between the value of the property and the incumbrance must be such as to show gross inadequacy of consideration. Hasenjeager v. Voth, 91 Cal. App. 398, 267 P. 146. Fraud is never presumed, and the burden is on the creditor who seeks to avoid the transfer to both allege and prove inadequacy of the consideration. Conversely, the grantee is not required to either allege or prove the adequacy of the consideration. The views here expressed find support in the further cases of Manning v. App. Con. Gold Mining Co., 171 Cal. 610, 154 P. 301; Saunderson v. Broadwell, 82 Cal. 133, 23 P. 36; Gladwin v. Gladwin, 13 Cal. 332; Greenwalt v. Mueller, 126 Cal. 639, 59 P. 137; Carty v. Connolly, 91 Cal. 15, 27 P. 599.

Appellant complains of the trial court's finding that all of the claims presented against the estate, other than his own claim, have been paid by respondent. He is hardly in a position to question this finding because it is directly in accordance with the allegations contained in his complaint. Litigation developed between the Pisgah Home movement and the decedent's two sons, in which it was asserted that the title to the real property in question was received by the sons from the father, and held by them in trust for the Pisgah Home movement. This action was compromised and some of the claims were paid by the Pisgah Home movement, apparently in accordance with the compromise. Suffice it to observe that these claims were in any event indirectly paid by respondent through the compromise effected.

[6] Appellant complains of the court's ruling sustaining objections to questions asked for the purpose of eliciting testimony to establish that the deeds in question and the will were executed by the decedent as part of one transaction. The evidence does disclose that these instruments were all executed on the same day. The circumstances of the execution of the will were subsequently related. The error, if any, is not of such weight as to warrant a reviewing court in disturbing the judgment.

Appellant has noted thirty assignments of error. Several relate to the propriety of the court's rulings upon the admission or rejection of other evidence. We have carefully examined each of these specifications. It would extend this opinion unduly to comment specifically on each of these assignments. In the few instances where the correctness of the court's action is open to question, those instances relate to inconsequential matters which have but an incidental and unimportant bearing upon the final result, and not such as to disturb the judgment appealed from.

[7] Other of the specifications attack certain of the findings. The court found that the father did not know his death was fast approaching at the time of the execution of the deeds; that he was unaware of an indebtedness owing from him to the plaintiff; that years had passed without the plaintiff demanding payment; that the deeds were not executed in contemplation of the grantor's death; that at the date of the deeds the real property was not salable on account of a financial and real estate depression. There is at least some evidence to support most of these findings. All of these findings are rendered unimportant in view of our conclusion that the trial court was warranted in sustaining the transfers under attack as supported by a valid consideration. It must be borne in mind that error constituting ground for reversal must be shown to be prejudicial to an extent resulting in a miscarriage of justice.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

138 Cal.App. 211

BOLE v. LOVEJOY et ux.

LOVEJOY et ux. v. TITLE GUARANTEE & TRUST CO. et al.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. LOVEJOY et al.

Civ. 5034.

District Court of Appeal, Third District. California.
April 23, 1934.

Hearing Denied by Supreme Court
June 21, 1934.

1. Action ⚷59.

Failure to make one set of findings covering consolidated issues *held* not fatal to judgment.

2. Bills and notes ⚷539.

Where answer did not charge fraud, there was no issue on that question on which finding could be made in action on note.

3. Pleading ⚷8(15).

Fraud may not be alleged generally, but ultimate facts constituting fraud should be specifically alleged with reasonable certainty.

4. Trial ⚷395(6).

If facts are sufficiently stated in pleadings, findings by distinct reference thereto may be sufficient, though such practice is not to be commended.

5. Bills and notes ⚷539.

Finding that certain allegations of answer were untrue by reference thereto *held* sufficient to support judgment in action on note, without finding what consideration for note was, where real value of consideration was immaterial.

6. Sales ⚷36.

Purchaser who acquired what he intended to buy cannot resist payment of note given for purchase price, even though what he received was less valuable than he supposed, in absence of fraud.

◆

Appeals from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by J. B. Bole against C. I. Lovejoy and wife, and suit by Charles I. Lovejoy and wife against Title Guarantee & Trust Company and others, were consolidated for trial, and the Security First National Bank of Los Angeles intervened. From an adverse judgment C. I. Lovejoy and wife appeal.

Affirmed.

Mansur & Carleton, of Los Angeles, for appellants Lovejoy.

Marshall Stimson and Noel Edwards, both of Los Angeles, for appellees Bole.

G. W. Burch, Jr., and W. C. Shelton, both of Los Angeles, for intervener Security-First Nat. Bank.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1927, J. B. Bole, respondent herein, and C. I. Lovejoy, appellant, entered into an agreement, wherein Bole sold to Lovejoy all of his right, title, and interest in the Young-Sackett & Company or Guarantee Underwriters Incorporated, together with his interest in certain outstanding contracts. The selling price was evidenced by a promissory note for $2,500 secured by a deed of trust on certain real property in the county of Los Angeles, and the balance of $2,930 by an unsecured promissory note payable on or before one year after date. Some three years thereafter, the notes not having been paid, Bole filed suit against Lovejoy on the unsecured promissory note.

The defendant answered, alleging that there was no consideration for the execution of the note. At about the same time Bole delivered the deed of trust to the Title Guarantee & Trust Company with instructions to foreclose, and pursuant thereto the trust company proceeded to carry out such instructions. Thereupon, Lovejoy commenced an action against Bole and the Title Guarantee & Trust Company for an injunction to prevent the sale under the deed of trust and for the cancellation of the note and deed of trust on the ground the consideration for the note and deed of trust had fully failed.

At the request of counsel for respondent these two actions were consolidated for trial. Upon the hearing of the issues presented, the court found in the action on the unsecured promissory note, that Lovejoy was indebted to respondent for the amount claimed less certain credits, and judgment was entered accordingly. No findings or judgment were entered in the action for injunctive relief.

[1] One of the principal questions here presented by appellant is that, the court having ordered the two causes of action consolidated, findings were necessary to cover all the issues presented by both actions. In the action on the promissory note, as already stated, the court made findings responsive to the issues raised, but made no findings as to the complaint against Bole and the trust company, wherein injunctive relief was asked to

prevent the sale of the real property under the deed of trust.

Courts have heretofore considered the question, and while stating that it is the better practice to have only one set of findings in order to avoid needless repetition of facts common to all the causes and to prevent possible complications and inconsistencies, it is, however, merely a question of good taste and good pleading, and is not in itself cause for reversal. Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 P. 164. So, in the instant case, the failure to make one set of findings covering the consolidated issues is not fatal to the judgment.

[2-5] The next point urged by appellant is that the findings are not sufficient to support the judgment.

To the action on the note, which is in the usual form, the answer alleges in paragraph II: "That the note referred to in the complaint was made and delivered by the defendants to plaintiff to cover the purchase price of certain interests of plaintiff in certain partnerships and corporations which the plaintiff agreed to sell and deliver to defendants." Paragraph III alleges: "That in truth and in fact the said plaintiff had no interest in such partnership or companies at the time of such pretended sale and delivery of any value whatever." It then alleges that defendants received no consideration for said notes and prayed for a dismissal of the action.

On the issues thus presented the court found "that none of the allegations in paragraph III of defendants' answer are true." Appellant insists that this finding merely negatives the allegations of the answer, but does not find what was the consideration for the note, and is therefore, insufficient. As to the insufficiency urged by appellant we cannot agree. The consideration between the parties included "all my right, title and interest in the Young-Sackett & Company and/or Guarantee Underwriters, a corporation." The consideration paid was for any interest that respondents may have had in these concerns.

The answer not charging fraud, there was, therefore, no issue raised on that question upon which a finding could be made. "Fraud may not be alleged generally, but the ultimate facts constituting fraud should be specifically alleged with reasonable certainty." Davis v. Monte, 81 Cal. App. 164, 253 P. 352, 354. Appellant cites Field v. Austin, 131 Cal. 379, 63 P. 692, as supporting his contention. In that case, the answer put in issue the question of fraud, and findings should have been made upon that issue. The trial court took the view that the answer failing to allege a rescission, or to allege damages, could not be regarded as a cross-complaint to rescind or for damages for fraud or deceit; hence, the only defense was a want of consideration. The Supreme Court, however, held the allegations showed more than a failure of consideration but that defendant was damaged and the extent thereof; that upon proof, he was entitled to recoupment against the notes to the amount found by the court. Here we have no allegation or proof of fraud and no demand for recoupment and, therefore, the real value of the consideration is immaterial.

The findings are in accordance with the custom and practice of the courts, that of finding allegations of the complaint or answer to be true or untrue by reference thereto. If facts are sufficiently stated in the pleadings, findings, by distinct reference thereto, may be sufficient. County of San Diego v. Seifert, 97 Cal. 594, 32 P. 644; Reid v. Kerr, 64 Cal. App. 117, 220 P. 688. However, this practice is not to be commended. Davis v. Drew, 58 Cal. 152, 157. Sufficient findings appear to have been made as to the issues before the court and we find no support in the record for the contention of appellant.

[6] As to the further objection of appellant that the evidence does not support the findings and judgment the record seems sufficient therein. One Sackett, Bole, and Lovejoy, prior to the present controversy, had formed a partnership for the carrying on of a general insurance business under the name of Young-Sackett & Company. In 1926, Lovejoy purchased an interest therein. The following year the partnership conveyed its assets to a corporation formed by them under the name of Guarantee Underwriters. In December, 1927, Bole and Lovejoy entered into an agreement whereby Bole sold and transferred to Lovejoy all of his right, title, and interest in and to the Young-Sackett & Company and the Guarantee Underwriters, a corporation, including his interest in and to certain insurance contracts referred to as the "Mitchell-Lloyd" contract for the consideration hereinbefore stated.

The record discloses that the transfer and conveyances were made from Bole to Lovejoy and that Lovejoy entered into possession thereof. The contract between the parties was not formally prepared, but it is apparent Lovejoy acquired from Bole all that the contract called for, namely, all of his right, title, and interest in and to the Young-Sackett & Company or the Guarantee Underwriters, a corporation, including the interest in the insurance contract referred to.

Where, as here, a purchaser acquires what he intended to buy, he cannot resist payment. Harvey v. Dale, 96 Cal. 160, 31 P. 14. As was said in Giovannoni v. Bartmann, 59 Cal. App. 651, 211 P. 844, 848: "Where a party obtained what he contracted for, he cannot avoid his contract on the ground that what he received is less valuable than he supposed or that it has no value at all, unless he shows fraud or mistake as to the subject-matter of the contract." Further, the consideration was the insurance business, and not the value thereof, and there was no mistake as to what Lovejoy was to receive, namely, the interest of Bole in the insurance business. That there was a gross inadequacy of consideration cannot be contended, for appellant, at least prior to the transaction here in question, had an interest in the Young-Sackett & Company, and was one of the incorporators of the Guarantee Underwriters Incorporated, and presumptively familiar with its affairs.

Not only was there no pleading of fraud or mistake, but we find no indication thereof in the record.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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138 Cal.App.176

M. J. RYAN CO. v. BROWN et al.

Civ. 1265.

District Court of Appeal, Fourth District, California.
April 20, 1934.

1. Appeal and error 🔑1170(3).

Granting of permission to file amended answer to conform to proof of fraud after submission of case, but before judgment for defendant in action on sale contract, *held* not reversible error (Const. art. 6, § 4½).

2. Appeal and error 🔑1011(1).

Trial judge's fact finding, supported by evidence, cannot be disturbed on appeal merely because of contrary evidence warranting different conclusion, if believed.

3. Appeal and error 🔑197(7).

Error in admitting testimony supporting defense, not fully pleaded until subsequent filing of amended answer, *held* unavailable to plaintiff on appeal, where both parties introduced evidence on such issue and plaintiff made no request to reopen case after filing of defendant's last pleading.

4. Appeal and error 🔑994(3), 1012(1).

Judge, trying case without jury, is judge of witnesses' credibility and weight and sufficiency of evidence.

5. Appeal and error 🔑1170(7).

Appellate court cannot set aside judgment in accordance with all evidence on one side of issue because of conflicting evidence in record, unless error in admitting evidence for respondent resulted in miscarriage of justice (Const. art. 6, § 4½).

◆

Appeal from Superior Court, Kings County; Allan B. Campbell, Judge.

Action by the M. J. Ryan Company, a corporation, against Jennie L. Brown, sometimes known as Mrs. W. S. Brown, and another. From a judgment for named defendant, plaintiff appeals.

Affirmed.

H. A. Savage and V. D. Manville, both of Fresno, for appellant.

John F. Pryor and John G. Covert, both of Hanford, for respondent.

MARKS, Justice.

Appellant M. J. Ryan Company brought this action to recover $1,300 principal, interest, and attorneys' fees on an executory contract of sale of a tractor signed by defendant M. D. O'Dell and respondent Jennie L. Brown. Defendant defaulted. Respondent filed an answer which attempted to set up the defense of fraud but lacked some essential averments. The case went to trial on these pleadings, and the trial court permitted respondent to introduce evidence of fraud over the objection of appellant. At the close of the evidence, respondent asked leave to file an amendment to her answer to conform to the proofs. There was no ruling on this request, and the case was submitted. Later, and before judgment, respondent gave notice of a motion asking leave to file an amended answer to conform to the proofs. This was duly served, together with a copy of the amended answer. The motion was made and granted and the pleading filed. Appellant did not appear at the time of the motion and made no request to have the case reopened. The trial court's findings upheld the defense of fraud, and judgment was rendered for respondent.

[1] Appellant urges that it was reversible error to permit the filing of an amended answer. This contention is disposed of in the case of Richards v. Tavares, 105 Cal. App. 261, at page 269, 287 P. 552, 556, where it is said: "The allowance of amendments to conform to the proofs rests in the discretion of the trial court. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44. Such amendments may be allowed after the submission of the cause (Lee v. Murphy, 119 Cal. 364, 51 P. 549, 955; Hancock v. Board of Education, supra; Myers v. Holton, 9 Cal. App. 114, 98 P. 197), and are deemed denied (Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784). In the case at bar a copy of the amendment was served on the day the same was filed, and on February 9, 1928, the order for judgment was entered. The findings and judgment, however, were not filed until February 28, 1928. No request that the cause be reopened for the purpose of permitting the defendant to produce further evidence on the question presented by the amendment was made in the meantime, and it is not contended that all the facts relevant to the issue were not adduced at the trial. Before it can be held that the allowance of such an amendment was an abuse of discretion, it must be shown that the adverse party has been prejudiced thereby (McClure v. Alberti, 190 Cal. 348, 212 P. 204), and no reasonable ground for this conclusion appears in the present case. No judgment can be set aside for error in any matter of procedure unless after an examination of the entire record the court shall be of the opinion that the error complained of resulted in a miscarriage of justice. Const. art. 6, § 4½."

[2] Appellant contends that the evidence was such that it was entitled to judgment as a matter of law. This is but another way of saying that the findings are not supported by any evidence and are contrary to the evidence. We have examined the record and find the evidence in sharp conflict on the question of fraud. The evidence submitted by respondent amply supports the finding that fraud had been committed. This evidence was believed by the trial judge, who found in accordance with it. This finding cannot be disturbed on appeal simply because contrary evidence, if taken as true, would have supported another conclusion than that reached by the trial judge. Conflicts in the evidence are settled in the trial court and cannot furnish grounds for a reversal of the judgment where, as here, it is supported by material and competent evidence, even though such evidence did not become material and competent until after the amended answer was filed.

[3] Appellant urges that the trial court erred in overruling his objections to questions which sought to elicit testimony supporting the defense of fraud. His position is technically correct, as this defense was not fully pleaded until the amended answer was filed. The trial court permitted both parties to introduce evidence on that issue. Appellant made no request to have the case reopened after respondent's last pleading was filed. We may therefore assume that he was satisfied with the evidence before the court on this issue.

[4, 5] Since the adoption of section 4½ of article 6 of the Constitution, we cannot set aside a judgment on the ground of the improper admission of evidence until, after an examination of the entire cause, including the evidence, we form the opinion that the error complained of has resulted in a miscarriage of justice. We have studied the record and have formed no such opinion. The testimony is flatly conflicting on the question of fraud. A greater number of witnesses supported the theory of respondent on this issue. While the number of witnesses testifying on one side or the other in a trial is never controlling, the trial judge believed those produced by respondent. The reading of the record shows nothing that would indicate a greater probability of truth in one side than the other. The trial judge had the advantage of seeing the witnesses on the stand, of observing their demeanor and manner of testifying. He is the judge of the credibility of the witnesses and the weight and sufficiency of the evidence. It is his duty to pass on a conflict in the evidence, and, he having done so and rendered a judgment in accordance with all of the evidence on one side of an issue, we cannot say that there has been a miscarriage of justice because there is conflicting evidence in the record, where, as here, the evidence seems to preponderate in favor of the successful party.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

138 Cal.App. 80

In re GUGLIELMI'S ESTATE.

ULLMAN v. GUGLIELMI et al.

Civ. 9321.

District Court of Appeal, First District,
Division 2, California.

April 17, 1934.

Hearing Denied by Supreme Court
June 14, 1934.

1. Executors and administrators 🔑103.

Losses from executor's authorized investment of testator's funds must be borne by estate, but losses from unauthorized investments are executor's.

2. Executors and administrators 🔑106.

Decree requiring executor to account for amounts lost on loans, attacked solely as made without court order or sufficient surety, not for fraud or mismanagement, *held* erroneous.

3. Executors and administrators 🔑93(2).

Executor and testamentary trustee, directed by will and testator's instructions to continue corporation bearing testator's name, hold, manage, and control trust property and keep it invested and productive, *held* authorized to carry on testator's business, and hence not chargeable with losses from loans made in course thereof, in absence of fraud.

4. Executors and administrators 🔑93(2).

Losses incurred by executor in operation of business of family corporation organized by testator, if authorized by will, were not chargeable to executor, in absence of fraud or mismanagement.

5. Executors and administrators 🔑497.

Extraordinary fees are allowed executor within probate court's discretion, and testator's estate is not obligated to pay more than statutory fees, in absence of such allowance.

6. Executors and administrators 🔑497.

Executor, withdrawing funds of testator's estate to pay himself fee in addition to amount allowed by statute, must be charged amount thereof, with interest from date of withdrawal.

7. Executors and administrators 🔑507(1).

Propriety of executor's advances on distributive shares under will cannot be determined on hearing of settlement of executor's account, but only on hearing of petition for partial or final distribution.

8. Executors and administrators 🔑315(9).

Declaration in decree, denying partial distribution, that executor's advances to distributees in excess of monthly payments directed by will were improper and chargeable to executor because of previous decree settling his account, *held* sufficient determination that such advances were improper and hence chargeable to executor.

9. Executors and administrators 🔑301.

Executor, making advances solely from net income derived from his management of testator's estate to beneficiaries entitled to such income, should not be charged in full therefor nor with interest thereon.

10. Executors and administrators 🔑301.

Executor, accountable to testator's estate for amounts advanced by him in good faith to beneficiaries under will at their solicitation, should be given appropriate lien against their beneficial interest in estate.

* * *

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Rodolpho Guglielmi, also known as Rudolph Valentino, deceased. From an order settling the account current and report of S. George Ullman, executor, over the objections of Alberto Guglielmi, the Bank of America National Trust & Savings Association, administrator with the will annexed, and others, and an order denying the administrator's petition for partial distribution, the executor appeals.

Reversed.

Newlin & Ashburn and Gwyn Redwine, both of Los Angeles, for appellant.

Scarborough & Bowen and McGee & Sumner, all of Los Angeles, for respondent Bank of America National Trust & Savings Ass'n.

NOURSE, Presiding Justice.

Appeals were taken from an order of the probate court settling the account current and report of the executor and from an order denying a petition for partial distribution. Both appeals are presented on the same typewritten transcripts.

Rodolpho Guglielmi, also known as Rudolph Valentino, a motion picture actor, died testate August 23, 1926. On October 13, 1926, the appellant herein was appointed executor, and thereupon entered upon the administration of his estate. The pertinent portions of the decedent's will, which was duly admitted to probate, provide:

"First: I hereby revoke all former Wills by me made and I hereby nominate and appoint S. George Ullman of the city of Los Angeles, County of Los Angeles, State of California, the executor of this my last will and testament, Without bonds, either upon qualifying or in any stage of the settlement of my said estate.

"Second: I direct that my Executor pay all of my just debts and funeral expenses, as soon as may be practicable after my death.

"Third: I give, devise and bequeath unto my wife, Natacha Rambova, also known as Natacha Guglielmi, the sum of One Dollar ($1.00), it being my intention, desire and will that she receive this sum and no more.

"Fourth: All the residue and remainder of my estate, both real and personal, I give, devise and bequeath unto S. George Ullman, of the city of Los Angeles, County of Los Angeles, State of California, to have and to hold the same in trust and for the use of Alberto Guglielmi, Maria Guglielmi and Teresa Werner, the purposes of the aforesaid trust are as follows: to hold, manage, and control the said trust property and estate: to keep the same invested and productive as far as possible; to receive the rents and profits therefrom, and to pay over the net income derived therefrom to the said Alberto Guglielmi, Maria Guglielmi and Teresa Werner, as I have this day instructed him; to finally distribute the said trust estate according to my wish and will, as I have this day instructed him."

The instructions referred to in paragraph 4 of the will are as follows:

"To S. George Ullman.

"I have this day named you as executor in my last will and testament; it is my desire that you perpetuate my name in the picture industry by continuing the Rudolph Valentino Productions, Inc., until my nephew Jean shall have reached the age of 25 years; in the meantime to make motion pictures, using your own judgment as to numbers and kind, keeping control of any pictures made, if possible.

"Whenever there are profits from pictures made by the Rudolph Valentino Productions, Inc., it is my wish that you will pay to my brother Alberto the sum of $400.00 monthly, to my sister Maria the sum of $200.00 monthly, and to my dear friend Mrs. Werner the sum of $200.00 monthly.

"When my nephew Jean reaches the age of 25 years, I desire that the residue, if any, be given to him. In the event of his death then the residue shall be distributed equally to my sister Maria and my brother Alberto.

"Rodolpho Guglielmi
"Rudolph Valentino."

In due time the probate court decided that these instructions were made contemporaneously with the will and became a part of the execution of the will, also that the will and the instructions taken together constituted the full terms of the trust created by the will.

Notice to creditors was given, and all claims were paid or settled or had become barred when the account was filed. The inventory and appraisal filed April 13, 1927, showed real and personal property amounting to $244,033.15. A supplementary inventory and appraisal filed January 9, 1928, showed additional real and personal property amounting to $244,550 or a total estate of over $488,000.

On February 28, 1928, appellant filed his first account as executor, to which objections were made by Alberto Guglielmi and Maria Guglielmi Strada, the brother and sister of deceased. Proceedings for the settlement of this account were abandoned. On April 5, 1930, appellant filed a new first account to which objections were made by the same parties, but were not heard. On June 7, 1930, appellant filed his resignation as executor, which was accepted, and the respondent Bank of America was appointed administrator with the will annexed. On August 18, 1930, appellant filed a supplemental account, to which the administrator filed objections, including the objections made by the brother and sister to the former accounts. These accounts, with the objections of the administrator and of these heirs, came on for hearing on November 5, 1930, and on August 8, 1932, the probate court made the decree from which this appeal is taken.

In the course of this hearing, the question arose as to the legality of advances made by appellant to the brother and sister of the deceased and to another beneficiary of the will, and, on the suggestion of the court, a petition for partial distribution was filed by the administrator. On the hearing of that petition, the probate court found that the decedent left surviving him as his only heirs at law Alberto Guglielmi and Maria Guglielmi Strada; that the only persons entitled to benefit from the trust created by the will were said heirs, Teresa Werner, and Jean Guglielmi; that the questions relative to the advances made to three of the above beneficiaries were determined by the decree settling the account entered contemporaneously with this account; and that, because of the condition of the estate, no partial distribution should be decreed.

During his lifetime the decedent had been engaged in various activities in addition to his work as an actor. He was interested in the production and development of pictures under the corporate name of Rudolph Valentino Productions, Inc., which, however, was but an alter ego. He was engaged in the exploitation of chemical discoveries under the corporate name of Cosmic Arts, Inc. He was also sole owner of a cleaning business under the name of Ritz, Inc. In March, 1925, decedent made a contract with a motion picture producer under which he agreed to give his services as a motion picture actor to that producer exclusively. In April, 1925, he assigned his interest in the profits under this contract to Cosmic Arts, Inc. In August, 1925, Cosmic Arts, Inc., assigned its interest in this contract to Rudolph Valentino Productions, Inc. The stockholders in Cosmic Arts, Inc., were the decedent, Natacha Rambova, his wife, and Teresa Werner, his wife's aunt. Though these three corporations were separate entities, the decedent for a long time prior to his death conducted the affairs of all three under the ostensible name of Rudolph Valentino Productions, Inc., making all expenditures through the latter, with little regard for the corporate identity of the other two concerns. During this period, the appellant served in the capacity of business manager and personal representative of the decedent; superintendent of Ritz, Inc.; secretary, treasurer, and director of Cosmic Arts, Inc.; and manager of Rudolph Valentino Productions, Inc., his compensation for all these services being paid by Rudolph Valentino Productions, Inc.

Immediately upon his qualification as executor, and acting upon the asserted authority of the will to continue the Rudolph Valentino Productions, Inc., for the purpose of perpetuating the name of deceased, the appellant entered upon the management of all these concerns in the same manner in which they had been conducted in the lifetime of the decedent. In these transactions the appellant, seemingly acting as the executor of the estate rather than as trustee under the will, paid all claims outstanding against the decedent, personal as well as those incurred by the corporations mentioned. The exact figures covering these expenditures are not material to this inquiry, but the appellant emphasizes the fact that as executor he took an estate which was heavily involved financially and practically bankrupt, and through his management all indebtedness was cleared and the property of the estate was increased in value to $890,000.

In the course of the conduct of these activities, the appellant borrowed and loaned money, executed mortgages and retired existing liens, purchased new property to be used in the business, and sold property belonging to the estate. To obtain publicity to aid in the display of the decedent's pictures, two spectacular funerals were held—one in New York and one in Los Angeles—and Valentino Memorial Clubs were organized in many different centers. Because of the financial condition of the estate at the time, these expenditures were paid largely from money borrowed by the executor on his personal obligations, and all, or nearly all, were made without an order of court. When funds accumulated through the distribution of pictures, the appellant made loans, some with security and some without. In September, 1927, he loaned one Mae Murray $22,000 at 7 per cent. In March, 1928, he loaned the Pan American Company $50,000 at seven per cent., secured by Pan American Bank stock of the then value of $78,000; at various times during the year 1928 he loaned one Frank Menillo $40,000 at 8 per cent. The Murray loan was repaid. The Pan American loan was compromised at a loss of $16,000 to the estate, with which amount appellant was charged to account with interest on the full amount of the loan. The Menillo loan was unpaid at the time of the entry of the decree herein, and appellant was charged to account in full with interest.

[1, 2] The ruling of the probate court on these two items presents the principal ground of attack upon the decree. If appellant was authorized to carry on the business of the decedent, to invest and reinvest the funds in his hands, then any losses arising from these transactions must be borne by the estate. If he was not so authorized, the losses are his. The question of the right of an executor to carry on the business of the deceased when so directed by the testator first came directly before our appellate courts in Estate of Ward, 127 Cal. App. 347, 15 P.(2d) 901, a case which was decided after the decree herein was entered. In that case Judge Ames, sitting pro tempore in the appellate court, carefully reviewed the authorities, and concluded that, in the absence of fraud or mismanagement, an executor should not be charged with losses while he is following out the instructions of the testator. Numerous authorities from other jurisdictions are cited by Judge Ames, to which reference may be had in that opinion. This distinction between the two cases should be noted—here all these loans were made from profits of the estate accumulated by the executor; in the Ward Case the losses were in the principal. The conclusions there reached compel a reversal of the decree as to the Pan American and Menillo loans because they were attacked on the sole ground that they

were made without order of court or without "sufficient" surety, but were not attacked upon any charge of fraud or mismanagement.

[3] The dual capacity of the executor and trustee involved in this appeal is the same as that considered in the Ward estate, where the court, after reviewing authorities on that subject, held that, taking the will as a whole, it could not have been the intention of the testator to suspend operations of the business during the period of time required for the administration of the estate and the appointment of a trustee. The case here is even stronger than the will interpreted in the Ward Case, because the instructions of the testator to the trustee are so blended and mingled that they could scarcely be separated the one from the other. The directions to the executor to "perpetuate my name in the picture industry by continuing the Rudolph Valentino Productions, Inc.," and the directions, to the trustee "to hold, manage, and control the said trust, property, and estate; to keep the same invested and productive as far as possible," disclose an intention of the testator to treat the executor and trustee without the legal distinction that a court would draw between the two offices.

For these reasons we conclude that the executor was both authorized and directed by the will to carry on the business of the decedent as it had been carried on in his lifetime, and that the investments made by him through loans to the Pan American Company and to Menillo were made in the course of the operation of that business, and, being without fraud, the appellant should not be charged for the losses occurring therefrom, nor should he be surcharged with interest on account of any investments made in his management of the estate.

[4] The probate court charged appellant with an item of $17,280.19 expended by him in compliance with a contract of Cosmic Arts, Inc. This item presents an issue closely related to that just discussed. Cosmic Arts, Inc., was a family corporation organized by the deceased. Ten shares of stock were issued, all in the name of Natacha Rambova, the then wife of the decedent. One of these shares was transferred to her aunt, another to the decedent, and the three were the directors. Decedent resigned from the directorship and had the appellant appointed in his place. While the latter was acting as director and treasurer of the corporation and under the authority of the by-laws, he executed a contract with one Lambert obligating the corporation to bear any and all expenses in connection with the patenting, sale, and exploitation of patents covering a chemical discovery called Lambertite. For a considerable period prior to his death, the affairs of this corporation were conducted by the decedent as his alter ego, acting through the appellant as his personal manager in very much the same manner as the affairs of the Rudolph Valentino Productions, Inc., were conducted. The contract referred to was apparently ratified by the corporation, and the expenses of the corporation were paid by the decedent, not only in connection with the patenting of the process, but in the conduct of the laboratory in New York City for the development of the process. Upon his qualification as executor the appellant continued to pay these expenses, amounting to a total of over $19,000 and so accounted to the estate. In the hearing of the objections to this item, the appellant contended that the entire stock of the corporation had been transferred to the decedent through a property settlement made at the time of the separation with his wife, but the separation agreement was not produced. The contract with Lambert was received in evidence, and from this the probate court found that Cosmic Arts, Inc., was entitled to one-third of the profits resulting from the sale and exploitation of the patents, and that therefore it was liable for but one-third of the expenses incurred in the patenting, sale, and exploitation of the process. Upon this theory it was concluded that the decedent and his estate were liable for but one-ninth of these expenses, basing this conclusion solely upon the theory that Cosmic Arts, Inc., was a family corporation organized by the decedent, his wife, and his wife's aunt, in which the decedent had a one-third interest.

The evidence on this issue is in such an unsatisfactory state that it is impossible at this time to determine the issue. It is manifest that it was tried by the probate court without the benefit of the decision in the Ward Case, and that, if the facts justify the contention of the appellant that Cosmic Arts, Inc., was also an alter ego of the decedent, the business of which appellant was authorized by the will to carry on under the will, then such losses incurred by appellant in the operation of that business as may be found to have been incurred without fraud or mismanagement must, under the rule of the Ward Case, be held to be the losses of the estate and not of the appellant. For these reasons this issue should be retried.

[5, 6] Appellant, complains of the ruling of the probate court surcharging him with interest on the full amount of moneys withdrawn by him on account of his fees for extraordinary services in advance of an order of court authorizing any fee for such services. The evidence discloses that during his period of administration the appellant withdrew from the funds of the estate sums aggregating $22,300, for which he asked credit in the settlement of his account upon the basis of extraordinary services rendered the estate. The probate court disallowed the item and charged appellant to account for interest at the rate of 7 per cent. from the time of each withdrawal. It then allowed the appellant an additional fee for extraordinary services fixed at $15,000. The appellant now argues that this sum should be subtracted from the total amount withdrawn, and that he should be charged to return to the estate the difference, amounting to $7,300, and should be charged interest on that amount only. Authorities cited by the appellant relating to statutory fees to which an executor is entitled as matter of right do not apply to a case of this kind. Extraordinary fees are allowed an executor within the discretion of the probate court, and, unless and until an order is made, there is no obligation on the part of the estate to pay more than the statutory fees. Hence, when an executor upon his own motion withdraws the funds of an estate to pay himself fees in addition to the amount allowed by statute, he is to be charged with the amount thereof, with interest thereon from the date of withdrawal. Estate of Piercy, 168 Cal. 755, 757, 145 P. 91.

[7, 8] It is next contended that the court erred in holding the appellant liable for the advances to the brother and sister of the decedent and to Teresa Werner on account of what he deemed to be their distributive shares of the estate. The court found in its decree settling the account that the executor improperly and without authority or order of court advanced to decedent's brother over $37,000 out of the funds and property of the estate; to the decedent's sister over $12,000 in cash and personal property; to Teresa Werner over $7,000 in cash; and to Frank A. Menillo at various times and in various amounts an aggregate sum of $9,100. Having ruled during the hearing on the settlement of the account that it was not competent for the court in that proceeding to determine questions of heirship, and having directed a special proceeding to be instituted for that purpose, the court, contemporaneously with the entry of its decree in the settlement of the account, entered its decree in the other proceeding wherein it was found that the brother and sister were the only surviving heirs at law of the decedent, and that the only persons entitled to benefit under the will were the brother, the sister, Teresa Werner, a stranger, and Jean Guglielmi, a nephew of decedent. It will be recalled that under the terms of the instructions the brother, the sister, and Mrs. Werner were each to receive a stipulated sum monthly until the nephew, Jean, reached the age of 25 years, when the residue was directed to be given to him; that, in the event of the death of the nephew, the residue was to be distributed equally between the brother and sister. It is apparent from these provisions of the will that Teresa Werner was entitled to participate in the assets of the estate only to the extent of a monthly payment out of profits which the executor derived from pictures made under his direction, and that the brother and sister were entitled to a distributive share in the estate only in the event of the death of the nephew, Jean. It necessarily follows that advancements made to these individuals in excess of the monthly payments directed by the will were improper. The appellant does not question this final result, but does criticize the method by which the court expressed its conclusion. In its decree in the proceeding for partial distribution, it declared the issues relative to these advances had been determined by its decree correcting and settling the account of the executor, and that by reason of the foregoing decree said advances "are hereby declared to be void and improper and chargeable to said executor herein." It is true, as argued by the appellant, that the issue covering the propriety of advances on distributive shares is not one which may be determined on a hearing of a settlement of the executor's account, but that such issue can be determined only upon a hearing for distribution, partial or final. 12 Cal. Jur. 181. We are not, however, in accord with appellant's view that the court was in error so far as it went. Though reference is made in its decree to the order settling the account, there is sufficient in the decree denying distribution to constitute a determination that these advances were void and improper and as such chargeable to the executor.

[9, 10] There are certain equities involved in this issue which require comment. In the will proper, which was admitted to probate in October, 1926, the executor was directed to hold all the property in trust "to keep the same invested and productive as far as pos-

sible and to pay over the net income derived therefrom" to Alberto and Maria Guglielmi and to Teresa Werner. Four years later, the appellant, in answer to the petition for partial distribution, came into court and for the first time set forth a copy of the written instructions which he alleged had been executed contemporaneously with the execution of the will and which he alleged had been lost, destroyed, or surreptitiously removed from the personal effects and safe of the decedent. In the decree entered in that proceeding the probate court found this to be a true copy of the original instructions executed by the decedent, and declared that said instructions should be taken together as the complete terms of the trust created by the will. Under the terms of these instructions, the appellant was directed to pay to Alberto Guglielmi $400 a month, to Maria Guglielmi $200 a month, and to Mrs. Werner $200 a month out of the "profits from pictures made by the Rudolph Valentino Productions, Inc." Then for the first time the nephew, Jean, is mentioned, and to him is given the entire residue when he reaches the age of 25 years. This is followed by the proviso that in the event of his death the residue should be distributed equally to Alberto and Maria. It will be noted that under the terms of the will proper the appellant was directed to pay over to Alberto and Maria and to Mrs. Werner the net income derived from the estate as a whole, whereas under the terms of the written instructions he was directed to pay stipulated amounts monthly to each of the three from profits from pictures made by the Rudolph Valentino Productions, Inc. It does not appear from the record who was responsible for the loss of the written instructions following the decedent's death nor whether the appellant had any information or knowledge of their terms prior to the advancements he made to these three. It does appear that all these advances were made with the consent and at the solicitation of the three beneficiaries involved. We are in accord with the holding of the probate court that these advances were improperly made if the terms of the written instructions are held to be controlling over the terms of the fourth paragraph of the will proper and if these advances are held to have been made from funds other than the net income derived from the estate as a whole. Under the rule of Estate of Willey, 140 Cal. 238, 73 P. 998, this is an issue which cannot be tried or determined in the proceeding for the settlement of the account, but is one which could have been determined on the proceeding for partial distribution. The proper practice is as outlined in the Willey Case to retire from the consideration of the settlement of the account the question of the propriety of advances of distributive shares so that that question can be determined on distribution of the estate. The record on the petition for distribution does not disclose that this question was fully tried and determined. Manifestly, if these three beneficiaries were entitled to the net income derived from the management of the estate as a whole, and if the advances made to them by the appellant were from that net income alone, he should not be charged to account to the estate in full for those advances or for interest as if he had defaulted or misapplied the funds to his own use. On the other hand, if, upon final distribution, it be found that the nephew is dead and that the brother and sister are then entitled under the will to the entire residue, then the amounts advanced to them by the appellant may be held to have been advanced on account of their distributive shares, and appellant would be entitled to a credit accordingly. These considerations were undoubtedly in the contemplation of the probate court when, in rendering its decree denying partial distribution, it found that it was unable to determine whether there would be sufficient funds or property to distribute to the trustee or to permit the trust to be executed and performed, and for that reason reserved its determination of the ultimate practicability of the trust until the final distribution of the estate. But, in any event, if these advances were made in good faith and at the solicitation of the beneficiaries, and appellant is held to be accountable to the estate in full therefor, he should be given an appropriate lien against the beneficial interest of those who participated in the advancement of the property and funds of the estate. In re Moore, 96 Cal. 522, 31 P. 584; Finnerty v. Pennie, 100 Cal. 404, 407, 34 P. 869; Estate of Schluter, 209 Cal. 286, 289, 286 P. 1008.

Though the appellant has not assigned any special error for the reversal of the order denying partial distribution, the equities herein referred to impel a reversal, so that both matters may be before the probate court for new proceedings consistent with the views herein expressed.

The orders appealed from are both reversed.

We concur: STURTEVANT, J.; SPENCE, J.

138 Cal.App. 202

HAND et al. v. CARLSON et al.

Civ. 4872.

District Court of Appeal, Third District, California.

April 23, 1934.

Rehearing Denied May 23, 1934.

Hearing Denied by Supreme Court June 21, 1934.

1. Waters and water courses 🔑152(8).

In action to determine right to appropriate water of stream, evidence supported finding that plaintiffs and their predecessors in title had since 1861 continuously appropriated and beneficially applied upon their land 63 miner's inches of summer flow and 10 inches of winter flow of water.

2. Waters and water courses 🔑145.

Change in use of water from mining to agricultural use did not impair vested right to appropriate water.

3. Waters and water courses 🔑152(8).

In action to determine right to apppropriate water of stream, evidence did not establish that defendants diverted all of summer flow of water at point above place of diversion by plaintiffs.

4. Appeal and error 🔑175.

In action to determine right to appropriate water from certain stream where issues did not raise or trial court consider question of plaintiffs' right to store winter water, question would not be considered on appeal.

5. Waters and water courses 🔑52.

In action to determine right to appropriate water from certain stream, defendants could not object to plaintiffs' storage of winter flow of water where plaintiffs' reservoirs were below defendants' lands, and combined use of natural flow and accumulated winter flow of water was not excessive for plaintiffs' use.

6. Waters and water courses 🔑51.

Riparian owner had right to natural flow of water, and could prevent others from storing water for future nonriparian use.

7. Waters and water courses 🔑21.

Where title to school section on which water was diverted for use on other lands passed to state before federal government recognized appropriation of water on public land, state's recognition of appropriation while it retained title rendered appropriation effectual, and hence grantees of school section took subject to appropriation (Act Cong. March 3, 1853, § 6 [10 Stat. 246]; St. 1871–72, p. 622; Civ. Code, § 1410 et seq.).

8. Appeal and error 🔑119, 873(1).

Order on motion to retax costs made after rendition and entry of final judgment is appealable as "special order," and is not reversible on appeal from judgment.

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

9. Courts 🔑116(1).

Trial court has inherent power to correct its record so that it conforms to actual facts.

10. Appeal and error 🔑873(1).

Where court struck items in plaintiffs' memorandum of costs on defendants' motion to retax costs, but through clerical error inserted full amount of costs claimed by plaintiffs, remedy of defendants was by application to trial court to correct error.

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Charles E. Hand and others against A. Carlson and others. From an adverse judgment, defendants appeal.

Affirmed.

White, Miller, Needham, Harber & Mering, of Sacramento, for appellants.

Treadwell, Van Fleet & Laughlin, of San Francisco, and Charles L. Gilmore, of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiffs to have it decreed that they are entitled, by prior appropriation, to the waters of a stream in the county of El Dorado know as Johnson's north canyon. This stream rises to the east of all of the lands here involved and flows into the south fork of the American river at a point below all of the lands and points of diversion herein referred to. The flow in Johnson's north canyon is, like that of many of the streams in the foothills of California, variable, and, while early in the spring carries a considerable amount of water, it diminishes rapidly with the progress of the season, so that in the dry summer months, when water is most needed for irrigation, there is but a limited volume in the stream.

The judgment herein establishes a joint right by appropriation in the three plaintiffs in 63 miners' inches of the natural flow of the waters of Johnson's north canyon during the period of each year from the 15th day of April to the 1st of November and a winter use of 10 inches during the period from November 1st to April 15th, the 63-inch right being subject only to a first right in the Hoys to the use of 8 inches of water, 2 inches for irrigation under a certain ditch, 2 inches for domestic purposes, and 4 inches as booster water to be returned immediately to the stream to operate a hydraulic ram. The rights of Carlson, Bradshaw, and Phillips in the water of north canyon, who had constructed a dam and sump in the bed of the canyon and were pumping water therefrom to their orchards, are made subordinate to the right of plaintiffs in the 63 inches. The court also established certain riparian rights of John P. Cleese.

This appeal is from the judgment, and is taken by all of the defendants, and as grounds therefor they claim the original appropriation of plaintiff, if any, has been abandoned; that defendants Hoy and their predecessors diverted all of the summer flow of the water in question through their ditch, and therefore the evidence does not support the claim of plaintiffs to a preferential right in the water. Appellants also contend that plaintiffs' appropriation was not made on the public domain, and therefore is not superior as against upper riparian lands subsequently patented. Appellants also attack the decree giving plaintiff Cleese riparian rights in the flow of the stream, and question also certain items of cost.

The initial appropriation of the waters of Johnson's north canyon was by J. C. Johnson, the earliest predecessor in interest of plaintiffs Sarah Celio and Charles E. Hand, who in 1861, for the purpose of mining his lands, constructed a ditch leading out of the north canyon, across the Maxwell ranch now owned by John P. Cleese, to the Johnson ranch, now owned by Celio and Hand.

In 1864, Michael Maxwell, the earliest predecessor of John P. Cleese, was granted the right by Johnson to take water from the Johnson ditch for irrigation and agriculture only in return for a right of way and for his assistance in reconstructing the ditch.

The common point of diversion of the appropriative claim of the plaintiff and their predecessors, which the court found was begun in 1861, is in section 36, township 11 north, range 11 east, Mount Diablo base and meridian. By Act of Congress March 3, 1853 (10 Stat. 246, § 6), the sixteenth and thirty-sixth sections of each township of the public lands in California were granted to the state for school purposes. These lands were not immediately surveyed, and it was not until May 4, 1871, that this particular section 36 was surveyed. The land of Carlson, lying in section 6 and upstream on the west branch of Johnson's north canyon, above the point of diversion of plaintiffs, was filed on subsequent to 1861, but some years prior to 1871. The land of Phillips and Bradshaw lies in section 5 and still further up stream, and was filed on in 1870 and patent issued thereon in 1882.

This becomes important, in that defendants here contend that, under the act of Congress to which we have just referred, title to section 36 passed to the state of California immediately, or at least section 36 was no longer a part of the public domain of the United States after the act of 1853. On the other hand, it is the claim of plaintiffs that title did not pass to the state of California until the time of actual survey. Under the provisions of an act of Congress of 1866, all appropriations of water on public lands then effective (1866) were recognized, and a subsequent patentee of the lands took subject to the appropriation. Therefore, if title to section 36 passed to the state of California at the date of the passage of the act in 1853, the subsequent act of 1866 (14 Stat. p. 253, § 9) confirming existing appropriations on the public domain would here be of no effect; but if, as claimed by plaintiffs, section 36 remained a part of the public domain until finally surveyed in 1871, then the act of 1866 would inure to the benefit of plaintiffs.

The trial court found that the original appropriation by the predecessor of plaintiffs began in 1861 and ever since that time plaintiffs and their predecessors have continuously appropriated and beneficially applied 63 inches of the summer flow of said waters upon their lands.

Let us first examine this questioned finding. In determining the amount of water appropriated by the early users, we must expect to find in practically all cases, and this case is no exception, a considerable amount of vagueness and uncertainty. The evidence comes from the lips of witnesses advanced in years who are testifying as to conditions extending back many years; they are often giving their boyhood recollection of conditions that probably at that time made no particular impression upon their minds; the capacity of the ditches and the volume of water flowing therein, the times and nature of use, the dates of construction and changes of improvements and conditions. However, it seems to be quite clearly established in this case that the ditch diverting the water from Johnson's north canyon was constructed in 1860, passing through the Maxwell ranch to the Johnson ranch, where mining was being carried on. At that time the winter flow was in excess of 100 inches, and during the summer it varied from 35 inches or 40 inches to as low as 10 inches.

Its earliest use was for mining on the Johnson ranch, with a small amount diverted for a family garden and domestic use. On the Maxwell ranch the use was restricted to agricultural and domestic use, and it appears that, as the mining operations ceased on the Johnson ranch, more and more of the water was diverted to the Maxwell ranch for the agricultural and domestic uses of that property. Mining ceased about 1884, although it was testified that the Chinese continued to mine until about 1889, although the amount of water then used is not given.

George Johnson, one of the witnesses, testified that he knew the ditch in question since its construction in 1860 and that it had remained the same size throughout the period of time with which he was acquainted. He was not able to state the quantity of water in inches, but he did state that in the wintertime the full capacity of the ditch was carried for mining operations and that in the summer time the entire flow of the canyon was diverted into the ditch for their irrigation and household use. Other witnesses testified that a garden was maintained on the Johnson place and that a meadow was flooded in order to produce a crop of meadow hay. On the Maxwell or Cleese ranch the water was used for domestic and agricultural purposes, the watering of live stock and the production of meadow grass, and irrigation of a small orchard.

In the early history of the community but few orchards were planted, but from time to time additions were made to the small family orchard on the Cleese ranch until about 1920, when large plantings were made, and there are now approximately 13,000 fruit trees under cultivation.

As to the capacity of the ditch and the amount of water available and used, the record discloses that the volume varied from a flow in excess of 100 inches in the early spring to an amount varying from 25 inches to 10 inches in the summer, and sometimes in September it would diminish to a point where there would not be sufficient water at the head of the ditch to reach the Johnson or Maxwell ranches in the afternoon. As to the capacity of the ditch, we have testimony from several witnesses that the size remained the same from its original construction to the date of trial, except perhaps a certain wooden flume which certain witnesses testified might have at one time been larger than at the time of trial. To convert the capacity of the ditch in terms of miners' inches, plaintiffs called an expert who measured the flow and capacity of the ditch and flume and found the ditch would divert and carry 96 miners' inches and that the flume would carry 67 miners' inches. As to the use to which the water was put, the record discloses in the early history of the canal the water was used primarily for mining. Apparently hydraulic was the method used as long as the seasonal flow permitted, but whether other methods were employed the record does not disclose. In addition to this seasonal use, the water was also used during the winter months for domestic purposes and for the watering of live stock on the Johnson and Maxwell ranches, the need for which requiring from 8 to 10 inches of water during the winter months. Also water was applied to certain meadow lands on the Johnson and Maxwell ranches during the spring and winter months as available. As to the summer use the record discloses the domestic needs, and water for live stock and a garden on the Maxwell ranch of from 4 to 6 acres in extent, and also about 3 acres of meadow on the Johnson ranch, which were irrigated during the early spring and winter, and also later if water was available for that purpose. On the Maxwell ranch also, from the beginning, was a small family orchard which was gradually extended until about 1920, when all available water was taken from the garden and meadow and applied to the orchard, together with an increased winter water used for spraying and an additional domestic use made necessary by the increased number of employees living on the ranch required in the carrying on of orchard operations.

[1, 2] This we believe is a sufficient summary to show that the winter flow to the amount awarded by the court has always been diverted and put to a beneficial use upon the properties of plaintiff, and that to the full extent of the full summer flow not exceeding 63 inches has been continuously applied to the ranches for a beneficial purpose. Although abandonment was charged by defendants, we find no testimony of such in the record, but, on the contrary, all of the witnesses who were interrogated upon that issue testified that the water was always used and that neither the ditch nor the diversion was ever abandoned. Also a change of use, as in the instant case, a change from a mining to an agricultural use, will not impair a vested right. Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554; City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Senior v. Anderson, 130 Cal. 290, 62 P. 563.

[3] Appellants next contend that all of the summer flow of the water from the canyon was diverted through the canal above the

Johnson ditch and into the Davey ditch and used by defendant Hoy. As to this it appears that this water irrigated about an acre or two of garden below the Davey ditch, and some was used for household purposes and the balance ran back into the channel of Johnson's north canyon.

[4, 5] The court has adequately taken care of the rights of defendant Hoy, granting him a right superior to plaintiffs for their necessary use. Defendants also objected to plaintiff's storage of winter flow in the Johnson canyon subsequent to 1921, but, inasmuch as the court did not consider this salvaged winter water in its determination, we shall not consider it here. Furthermore, the issues in this case are not framed to raise any issue as to the right to store winter water and the question is not before us. We are here concerned with the rights of plaintiffs in the natural flow of the stream as beneficial use. It further appears that defendants were not injured by such reservoiring, as the reservoirs were entirely below the lands of the defendants and the combined use of the natural flow, together with the accumulated winter flow, was not excessive for the use required by plaintiffs.

[6] So, also, as to the objection of defendants as to that portion of the decree giving John P. Cleese riparian rights in the natural flow of the canyon. This action was not brought, as was the case of Cowell v. Armstrong, 210 Cal. 218, 290 P. 1036, to apportion waters among the riparian owners, but the finding was merely incidental, preventing the reservoiring by defendants of water for future use, which was a nonriparian right as against plaintiff John P. Cleese, a riparian owner. Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607; Seneca Consolidated Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93, 70 A. L. R. 210.

[7] This now brings us to the question raised by appellants that the original appropriation of Johnson was ineffectual because the point of diversion was located upon a school section, the title to which passed from the federal government to the state prior to the date of the location, and therefore the appropriation was made subject to all rights in the owners of the upstream lands. We do not believe we are here concerned with whether the grant of school land was a grant in præsenti, for, conceded that it was, as ably argued by appellants, still it passed to the state of California, which, before the initiation of any right thereto on the part of any grantor of defendants, the state of California had subjected its proprietary interest in such land to the appropriation and diversion of waters by plaintiff's grantor and recognized the diversion and ditch rights then established on section 36. Stats. Calif. 1871–72, p. 622; Civ. Code, § 1410 et seq.; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 P. 726, and Id., 147 Cal. 228, 81 P. 512; Palmer v. Railroad Commission, 167 Cal. 163, 138 P. 997; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674.

[8-10] Lastly, appellants insist that the judgment includes improper items of costs and should therefore be reversed. In due time plaintiffs filed their cost bill, followed by a motion by defendants to retax. The court struck out certain items in the memorandum of costs and sustained others and fixed the costs at $314.90. By a clerical error the full amount of the costs claimed by plaintiffs was inserted, and that amount now appears in the judgment rather than the amount at which the same were taxed by the court. An order on a motion to retax costs made after the rendition and entry of final judgment is appealable as a special order, and is not reversible on an appeal from judgment. County of Contra Costa v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.(2d) 606; Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 P. 810; Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862. The trial court has the inherent power to correct its record so that record shall conform to the actual facts and speak the truth. Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am. St. Rep. 139; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491. Therefore the remedy of appellants lies in an application to the trial court, which, upon proper notice, will undoubtedly correct the error of which complaint is here made.

Other points are urged for reversal, but we believe what has been already said is determinative of the questions here involved, and, finding no error, the judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

138 Cal.App. 198

HAUPENTHAL v. BERT L. PERRY, Inc., et al.

Civ. 9339.

District Court of Appeal, First District,
Division 2, California.

April 23, 1934.

1. Mechanics' liens ⚷281(1).

Proof of assignment of materialman's claim of lien made prima facie case for assignee, and evidence of subsequent claim made by assignor was merely evidence tending to prove rescission or waiver.

2. Appeal and error ⚷1008(1).

Where there was evidence tending to prove rescission or waiver of assignment of materialman's claim of lien, intention of parties *held* question of fact for trial court, whose finding was conclusive.

3. Mechanics' liens ⚷281(3).

Evidence in suit to foreclose materialman's lien sustained finding that materials were furnished under express contract to be used in building.

4. Mechanics' liens ⚷272.

Where pleadings in action to foreclose materialman's lien did not mention bond, and cause was tried on theory that no bond had been filed by owner, existence of bond *held* matter of defense which should have been raised by answer.

5. Mechanics' liens ⚷161(4).

Where action to foreclose mechanics' liens was based on express contract and amount due was readily ascertainable by mere calculation, claimant *held* entitled to recover interest from date of commencement of action (Code Civ. Proc. § 1183).

◆

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by J. R. Haupenthal, doing business as the Wholesalers' Credit Adjustment Bureau, against Bert L. Perry, Inc., S. H. Kress & Co., and others. Judgment for plaintiff, and S. H. Kress & Co. appeals.

Judgment modified and, as so modified, affirmed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles (Ernest K. Little, of San Francisco, of counsel), for appellant.

Francis B. Cobb, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued as assignee of a claim of lien filed for materials used in the construction of a building for S. H. Kress & Co., the owner. Judgment went for plaintiff, and the owner alone has appealed.

The trial court found that plaintiff's assignor furnished to Bert L. Perry, Inc., upon an express contract evidenced by an open account, electrical materials which were used in the building under contract with the owner; that in due time this assignor filed its claim of lien which was duly assigned to plaintiff; and that, after said assignment Bert L. Perry, Inc., was adjudged a bankrupt.

[1, 2] Following the assignment to respondent, the assignor filed a claim against Bert L. Perry, Inc., in the bankruptcy proceedings covering the same items of account, and, for this reason, appellant argues that the trustee in bankruptcy is a necessary party plaintiff. The trial court found that he was not a necessary party. The proof of the assignment made a prima facie case for plaintiff. The evidence of a subsequent claim made by the assignor was merely evidence tending to prove a rescission or waiver. The intention of the parties was a question of fact for the trial court and its finding is conclusive.

[3] Appellant contends that the finding that the materials were furnished under an express contract to be used in the building is not supported by the evidence. Without reciting the evidence in detail, we find that all the materials were shipped to the "Kress Job" at Pasadena under express authority of a letter from Bert L. Perry, Inc., addressed to respondent's assignor prior to the date of the first shipment, and that all materials were delivered to that job under invoices expressly identifying the contract.

[4] Appellant attacks the judgment on the ground that the complaint failed to allege that the owner did not file a bond, and hence did not affirmatively bring the case within the class of liens in which a foreclosure is permitted, irrespective of the contract price. Tyler v. J. I. Mitrovich Building Co., 47 Cal. App. 59, 190 P. 208, is cited as the only case in point. Appellant misconceives the ruling in that case, which was that, when the plaintiff assumes that a good bond has been filed, joins the sureties as parties, and seeks recovery on the bond, he may not attack the validity of the bond on the trial. In other

words, if a bond has been filed and the plaintiff seeks foreclosure on the ground that the bond is void, he must make appropriate allegations to tender that issue. Here the pleadings do not mention a bond, and the cause was tried on the theory that no bond was filed. If a bond had been filed in accordance with the statute, it was a matter of defense which the appellant should have raised by answer.

[5] The judgment awarded respondent interest from the date of filing the lien. Appellant argues that interest could not run prior to judgment because of the language of section 1183, Code of Civil Procedure, reading: "But said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both. * * *" From this it is argued that, notwithstanding an express contract, the suit to foreclose must be deemed one in quantum meruit for which interest could run from the judgment only. Our understanding of the portion of the section quoted is that it was intended to give the court equitable jurisdiction over all contracts, express or implied, to prevent a fraud upon the owner through collusion between the labor and materialmen and the contractor or subcontractor. Here we have an express contract calling for interest thirty days after each invoice. The reasonable value of the goods delivered was not contested. The amount due might have been readily ascertained by mere calculation.

Counsel have not indicated in their briefs why the date of filing the lien was selected as the date from which interest should run. The appellant argues that it should not run prior to the judgment; the respondent argues that it should run from the date of the lien or from the date suit was commenced. The cases cited by appellant are not helpful. Barr Lumber Co. v. Perkins (Cal. App.) 297 P. 922, was set aside by the Supreme Court, 214 Cal. 531, 6 P.(2d) 948. Combs v. Eberhard, 120 Cal. App. 25, 7 P.(2d) 338, involved unliquidated claims for extras. Respondent relies on Hardwood Interior Co. v. Bull, 24 Cal. App. 129, 140 P. 702, as supporting the judgment carrying interest from the date the lien was filed. A statement to that effect is found in the syllabus, but is not supported in the text of the opinion. Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 234, 39 P. 758, 760, and Hubbard v. Jurian, 35 Cal. App. 757, 766, 170 P. 1093, 1097, are directly in point. In the former the court said: "If a claimant has furnished materials from time to time as they were needed, and receives payments on account, his claim is not 'unliquidated and open to be adjudicated.'" In the Hubbard Case the court said: "* * * At the time the several actions were commenced to foreclose the several claims of lien, the lien claimants' right to recover upon the open account upon which the liens rested was vested in them, and was capable of being made certain by calculation. Consequently they were entitled to recover interest upon their several claims from the date of the commencement of the several actions."

For these reasons the judgment should be modified. The lien was filed April 8, 1931. The complaint was filed June 29, 1931. The interest covering this period amounting to $33.40 should be deducted from the amount of the judgment, so that the latter will cover an award to plaintiff in the sum of $1,906.89, "together with interest thereon at the rate of seven per cent. (7%) per annum from June 29, 1931, etc."

The judgment is modified accordingly, each party to bear its own costs.

We concur: STURTEVANT, J.; SPENCE, J.

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138 Cal.App. 217

MUESELER v. BRIDGEWATER et al.

Civ. 5091.

District Court of Appeal, Third District, California.

April 23, 1934.

Trover and conversion 🔑16.

Where car purchased by father was, without his knowledge and through mistake, registered in son's name, who some sixty days later made transfer to father without informing him of it, subsequent attachment and sale of car for son's indebtedness contracted prior to father's purchase of car *held* conversion for which father could maintain action for damages (Code Civ. Proc. § 689).

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action for conversion by A. R. L. Mueseler against H. S. Bridgewater and the National Surety Company. From a judgment for plaintiff, defendants appeal.

Affirmed.

Whitson & Sims, of Los Angeles, and R. G. Akers, of Long Beach, for appellants.

Amend & Amend and Joseph Hansen, all of Los Angeles, for respondent.

Mr. Justice PLUMMER, delivered the opinion of the court.

The plaintiff had judgment against the defendants in the sum of $2,500 and costs for and on account of the alleged wrongful conversion of a certain Packard automobile. From this judgment the defendants appeal, and bring this cause before us upon the judgment roll alone.

The findings of the court are to the effect that on or about the 19th day of May, 1930, the plaintiff purchased from Carl R. Henderson a Packard sedan automobile, paying therefor the sum of $2,287.50; that the plaintiff, being incapacitated, by reason of physical infirmities, from driving an automobile, and also from transacting business, requested his son to look about for a good used car for the uses and purposes of the plaintiff and his wife, to be driven, however, by the son. In accordance with such request, the plaintiff's son, after looking about, found the car in question, took the plaintiff out two or three times in the car, whereupon the plaintiff decided to buy the automobile. The plaintiff was then driven by his son to the automobile agency, where the plaintiff made out a check for the purchase price of the automobile, gave it to his son, who went into the salesroom and arranged with a salesman for some slight repairs, delivered the check to the salesman, and signed his own name to an order slip for the purchase of the automobile, the son believing at the time that he was signing only an order for the delivery of the car.

Following the usual custom, the order slip was placed in a desk basket, from which Henderson took the slip and caused the car to be registered with the motor vehicle department of the state of California in the name of the son, H. A. Mueseler. The matter of registration of the car was never mentioned between father and son or the agent or salesman, and the plaintiff did not know that said automobile was registered in his son's name at any time until after the automobile was attached at the instance of the defendant H. S. Bridgewater.

Upon the completion of the purchase the car was delivered to the residence of the plaintiff in this action, and remained there for several days, after which it was kept in the garage owned by the son. It appears that the son lived six or eight blocks from the residence of the plaintiff, where the plaintiff had theretofore kept other cars owned by him, and, whenever the plaintiff desired to be driven about, the son would take an automobile from the garage, drive to the residence of the plaintiff, pick up the plaintiff and drive for him, whether for pleasure or business, and, after the completion of the drive, leave the plaintiff at the plaintiff's residence, and, to save himself from walking the six or eight blocks, drive the car back to the garage situate on the premises occupied by the son.

Some time after the first registration of the automobile herein referred to, and on or about the 22d day of July, 1930, and preceding the attachment herein, the son, H. A. Mueseler, wrote his name upon the certificate of ownership and registration, as transferer, and wrote the name of A. R. L. Mueseler, the plaintiff, on said certificate, as the transferee, and the address of the plaintiff on the reverse side of the certificate, and forwarded the certificate so indorsed to the division of motor vehicles of the state of California. The plaintiff was not informed as to this transaction until after the attachment.

On or about the 29th day of July, 1930, the automobile in question was attached by the defendant H. S. Bridgewater as being the property of H. A. Mueseler. The plaintiff in this action filed a third-party claim, and the defendant National Surety Company executed an undertaking, and delivered the same to the sheriff, as provided by section 689 of the Code of Civil Procedure. Thereafter, and on or about August 28, 1930, the automobile was sold by the sheriff of the county of Los Angeles. This action was prosecuted to recover the value of the car and damages sustained by reason of the attachment.

No question is made upon this appeal either as to the value of the car or the damages sustained by the plaintiff; the only contention being that, by reason of the automobile having been registered in the name of H. A. Mueseler, and the registration certificate having been signed by H. A. Mueseler in transferring the registration to the plaintiff in this action, and not by the plaintiff personally, judgment should have been rendered for the defendants.

No issue is tendered in this cause that the indebtedness of H. A. Mueseler to the defendant H. S. Bridgewater was incurred by reason of any reliance upon the apparent ownership of the automobile in question as being in H. A. Mueseler, as the indebtedness arose by reason of transactions preceding the purchase of the automobile by the plaintiff in this action.

To sustain their contention that judgment should have been rendered in their favor, the appellants rely upon the case of General Motors Acceptance Corporation v. Dallas, 198 Cal. 365, 245 P. 184. The circumstances of that case are, however, readily distinguishable from those presented for our consideration. This appears from a recital of the first paragraph of the syllabus, to wit: "In an action for damages for alleged wrongful conversion of an automobile, it is incumbent upon the plaintiff to sustain the affirmative of the issue and prove either ownership and the right of possession or actual possession of said automobile in itself at the time of the alleged conversion thereof; and if it fails to prove either that it was the owner of the automobile and entitled to the possession thereof, or that it was in the actual possession thereof when the alleged conversion took place, judgment is properly entered against it."

In the instant case, as shown by the summary of the findings herein set forth, the plaintiff in this action at all times since the purchase of the Packard car was the owner thereof. It is true that for a short period of time the legal title was in the name of his son, but the plaintiff was the owner thereof, and also entitled to immediate possession. At the time of the attachment not only the equitable, but the legal, title was vested in the plaintiff. The mere fact that the name of the plaintiff was written upon the registration certificate or blanks, by his son, did not in any wise mislead either of the defendants in this action. By an examination of the records of the motor vehicle department of the state of California it could have been ascertained by the appellants that the legal title was in the plaintiff in this action. Furthermore, it appears that the transfer of the apparent legal title from H. A. Mueseler to the plaintiff was not in violation of any of the Code provisions relating to fraudulent transfers. Whatever right of action the appellant Bridgewater had against H. A. Mueseler existed prior to the purchase of the automobile, and, as we have said, the indebtedness was not incurred on the faith of H. A. Mueseler being the owner thereof, so that the question of an innocent purchaser or a creditor standing in the same relation does not arise in this action. Hence the cases which have been decided on the theory of constructive fraud upon an innocent purchaser for value are inapplicable, and reference thereto will not be made in this opinion.

The fact that the change in the registration from H. A. Mueseler to the plaintiff in this action was not made within ten days after the purchase of the Packard car by the plaintiff did not work to the injury of the appellants is evident from what we have heretofore said, and therefore it cannot be held that such delay in placing the apparent legal title in the name of the plaintiff, who was the actual owner of the car from the date of its purchase, rendered the plaintiff's ownership subject to any rights which the appellant Bridgewater had against H. A. Mueseler. In other words, the delay in the transfer of the apparent legal title did not work a forfeiture of the plaintiff's ownership, or subject his ownership to the claims of any one who was uninjured thereby.

The form in which the transfer of the apparent legal title was made, from the name of H. A. Mueseler to the plaintiff in this action not having been presented to us in the record in order to support the judgment of the trial court, it would be incumbent upon us to presume that there was sufficient evidence introduced in the trial of the action showing that H. A. Mueseler was acting as the agent of the plaintiff in making the transfer and signing the necessary names. No cases have been cited holding that such transfer may not be properly executed by an agent of the actual owner of the car.

A somewhat similar case to the one we are considering is that of Maryland Casualty Company v. Hollman, 100 Cal. App. 669, 280 P. 1034, where what we have said is abundantly supported by the reasoning and citations contained in the opinion in that case. See, also, the case of Pendell v. Thomas, 95 Cal. App. 33, 272 P. 306.

All that we have said is likewise supported by the well-considered case of Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672. However, in this latter case it appears that the rights of an innocent third party intervened, and, as between innocent parties, it was held that the neglect of the one who had caused another innocent party to suffer must stand the loss.

It appearing from the record that there is no merit in this appeal, either from an equitable or a legal standpoint, it follows that the judgment should be affirmed, and it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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138 Cal.App. 108

Ex parte FARUQI.*

Cr. 2532.

District Court of Appeal, Second District, Division 2, California.

April 18, 1934.

Habeas corpus 🔑30(1).

Alleged error in receiving defendant's admissions on issue of his alienage in prosecution for carrying weapon *held* not reviewable on habeas corpus petition (Gen. Laws 1931, Act 1970, § 2).

Application by Jamal Effel Faruqi for writ of habeas corpus.

Writ discharged, and petitioner remanded.

Henry L. Knight, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

This petition for habeas corpus arises as follows: Petitioner was arrested for violation of chapter 339, p. 695, Statute of 1923, as amended in 1931, Act 1970, § 2, Deering's Gen. Laws 1931, Deadly Weapons Act (alien carrying weapon), and bound over to superior court for trial. He here claims that the proof of alienage belonged to the corpus delicti, that the only evidence introduced before the magistrate on that subject was as to his own admissions, and that evidence of such extrajudicial statement was improperly received.

Upon authority of In re Leonardino, 9 Cal. App. 690, 100 P. 708, the writ is discharged and petitioner remanded.

We concur: CRAIG, J.; DESMOND, Justice pro tem.

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138 Cal.App. 227

FERAUD v. ANAHEIM INV. CO. et al.

Civ. 9338.

District Court of Appeal, First District, Division 2, California.

April 24, 1934.

Hearing Denied by Supreme Court June 22, 1934.

1. Mortgages 🔑151(2).

Rights of second mortgagees *held* subordinate to first mortgage duly recorded some five years before execution of second mortgage.

2. Mortgages 🔑401(1).

Provision in mortgage, given to secure payment of monthly annuity for life, that on default the whole sum due and to become due thereunder according to specified mortality table should become due on mortgagee's written notice, *held* not invalid as "penalty" or inequitable as regards junior mortgagees.

[Ed. Note.—For other definitions of "Penalty," see Words & Phrases.]

3. Time 🔑4.

In computing amount due under mortgage given to secure payment of monthly annuity for life, and providing that on default whole sum due and to become due thereunder according to specified mortality table should become due on mortgagee's written notice, fractional parts of the year should not be disregarded.

4. Mortgages 🔑114.

Where mortgage given to secure payment of $1,200 annually in equal monthly installments on first day of each month for life provided that on default whole sum should become due thereunder according to specified mortality table on mortgagee's written notice, and such notice was duly given, sum due to mortgagee with expectancy of 21 years and 7½ months when action was brought was $26,000, plus delinquencies then existing, and not value of $1,200 annuity for person of mortgagee's age.

5. Evidence 🔑357.

In action by mortgagee to foreclose mortgage given to secure payment of $1,200 annually for life and providing that on default whole sum should become due thereunder according to specified mortality table on mortgagee's written notice, letter written by junior mortgagee setting forth correct theory of computing amount due to mortgagee on default and giving of such notice *held* admissible.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Marie Feraud against Anaheim

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*For modifying opinion, see 32 P.(2d) 648.

Investment Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Willcox & Judson, Hill, Morgan & Bledsoe, Benjamin F. Bledsoe, and Charles P. McCarthy, all of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal by certain defendants from a judgment in favor of plaintiff in an action to foreclose a mortgage.

In September, 1924, defendant Anaheim Investment Company and others executed a promissory note in favor of plaintiff, which note was secured by a mortgage on certain real property. The plaintiff herself owned a life estate in said property. The note was an unusual one, reading in part as follows: "For Value Received, the undersigned, jointly and severally promise to pay to Marie Feraud, at 2289 Cambridge Street, Los Angeles, California, the sum of Twelve Hundred ($1,200.00) Dollars per annum for and during the period of her natural life, said sum to be paid in monthly installments of One Hundred ($100.00) Dollars each, commencing on the first day of October, 1924. * * * This obligation is secured by a mortgage of even date herewith, and if any of said installments shall not be paid when due, then the whole sum due and to become due under this obligation, computed according to the American experience table of mortality, shall after ten days written notice of such default, given to the Anaheim Investment Company by registered mail addressed to said Company at Anaheim, California, become immediately due and payable at the option of said Marie Feraud." The mortgage which was given as security for the note was recorded on September 17, 1924. A copy of said note was set forth therein.

In 1929 the mortgagors executed a second mortgage on said premises in favor of defendants Meserve & Meserve for the purpose of securing an obligation to said last-named mortgagees. Said second mortgage was duly recorded and was subsequently assigned, together with the obligation secured thereby to defendant Edwin A. Meserve. Following the description of the real property in said second mortgage is found the provision "Subject to the rights of Marie Feraud therein."

In 1930 and 1931 the mortgagors defaulted in the payment of certain installments due upon plaintiff's note, which delinquent installments totaled $700. Plaintiff served written notice of default as required stating therein that unless said payments were made within ten days, she would exercise her option and declare the whole sum due as provided in said note. No payments were made and plaintiff immediately commenced this action. The trial was brief as there was no dispute regarding the material facts. It appears that plaintiff was born on March 1, 1882, and that her expectancy was twenty-one years, seven and one-half months, when computed according to the American experience table of mortality. The trial court found that the total amount due to plaintiff was the sum of $26,700, being the amount due for twenty-one years and eight months after the action was brought, together with the $700 which had become delinquent prior to the commencement of the action. Judgment was entered in favor of plaintiff whereby it was adjudged that said sum was owing and unpaid to plaintiff on said note; that the mortgage given to plaintiff to secure said obligation was a first lien upon the remainder interest of the mortgagors; and that the claims of the defendants, including appellants herein, were subsequent and subject to said mortgage held by respondent.

Appellants raise several points in attacking said judgment and conclude that the mortgage now owned by appellant Edwin A. Meserve should be held to be prior in right to the mortgage which respondent sought to foreclose. We have examined appellants' briefs with care, but find no merit in any of the points raised.

[1] It is first contended that the words "subject to the rights of Marie Feraud therein," which words are found in the mortgage under which appellants make their claim, do not refer to respondent's rights under her mortgage, but only to respondent's rights in the property as life tenant. We need not pause to discuss this contention, for even if these words had been omitted from appellants' mortgage, respondent's mortgage would still have been prior in right. It is conceded that respondent's mortgage was duly recorded approximately five years prior to the time that appellants' mortgage was executed and therefore appellants were charged with constructive notice thereof. We may add that it is not even suggested that appellants did not have actual knowledge of the existence of respondent's mortgage and the terms of the obligation secured thereby.

[2] Several further points are argued at length under separate headings in appellants'

briefs. These points deal with the questions raised in appellants' "statement of questions involved," which precedes the brief proper. The gist of appellants' claims is found in said statement. Appellants there state the facts and then continue as follows: "The ultimate question is, after the exercise by the mortgagee of her option, is the mortgage first in time prior in right to the mortgage second in time? This question involves the question, is the amount due according to the American experience table of mortality a penalty; and the question, is the law of optional advances applicable to such a case?" In other words, appellants claim first, that the provisions of respondent's note giving respondent the option to declare due the total amount which would become payable according to the American experience table of mortality were provisions for a penalty and therefore void; and, second, that there is an analogy between respondent's position in exercising said option after actual knowledge of the subsequent mortgage and the position of a mortgagee making optional advances after actual knowledge of a subsequent mortgage. It is therefore urged that the law applicable to optional advances should be applied in the instant case. In our opinion neither of said claims may be sustained. Appellants cite no authority in point and we know of no authority supporting appellants' views.

While respondent's note was unusual in its terms, it contained no provision such as is denounced by the law as a penalty. Obviously, the primary purpose of the note and mortgage was to secure to respondent a return of $100 per month during her entire lifetime. The total amount which the promisors would be compelled to pay in monthly installments thereunder was wholly uncertain because of the uncertainty of the duration of respondent's life. It was probable that respondent would live for either a longer or shorter period than the average person of her age and it was therefore entirely reasonable and proper for the parties to provide a means of making certain the total obligation of the promisors in the event of default in the payment of the monthly installments. If such provision had not been made, the difficulty which would have been encountered in enforcing the recurring monthly payments is apparent. There was nothing unreasonable, unlawful, or against public policy in the provisions of the note whereby the parties agreed to adopt the American experience table of mortality as the means of making certain the total obligation of the promisors in the event of default.

Appellants' effort to establish an analogy between respondent's position and the position of a mortgagee making optional advances necessarily fails. No further or optional advances were made by respondent after her mortgage was executed. She merely exercised her right arising upon default in the monthly payments to change the obligation of the promisors from an obligation to pay a fixed monthly sum for an indefinite period to an obligation to pay a fixed sum presently.

We believe that the provisions of respondent's note are somewhat analogous to the acceleration clauses frequently found in promissory notes. Appellants concede that if respondent's note had provided for the payment of a specified total sum payable in monthly installments of $100 per month until said total sum had been paid, then a clause providing for an option to declare the whole sum due on default in the payment of any of the installments would have been a valid acceleration clause. We find no such essential difference between such a note and the note in the present case as would justify the conclusion that the provisions of the latter are void, while the provisions of the former are valid. Nor do we find any such essential difference as would justify the conclusion that in the one case the exercise of the option would not affect the priority of the mortgage while it would in the other.

[3, 4] Appellants also claim that the amount of $26,700, fixed by the judgment, is incorrectly computed. In this connection they first assert that in computing the amount due, fractional parts of a year should have been disregarded. We find no sound basis for such assertion. They further seem to take the position that respondent was entitled to recover only an amount equal to the value of an annuity of $1,200 per year for a person 49 years of age. What this amount would be appears uncertain in the minds of the appellants as they make certain computations based upon the American experience table of mortality and upon varying rates of interest and arrive at different figures. We are of the opinion, however, that appellants' position is not in accord with, but is contrary to, the terms of the note in question.

[5] Appellants further complain of the admission in evidence of a letter written by appellant Edwin A. Meserve on June 9, 1931. Said letter reads in part as follows: "* * * Miss Phillips says that Max reports that Marie Feraud's age is now 49. That being true, her life expectancy according to the

American mortality tables is 21½ years. Multiply this by 1200 and you have approximately $25,800 as the amount that you will now owe her for not having paid her $700 during this spring. * * * No good can come from seeing or talking with me about it. The facts are very simple and very plain. * * * If Marie Feraud should die tomorrow instead of the Anaheim Investment Company owing her estate $700.00, it would owe her the full $25,800." We find no error in the admission of said letter, but in any event the error, if any, could not have been prejudicial under the undisputed facts appearing in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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138 Cal.App. 184

PEOPLE v. CLINE.

Cr. 97.

District Court of Appeal, Fourth District, California.

April 21, 1934.

1. Larceny 🔑65.
Poisons 🔑9.

Evidence *held* sufficient to sustain conviction for grand theft and for administering a narcotic, anæsthetic, or intoxicating agent to enable defendant to commit grand theft (Pen. Code, § 222).

2. Larceny 🔑50.
Poisons 🔑9.

In prosecution for grand theft and for administering a narcotic, anæsthetic, or intoxicating agent to enable defendant to commit grand theft, evidence that typewriting on paper which victim had signed in blank was done on typewriter found in defendant's home *held* admissible.

3. Poisons 🔑9.

Instruction in prosecution for administering narcotic, anæsthetic, or intoxicating agent to enable defendant to commit grand theft *held* not erroneous as withdrawing from jury question whether luminal was intoxicating (Pen. Code § 222; Code Civ. Proc. § 1870, subd. 9).

4. Criminal law 🔑824(2).

In prosecution for administering narcotic, anæsthetic, or intoxicating agent to enable defendant to commit grand theft, in which there was testimony that luminal claimed to have been used was an intoxicating agent, court's refusal, in absence of request, to define narcotic and anæsthetic, *held* not prejudicial error (Pen. Code § 222).

5. Criminal law 🔑829(15).

Requested instruction that circumstantial evidence to warrant conviction must be incapable of explanation except upon supposition of guilt *held* sufficiently covered by instruction given.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

A. L. Cline was convicted of grand theft and of unlawfully administering a narcotic, anæsthetic, and intoxicating agent, and of a prior conviction for felony, which he admitted, and he appeals.

Affirmed.

Ralph E. Swing, of San Bernardino, and Vincent A. Marco, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged in one count of an information with the crime of grand theft, in that he willfully, unlawfully, and feloniously took the sum of $240 from one Martin Frame, and, in a second count, with the violation of section 222 of the Penal Code, in that he willfully, unlawfully, and feloniously administered to the said Martin Frame a narcotic, anæsthetic, and intoxicating agent, to wit, phenobarbital, also known as luminal, with the intent thereby to enable and assist him in committing the crime of grand theft. He was further charged with a prior conviction of a felony and having served a term in the penitentiary as punishment therefor. The defendant admitted the prior conviction and pleaded not guilty to both counts of the information. A jury found him guilty on both counts, and he has appealed from the judgment and from an order denying a new trial.

The appellant struck up an acquaintance with Martin Frame, a man sixty-one years old, in Pershing Square, in Los Angeles, on Saturday, October 14, 1933, and in the conversation that followed told Frame that he had been a banker in Denver and had come to California for his son's health. He expressed a desire to take Frame to his home to meet his son, and also suggested he would like to take him to his ranch at El Centro. In the same conversation Frame told the appellant that he had $2,500 in post office savings and also $205 in a building and loan society. They agreed to meet at the same place on the following Monday, but the appellant did not then appear. However, on the next day, October 17, they again met in Pershing Square. The appellant then gave Frame a suit of clothes which he said he had received through an estate of which he was administrator. The appellant spoke of going to El Centro, and that he wanted some one to go with him for company. Frame finally consented to go along; it being planned to go to El Centro that day, remain there overnight, and return the next day. The appellant had a Marmon sedan, and the two set out for El Centro. The appellant first took Frame to his home in Glendale, where he introduced him to his son, and where lunch was served. After lunch, they again started out for El Centro, but stopped first at a washerwoman's house and later at a house in Altadena. The appellant told Frame that the purpose of this visit was to see an old lady over whom he was a sort of guardian, further telling him that some real estate man had beaten her out of her money, and that he and some other men were donating $10 apiece toward her upkeep. They then proceeded east on United States highway 66 at a slow rate of speed, and during the ride the appellant asked Frame if he liked buttermilk, receiving an affirmative reply. The appellant stopped at a small roadside café, which it later developed was in Rialto, telling Frame to remain at the car while he went in to phone some man in San Bernardino, in order to save time when he got there. Frame testified that he thought the place they stopped was twenty to twenty-five miles from San Bernardino, but that he had never been there before and did not know the names of the towns along the way. The appellant went into the café and returned in a few minutes with a large glass of buttermilk, which he gave to Frame. Frame drank all of the buttermilk, although he found it tasted a little bitter. The appellant took the empty glass into the café, and they proceeded on their way. When he got in the car, the appellant told Frame that he had not been able to get the man on the telephone, but had talked to the man's wife. Along about that time they again stopped, and Frame ate a piece of pie and drank a cup of coffee. Soon after resuming their journey Frame dozed off to sleep and remembered nothing thereafter until he found himself in a room at the Antlers Hotel in San Bernardino. Nothing had been said about staying all night at San Bernardino.

The hotel clerk testified that the appellant came in about 7:30 o'clock that night and said he was driving through with an old gentleman; that they had stopped for a cup of coffee along the road; that the old gentleman had become ill; that he thought the man had heart trouble; and that he was afraid to go on. He registered for both men and secured two connecting rooms. He then went out and brought Frame in, and the clerk noticed that Frame was faltering and staggering, and that the appellant had to help him. Frame testified that, when he found himself in the hotel room, he was almost all in, that he did not know what he was doing, and that he wanted to go to sleep. He remembered the appellant undressing him, telling him that his pulse was down to forty, saying something about a will, that he signed some slips or tablets three or four times, and that he signed two sheets of paper on the hotel stationery and a few other sheets of paper. He further testified that these sheets of paper had no typewriting on them at the time he signed them. The next thing Frame remembered, after being undressed, was when he awoke in the middle of the afternoon of the next day. He got his clothes on and went outside in search of a doctor. The hotel clerk testified that, when he went out, he staggered and could not seem to talk. All that he could understand was "doctor" and "house." He told him there was no house doctor, whereupon Frame staggered out the front door. Frame finally got to the office of a Dr. Love. This doctor testified that he at first thought Frame was drunk, but discovered he was not. Frame was able to tell him that the drinking of the buttermilk was the beginning of his illness. An examination showed a slow respiration, slow heart action, and feeble reflex action. The doctor concluded that Frame was under some strong hypnotic, which could have been luminal. Frame told the doctor that he could not find his money, and the doctor called the police station and an officer came and took him away.

The evidence shows that, in the meantime, the appellant took his car out of the garage early that morning, and, at about noon, appeared in Frame's room at Los Angeles and told the landlady that Frame was going to a hospital for treatment and had sent him for his clothes. With the assistance of the landlady, he packed Frame's belongings in two suitcases, which he took away in his automobile. Late in the afternoon he again appeared at the Antlers Hotel in San Bernardino. The clerk told him, "Your friend is looking for you." He replied, "He is not out is he" and "I told him to stay in his room." He asked where Frame had gone and then said, "Why, he will drop dead." He talked to another hotel employee, who told him that he had seen Frame hanging on to a lamp post in front of the hotel, acting as a drunkard would act, and that his legs and limbs gave way beneath his weight. This employee testified: "I asked Mr. Cline what seemed to be the trouble, and I said, 'Mr. Frame was in a very bad condition when I saw him.' I said 'Mr. Holmes sent me out in front of the hotel and his tongue was very thick and he could hardly talk, and he kept sticking his tongue out and his limbs were giving away on him.' I says, 'What is the trouble with the man? He seems to be very ill.' And Mr. Cline said that he had stomach trouble and also heart trouble, and asked me then—seemed to be in a hurry to find this man and asked me if he came in if I would kindly keep him there, that he was a very sick man and that he should not be out in the street." The appellant then left, stating he was going to look for Frame. Shortly thereafter he appeared at the police station and asked if they had picked up an old man. He stated that the old man had been feeling badly for a few days; that he was taking care of him; that he had taken him to the Antlers Hotel; that during his absence the old man had wandered away; that he had not been feeling just right and was in more or less of a dazed condition; and that he did not know just where he might go or what might happen. The police officer told him that they had a telephone call from a doctor who said there was a man in his office who was under the influence of some narcotic or dope of some kind and that the old man claimed to have been robbed. The officer asked the appellant if he knew anything of this, and the appellant replied that he had the man's money and also his keys. He asked where the doctor's office was, and stated that he would go there. An officer was sent with him to the doctor's office, and on the way the appellant twice asked the officer what he would have done under the same conditions. Before they arrived at the doctor's office, another officer who had gone there took Frame to the hotel. Later, the appellant and the other officer came to the hotel, whereupon the appellant was arrested and taken to the police station. Frame was in a dazed condition and was taken to the county hospital, where he did not awake until the next day.

The chief of police testified that he questioned the appellant as to why he had stopped in San Bernardino when he was on his way to El Centro and that he replied: "Well the old man was not feeling well and went to the hotel." The police chief testified: "I asked him how he came into possession of the money and he said he took it from Mr. Frame. I asked if he took it with Mr. Frame's knowledge and consent and he said 'No.' I said, 'Well, why did you take it?' He said, 'I wanted to protect the old man.' He said he was sick and he had called a doctor, and I said, 'What doctor did you call?' and he was unable to tell me. It was at that time that I asked him if he had ever been in trouble before, or had been arrested, and he says, 'A little.' I says, 'Have you been arrested before?' And he says, 'Yes.' I told him that he might as well tell me because I would find out within an hour. 'Well,' he says, 'I might as well tell you the truth, because you will find out anyway' and he said he was in trouble in Los Angeles. I says, 'What for?' and he says, 'For "bilking" an old woman.' * * * I asked him further if he had, when he took this $240 from Mr. Frame, if he had notified the hotel authorities that he had this money and he said that he did not. I asked him why he did not notify the proper authorities, that this man Frame was practically a stranger to him, and he says, 'Well I probably should have done so.' It was then that I ordered him booked on the grand larceny charge." The appellant was searched and there was found on his person Frame's keys, a small empty vial, and the bag or sack in which the evidence shows Frame had had $240 in currency the night before; the sack having been pinned to his underclothes when he was undressed. A leather wallet was also found which contained about $273 in currency, and the appellant stated that of this amount $240 belonged to Frame and the remainder to him. An officer was sent to search the appellant's car which he had left in a garage and found two suitcases full of clothes and other effects belonging to Frame. Frame identified his keys and the homemade sack, stating that he had this, with $240 in it, with him on the trip to San Bernardino, that it had disappeared, and that he saw it next at the preliminary hearing. He also identified the two suitcases and their contents, and testified that he had left them at his room in Los Angeles, and had not given the appellant permission to remove them. He also identified five postal savings deposit certificates for $500 each as belonging to him and a deposit book in a certain bank showing a balance of $2,283.75, all of which he testified he did not have with him on the trip. These papers, and other papers above referred to, signed by Frame, were found in a brief case in the appellant's automobile. An officer was later sent to search the automobile a second time, and on this occasion he found in a recess behind the back upholstery of the rear seat a package wrapped in an old coat sleeve in which was a private detective's badge, three bottles containing luminal in various forms, and two bottles containing potassium cyanide. The city health officer, who was called to the police station to examine Frame, found him in a stupor, apparently under the influence of a sedative or drug, and ordered him sent to the county hospital. He testified that luminal acts as a sedative, that it produces sleepiness and slows down the mental activity and makes a person appear to be intoxicated, and that it was possible to determine whether luminal had been administered by an urinalysis. Another doctor testified that luminal was both a narcotic, an anæsthetic, and an intoxicating agent, and that, when taken, it would appear in the urine for three or four days thereafter. Evidence was introduced that urinal specimens from Frame were taken while he was in the hospital and that they contained luminal. A typewriter which was found in the house occupied by the appellant in Glendale was introduced in evidence, and expert evidence was introduced that the typewriting found on certain of the papers found in appellant's brief case were typed on this machine. So far as shown by the record, two of these papers read alike and thus appear: " 'October 18, 1933. In case of my demise I would like for the following persons to be notified and the following wishes to be carried out,' with the signature of Martin Frame at the bottom. * * *"

A waitress in the café in Rialto testified that on October 17 the appellant came in between 5 and 6 p. m. and ordered a large glass of buttermilk, which she gave him, that when she started away he asked for a spoon, and that he took the buttermilk out to a car and returned in five or ten minutes with the empty glass. She testified that the appellant did not speak of using a telephone; that he did not use one; that it was not yet dark at the time; and that about five or six persons were then having dinner in the café. Another witness testified that he was eating in the café at that time; that he remembered no one else being there except the waitress; that the appellant came in and asked for a glass of buttermilk; that, when he received it, he called the waitress back and asked for a spoon; that the witness then observed him with his hand above the glass, and that he was stirring the contents of the glass; and that the appellant then went out, taking the buttermilk with him, and later came back with the glass.

The appellant first contends that the evidence is not sufficient to sustain a conviction upon either count. It is contended that the second count is, in fact, but a repetition of the first count, and that the charge of theft was not sustained unless it can be said that the appellant was properly convicted of the charge of administering luminal to the prosecuting witness. It is further contended that all of the evidence was circumstantial, that the same is in all respects consistent with the hypothesis that the appellant is innocent, and that the evidence relied upon by the prosecution is so inherently improbable as to be unworthy of any belief.

It may first be observed that the charges set forth in the respective counts of the information are entirely distinct and separate, and that a failure of proof as to the second count would not, of itself, constitute a failure of proof with respect to the first count.

In support of his contention that the evidence which must be relied upon for a conviction is inherently improbable, the appellant relies upon two inconsistencies therein. The first relates to the place where Frame drank the buttermilk. Frame testified that this was twenty to twenty-five miles from San Bernardino, while the two witnesses referred to testified that the appellant purchased buttermilk and took it out to a car at Rialto, which is about five miles from the center of San Bernardino. It is argued that the incident related by Frame must have taken place outside of the county of San Bernardino and could not have been the same incident testified to by the other two witnesses. Frame testified that he was unfamiliar with the country, that he never had been there before, and did not know the names of the towns. In view of this, and the fact that he went into a stupor shortly afterward, it is not surprising that his estimate of the distance from San Bernardino proved to be incorrect. Another inconsistency appears in the fact that Frame testified it was dark at the time he drank the buttermilk, while the waitress and the other occupant of the café testified to the effect that it was getting dark but was still light. It appears from all of the evidence that the incident occurred in the early evening. As was pointed out in People v. Haydon, 18 Cal. App. 543, 123 P. 1102, 1114, some inconsistency in the details of testimony is common and more or less natural. In view of the frailty of human memory and of differences in human observation, this not only is usually a matter that goes to the weight of the testimony, but it frequently happens that such inconsistencies in fact indicate that witnesses varying as to details are more to be believed than those whose stories are too near identical. The alleged inconsistencies in the testimony here in question not only relate entirely to immaterial matters, but, in the light of circumstances, they are far from sufficient to make the testimony of these witnesses inherently improbable.

[1] Without reviewing the evidence in detail, the condition of Frame at the time he was undressed by the appellant, the taking of the money from him without his consent, as admitted by the appellant, together with the evidence tending to show a felonious intent, is sufficient to sustain a conviction on the first count. The appellant, after taking the money from Frame's underclothing, removed it from its container and mingled it with his own, he obtained Frame's signature to a number of documents, he took Frame's keys and went to his room in Los Angeles where he took his clothing and personal effects, he took the postal certificates of deposit and other valuable papers and placed them in his own brief case, he told the landlady that Frame was going to a hospital and had sent for the clothes, he told the officers that Frame had been out of his head and unable to care for himself for several days, and that he was taking care of him, and he gave an unsatisfactory explanation of his connection with the whole affair. It is argued that the fact that he went to the police station and the fact that he returned to San Bernardino indicate the purity of his motives. The theory is equally tenable that he intended to regain control of Frame and continue what he had apparently already begun, and that he admitted taking the money only when he saw that matters were in such a condition that he could not proceed with his plans. There is ample evidence of criminal intent, and it was entirely a question of fact for the jury, with the evidence sufficient to sustain its finding of guilt on the first count.

There is likewise evidence sufficient to sustain the conviction on the second count. This consists of the evidence that the appellant secured the buttermilk, asked for a spoon, was seen stirring the contents of the glass; that he gave the buttermilk to Frame; that Frame passed into a stupefied condition shortly thereafter; that luminal was found in his urine; that luminal was found secreted in the appellant's car, together with the medical evidence as to Frame's condition and the effects of luminal on the human system, and together with the actions and conduct of the appellant before and after the incident in question. In this connection, it is argued that the evidence is insufficient to show that luminal was administered to Frame, since it was not properly established that luminal was found in the samples of urine taken from him. While there was testimony to that effect, it is argued that it is untrustworthy, because the receptacle from which a sample was taken was left beside Frame's bed for probably an hour, during a part of which time the attendant was absent, and because when it was taken to the chemist for analysis the sample was poured into another bottle and there is no proof that the receptacles used were free from luminal. Not only does this objection go only to the weight of the evidence, but, if this portion of the evidence were entirely omitted, the remaining evidence would justify the jury in finding that luminal was administered to Frame by the appellant.

[2] It is next contended that the court erred in permitting the introduction into evidence of a typewriter found in the appellant's home in Glendale and of the testimony of an expert that the typewriting above referred to which was upon certain of the papers found in the appellant's brief case had been done upon that typewriter. The contention seems to be that under the rule laid down in Wolf v. Gall, 176 Cal. 787, 169 P. 1017, typewriting is not handwriting, and that under that case and section 1870, subdivision 9, of the Code of Civil Procedure, the evidence referred to was inadmissible. In the case referred to, the court held that expert testimony was not admissible to show that one of the defendants had prepared the deed on a particular kind of typewriter, and further that it was immaterial whether or not that defendant did type the deed. That is far from being authority on the point here presented, and, as far as anything in this case is called to our attention, we are unable to see any reason why the evidence in question was inadmissible. Not only was it on a subordinate point, one of many going to show the intent of the appellant, but the surrounding circumstances made the evidence peculiarly admissible. Frame testified that he signed some papers at the request of the appellant in the hotel room when he was not in condition to know fully what he was doing. Some papers were found the next day in the appellant's brief case written on the stationery of this hotel in typewriting, with Frame's signature at the bot-

tom. Frame had testified that no typewriting was on the papers when he signed them. The appellant was gone from San Bernardino during most of the next day, and, without question, had gone back to Los Angeles. The papers were dated October 18 and were found in appellant's car after he returned. No effort was made to show that the typewriting was done by the appellant, but evidence was introduced to the effect that the typewriting was done on a typewriter found in appellant's home. In our opinion, this evidence was admissible, and any question as to its weight was for the jury.

It is next urged that the court erred in refusing to grant a motion for a directed verdict on the ground that phenobarbital or luminal is not within the meaning of section 222 of the Penal Code. Two doctors had already testified that luminal was both a narcotic and anæsthetic and an intoxicating agent, and, in view of this and other evidence, the motion was properly denied.

[3, 4] Appellant's next point is that the court erred in giving the following instruction:

"You are instructed that the term 'intoxicating agent' as used in the law and in this case includes any drug or substance or compound which when introduced into the human system so affects or disturbs the human system as to cause or produce a serious disturbance of the physical or mental equilibrium by causing or producing profound sleep, stupor, unconsciousness or semi-consciousness, together with impairment of the power of self control.

"And in this connection you are instructed that if you find from the evidence beyond a reasonable doubt that phenobarbital, also known as luminal, is an intoxicating agent, as hereinabove defined; and if you further find from the evidence beyond a reasonable doubt that at the time and place set forth in Count Two of the information, the defendant, A. L. Cline, did administer said phenobarbital, also known as luminal, to Martin Frame with intent thereby to enable or assist himself, the said A. L. Cline, to commit the crime of Grand Theft, a felony, then you must find the defendant guilty as set forth in Count Two of the Information."

It is argued that this instruction took from the jury the question of fact as to whether or not luminal is an intoxicating agent within the meaning of this section of the Code. It is apparent that this instruction did not take this question from the jury but specifically presented it to them as a matter of fact. The court merely attempted to give a broad definition of certain things included in one of the terms of the section for the assistance of the jury, without excluding other possible elements. The intent of the section is shown by its explanatory title, "Administering Stupefying Drugs," and the section, after naming certain well-known drugs having a stupefying effect, proceeds to include any other narcotic, anæsthetic, or intoxicating agent. While that portion of the instruction may seem to more properly apply to a narcotic than to an intoxicating agent, we are unable to see that it does not also fit the latter. At least two doctors testified as to the effects of luminal, their testimony showing that it comes within the description of effects contained in the instruction, and both testified that luminal was an intoxicating agent. The record does not disclose that the defendant at any time asked for an instruction purporting to define a narcotic and an anæsthetic, or any of the other drugs named in the section, and, in the absence of any request for further definitions, we see no prejudicial error in the court failing to define the other words used in the section. There is ample evidence that luminal is an intoxicating agent, the question of fact was left to the jury, and if in any respect the first part of the instruction may be considered erroneous, the appellant has failed to point out any prejudice resulting therefrom, and a reading of the record fails to indicate a miscarriage of justice.

Error is next claimed in the sustaining of an objection to a hypothetical question asked of one of the doctors by the appellant. A reading of the question discloses that it was glaringly inconsistent with the evidence in the case upon which it was purportedly based, and the objection was properly sustained.

[5] The appellant complains of the court's refusal to give an instruction asked for by him, to the effect that, when a conviction is sought on circumstantial evidence alone, it must not only be shown by a preponderance of the evidence that the facts are true, but the proof must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any reasonable supposition other than that of his guilt. The essentials of the requested instruction were given in another instruction, which reads as follows: "In order to sustain a conviction on circumstantial evidence, all of the circumstances proved must not only be consistent with each other, but consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every

other rational hypothesis except that of guilt."

Numerous objections are raised to statements made by the district attorney in his opening statement and in his argument to the jury; it being claimed that these constituted prejudicial misconduct. It is argued that these statements are not supported by the evidence and that the district attorney, in his closing argument, appealed to the passion and prejudice of the jurors. In most, if not all, of the instances cited, the appellant made objection at the time that the district attorney was going outside of the record, and, at the request of the appellant, in almost every instance the court instructed the jury either to disregard the remark of the district attorney or to disregard the same unless they remembered that it was in accordance with the evidence. It would serve no useful purpose to set forth the many statements complained of, but, after carefully examining the same, we are of the opinion that most of them were in accord with the evidence or constituted such an inference as the district attorney had the right to contend for. We find nothing in any of the statements even remotely resembling reversible error.

We find no prejudicial error in the record, and, after reading the entire transcript, we are not convinced that any miscarriage of justice has occurred.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

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138 Cal.App. 123

PEOPLE v. PARMELEE.

Cr. 2515.

District Court of Appeal, Second District, Division 1, California.

April 19, 1934.

Criminal law ⚷1170½(5).

In prosecution for assaulting policeman at hunger parade, wherein evidence was conflicting, permitting prosecutor to question defense witnesses with reference to Communist Party without laying foundation therefor, when considered in connection with prosecutor's argument to jury thereon, *held* to require reversal.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Kenneth Parmelee was convicted of assault, and, from the judgment of conviction and from an order denying his motion for a new trial, he appeals.

Judgment and order reversed.

David G. Sokol and David Ziskind, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which followed his conviction of the crime of assault; also from an order by which his motion for a new trial was denied.

The incident which resulted in the alleged assault of which defendant was convicted arose on an occasion when a so-called "hunger parade" was about to take place. The pertinent testimony adduced on behalf of the prosecution was to the effect that, without provocation of any sort, defendant committed the assault in question. On the other hand, on behalf of defendant, testimony was given by each of several witnesses in substance that, not until after defendant had been attacked by the asserted victim of his assault, did he offer any physical violence to the person who theretofore had been the aggressor and the instigator of the difficulty between them.

The principal reason urged by appellant for a reversal of the judgment depends primarily upon the fact that, over the objection of defendant, as to each of the witnesses called by him to testify in his behalf, the prosecution was permitted to insistently and repeatedly question the witness not only as to whether he was a member of the Communist Party, but as well with reference to its general activities and its participation or interest in the "hunger parade" on the occasion in question —all without first, or ever, either establishing, or offering to establish, the fact that defendant was a member of the Communist Party, or that he had any political or other connection therewith. It also appeared that but one of the several witnesses introduced by defendant was a member of the Communist Party. Also lacking in that which for convenience only may be termed a "foundation" for the introduction of evidence relating in any manner to the Communist Party, it is noted that the prosecution utterly failed to show that that party, or any branch or subdivision thereof, had any concern or interest whatsoever in the "hunger parade"; nor was any evidence introduced by which the Communist Party was defined, or by which its objects or its purposes were made to appear.

In connection with the examination of such witnesses, the purpose thereof was made clear by the line of argument in which the deputy district attorney indulged in his address to the jury, of which the following excerpts are examples:

"* * * But, behind that innocent gathering, you see the sinister banner of anarchy. These people, who went there, not because they were hungry, not because they were out of work, but because they were members of a party that you know too well. * * * These people who went there, not because they were oppressed or distressed for want of food, clothing and employment, but because they recognized in that group of two or three hundred people, who were suffering from hunger and unemployment, the closest allies of anarchy, who recognized there a fertile bed, wherein they might deposit the seeds of anarchy, they went there for that purpose, to stage a demonstration, not a hunger demonstration, but to stage their own demonstration, aided, assisted and abetted by these unfortunate people who were going to stage this little gathering. And when they saw that the representatives of the people of this community, the representatives of law and order, your representatives were there, to see that there was no violence, that there was no demonstration of that kind, it aggravated them beyond control, because those individuals hate your representatives fundamentally; they hate police officers. And, when they realized that these police officers were there for the purpose of stopping them from staging their demonstration in conjunction with the hunger march, it aggravated them to the extent that they resorted to their old characteristics, force and violence. * * * Now, there is where you are going to have to determine who told the truth in this case. You are going to have to determine whether a woman such as Mrs. Clear, has told the truth, who comes here and tells you that she went down to join the hunger parade, and that she saw this fight. * * * Now, let us examine into who this Mrs. Clear is. She admits that she is a member of the Communist party and she tells you in one breath that she went down to this parade because she wanted to join in the hunger strike, in the hunger parade, and we question her a little further, and we find that she and her husband own a ranch within the city limits of Redondo, and we find not only that she has sufficient funds, so that she can stage what she calls social gatherings and dances at her home. Now, frankly, are those the kind of hunger victims that you and I have to feed? Do you see any truth in her story? * * * Now, I don't need to tell you what the principles of the Communist party are. Their principles are too well shown by the actions of the people connected with it in this case. They didn't go down there with any idea of helping these poor hungry people. They went down there with the sole idea of taking advantage of this gathering. They knew that hunger and distress were their closest allies; they knew that they could foment a disturbance down there; they knew that the frame of mind in which they would find these people would be the best thing in the world to help them along. They knew it was a fertile bed for them to get new members for their cause, and when they discovered that the police department were down there to keep these people in order, to see that no one was hurt—they knew there were women and children there in the parade—when they discovered their worst hated enemy was there, and when the police undertook to keep them in order, this defendant struck the officer, with this stick, over the head. * * * All I have to say to you is to stand behind your police officers as against a society of that character. * * * They were down there for an entirely different purpose, and had this Communist element kept out of there, there would have been no trouble at all. They are the persons who injected themselves into that proposition, knowing that it was a fertile field for them, and had they not been there that demonstration would have been staged without any trouble whatever. * * * When they discovered the officers were there and would not permit them to stage their demonstration and then they took the law into their own hands and this is the result."

It is apparent that such argument, burdened as it was with harsh insinuations and innuendo, was well calculated to excite and to inflame the passions of hatred of, and retaliation against, the Communist Party and its members, and in connection therewith to injuriously reflect upon the character and the credibility of defendant and the several witnesses who had testified in his behalf. Ordinarily, in circumstances analogous to those here present, with reference solely to an inquiry of a witness regarding his political faith or adherence, it is obvious that, although it might be considered irrelevant, its prejudicial effect might not be discernible. But in the instant case, especially in view of the fact that the evidence adduced by the prosecution was so strongly contradicted by testimony of witnesses who appeared on behalf of defendant, when the questions with reference to whether the several witnesses were members of the Communist Party and the answers thereto are considered in connection with the remarks made by the deputy district attorney to which attention hereinbefore has been directed, the prejudicial effect upon the substantial rights of defendant becomes so manifest that further discussion thereof would amount to a superfluity. People v. Pickens, 61 Cal. App. 405, 214 P. 1027.

It is ordered that the judgment and the order by which defendant's motion for a new trial was denied be, and they are, reversed.

I concur: CONREY, P. J.

I dissent: YORK, J.

◆

140 Cal.App.(Supp.) 757

MORGAN v. NEFF.

Civ. 2285.

Appellate Department, Superior Court, Los Angeles County, California.

April 13, 1934.

1. Courts 🔑190(6).
In absence of bill of exceptions or reporter's transcript, notice of motion for summary judgment and affidavits used on hearing of such motion were not part of record on appeal from judgment, where they were not part of judgment roll nor properly authenticated (Code Civ. Proc. §§ 670, 953a, 988a, 988b).

2. Appeal and error 🔑529(1).
Notice of motion for judgment and affidavits could not be considered by reviewing court, though they were actually in file, where they were not part of record on appeal.

3. Courts 🔑190(6).
Under statute authorizing superior court to make certain papers part of record, notice of motion for summary judgment and affidavits used on hearing of such motion would not be made part of record (Code Civ. Proc. § 988b).

4. Courts 🔑190(6).
Statute authorizing superior court to make certain papers part of record cannot be used to dispense with necessity for preparing bill of exceptions or reporter's transcript, where matters of evidentiary nature are to be considered on appeal (Code Civ. Proc. § 988b).

5. Appeal and error 🔑653(1).
Appellate court's inherent power to amend record does not permit it to make record when no attempt has been made to procure one, or to excuse appellant from complying with statutory provisions for bringing up evidence and other proceedings.

6. Appeal and error 🔑607(1).
Notice of appeal containing express admission that notice of entry of judgment was served on appellant twenty-eight days before notice of appeal was filed was too late to serve as statutory notice for preparation of reporter's transcript (Code Civ. Proc. § 953a).

7. Appeal and error 🔑648.
Trial court retains jurisdiction to grant relief to appellant who omitted preparation of bill of exceptions or transcript, in spite of pendency of appeal (Code Civ. Proc. § 473).

Appeal from Municipal Court of Los Angeles; Benjamin J. Scheinman, Judge.

Action for attorney's fees by L. J. Morgan against Sherman M. Neff. Judgment for plaintiff, and defendant appeals. On appellant's motion to add papers to record.

Motion denied, and submission on merits vacated.

Gaines Hon, of Los Angeles, for appellant.

Newby & Newby and Edward D. Garratt, all of Los Angeles, for respondent.

SHAW, Presiding Judge.

The defendant has appealed from a judgment, which on its face purports to have been entered in pursuance of plaintiff's motion for an order striking out the answer of the defendant and for the entry of summary judgment in favor of the plaintiff, and recites that the court "considered the affidavits filed by the plaintiff and the defendant." Upon the argument of the appeal, the defendant contended that the affidavits filed by him in opposition to the motion for a summary judgment were sufficient to show the existence of a defense and thus defeat the motion. A question having been raised whether a notice of motion and several affidavits, which had been sent to this court by the clerk of the trial court, were properly before us, defendant contended further that they were legally a part of the record on appeal, and also moved, in case this contention failed him, that this court order said papers made a part of the record, under section 988b of the Code of Civil Procedure.

[1, 2] We find in the record no bill of exceptions or reporter's transcript, and are of the opinion that the notice of motion for summary judgment and the affidavits used on the hearing of such a motion are not a part of the record on appeal from the judgment, because they are neither a part of the judgment roll nor authenticated in one of the modes just mentioned. Section 988b of the Code of Civil Procedure prescribes what shall be the record on an appeal from the municipal court, and, in case of a judgment, such record consists of the notice of appeal and notice, if any, requiring the preparation of a record under section 953a of the Code of Civil Procedure, the judgment roll, any bill of exceptions settled, or transcript certified, for use on the appeal, and all notices, affidavits, and other papers "properly referred to and identified" in such bill or transcript. The phrase "properly referred to" points to section 988a of the same Code, which permits reference in a bill of exceptions or transcript to notices, affidavits, and other papers on file with a municipal court without copying them in the bill or transcript. Section 670 of the Code of Civil Procedure prescribes what papers constitute the judgment roll, and by its terms does not include therein the notice of motion for summary judgment or the affidavits used on the hearing of such a motion. Not being a part of the judgment roll, they do not otherwise become a part of the record on appeal under the above-mentioned provisions of section 988b, unless there is a bill of exceptions or a transcript in which they are properly referred to and identified. Hence we cannot consider the notice of motion for judgment or the affidavits on the record now before us, even though they are actually in our file. Whipple v. Hopkins, 119 Cal. 349, 51 P. 535; Roberts v. Hall, 147 Cal. 434, 437, 82 P. 66; State Bank v. McLaury, 175 Cal. 31, 34, 165 P. 7; Hertel v. Emireck, 178 Cal. 534, 174 P. 30; Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 459, 274 P. 748; Cormond v. United Railroads, 41 Cal. App. 683, 685, 183 P. 218; Guyot v. Cassab, 118 Cal. App. 742, 5 P.(2d) 912; Salinas v. Riverside Fin. Co., 126 Cal. App. 675, 14 P.(2d) 1025; Sutcliffe v. Sutcliffe (Cal. Sup.) 31 P.(2d) 195.

[3-5] But, as above stated, appellant has moved that this court make the papers in question a part of the record under that provision of section 988b of the Code of Civil Procedure which reads as follows: "If it appear that there is any paper or record in the custody of the clerk of the municipal court which was before said court but which is not included in the record on appeal, and that an examination of such paper or record will assist in the determination of the appeal on its merits, the superior court may, on motion of either party, or on its own motion, require the production of such paper or a certified copy of such record, and the same shall thereupon be deemed a part of the record on appeal." This language is identical with the latter part of section 953 of the Code of Civil Procedure which affects appeals to the Supreme Court and to the District Courts of Appeal, and, as contained in the latter section, it has several times been referred to and construed. In People v. So. Pac. R. Co., 68 Cal. App. 153, 158, 228 P. 726, this provision was relied on by the court for authority to procure the original of an exhibit for examination in order to determine whether the copy in the transcript was erroneous. In Security-First National Bank v. J. G. Ruddle Prop., Inc., 211 Cal. 346, 295 P. 343, and Stafford v. Geary, 213 Cal. 650, 3 P.(2d) 10, the Supreme Court under section 953 directed that certain orders of the trial court be made parts of the record. In McMahon v. Hamilton, 202 Cal. 319, 324, 260 P. 793, section 953 was referred to but not construed, in a discussion of the inherent power of an appellate court to correct a record. In Armstead v. Jackson, 100 Cal. App. 725, 728, 280 P. 1028, this section was referred to as "a method of bringing to the appellate court all papers used in the trial court which are not included in the record on appeal," but this was coupled with an explicit statement that such papers must be authenticated as having been used on the hearing below, in the manner provided by law. In the very recent case of Stoltenberg v. Harveston (Cal. Sup.) 26 P.(2d) 833, where the appeal was on the judgment roll alone, and respondent sought under section 953 to present to the Supreme Court excerpts from the testimony and proceedings at the trial and copies of exhibits received in evidence, the court held that section 953 was not applicable, saying: "It relates to the record on appeal as provided in the three sections of

the code immediately preceding, and not to evidentiary matter properly brought up by a bill of exceptions, statement of the case or transcript of testimony." The three sections to which the court thus referred are those providing what papers constitute the record on appeal from the Superior Court. In view of this decision, we are bound to hold that the language of section 988b, on which defendant relies, cannot be used to dispense with the necessity for preparing a bill of exceptions or reporter's transcript where matters of an evidentiary nature are to be considered on appeal.

There are several decisions holding that an appellate court has inherent power to have its record amended so as to speak the truth, and may send the record back to the trial court for that purpose, and that it is the duty of the trial court thereupon to make the amendment as ordered. McMahon v. Hamilton, 202 Cal. 319, 260 P. 793; Tasker v. Warmer, 202 Cal. 445, 261 P. 474; Webster v. Webster, 216 Cal. 485, 492, 14 P.(2d) 522; Keck v. Keck, 217 Cal. 280, 18 P.(2d) 338; Seney v. Pickwick Stages, 88 Cal. App. 284, 263 P. 299; Brandes v. Rucker-Fuller Desk Co., 100 Cal. App. 512, 280 P. 379; Dugan v. Forster, 101 Cal. App. 144, 281 P. 411; Barnett v. Marsili, 122 Cal. App. 609, 10 P.(2d) 472. None of these cases, however, is like that before us. In McMahon v. Hamilton there was a bill of exceptions which the trial judge had inadvertently signed, believing that certain amendments allowed by him had been incorporated in it, and the bill was sent back for correction. In Tasker v. Warmer where both a clerk's transcript and a reporter's transcript had been prepared, certain papers belonging in the reporter's transcript had been placed in the clerk's transcript, and the record was sent back to have them put in the proper transcript. In Keck v. Keck a reporter's transcript had been requested under section 953a of the Code of Civil Procedure, but matters belonging therein had been sent up in the clerk's transcript, which the trial judge had refused to sign, and the record was sent back for a proper certification of these matters. In Seney v. Pickwick Stages, there was a reporter's transcript, but the trial judge had omitted therefrom a matter which belonged there and which the parties had stipulated he should place there. The transcript was sent back to have this omitted matter inserted. In Brandes v. Rucker-Fuller Desk Co. two instructions with notations showing who had requested them were inserted in a reporter's transcript. In Dugan v. Forster there was a bill of exceptions, and certain evidence had been inadvertently omitted therefrom, and the bill was sent back for the insertion of this matter. In Barnett v. Marsili it appeared that one question and one answer in a reporter's transcript were erroneous, and they were corrected, on presentation of an affidavit by the reporter and a certificate by the trial judge. In Webster v. Webster an excerpt from the proceedings at the trial was permitted to be filed in order to show a stipulation that the allegations of a supplemental complaint should be deemed denied, although the appeal was upon the judgment roll. In all but two of these cases a bill of exceptions or a reporter's transcript was on file, and mere corrections were allowed, and in one of the two, although there was no reporter's transcript, there had been a proper request for one, and the record which should have been in it was sent up without the judge's certificate. In the other case the pleadings only were under consideration in this connection; no question of an evidentiary nature being involved. In neither the facts nor the language of any of these decisions can we find any suggestion that the inherent power of an appellate court to amend its record goes to the extent of making a record when no attempt has been made to procure one or of excusing an appellant from complying with the statutory provisions for bringing up on appeal the evidence and other proceedings in the lower court, and we are satisfied that such inherent power does not extend so far. See, also, Espinosa v. Gould, 47 Cal. App. 316, 318, 190 P. 481; Ferguson v. Oildale, etc., Co., 78 Cal. App. 74, 77, 248 P. 256.

[6, 7] In his notice of appeal defendant included a notice to the clerk which might be regarded as sufficient for the preparation of a reporter's transcript under section 953a, but this notice of appeal contains an express admission that notice of entry of judgment had been served on defendant twenty-eight days before the notice of appeal was filed. The notice was therefore too late to serve as a notice under section 953a; a new trial proceeding to extend the time being impossible in this case. Hence none of the foregoing authorities can help defendant. Defendant's counsel suggests that he omitted the preparation of a bill or transcript in reliance upon information that, according to the practice prevailing in this court, affidavits on a motion for a summary judgment would be considered without any bill or transcript, and he

calls our attention particularly to the case of Cowan Oil, etc., Co. v. Miley Petroleum Corp., 112 Cal. App. (Supp.) 773, 295 P. 504, where he asserts this practice was followed. This matter was not considered in the opinion filed in that case, but reference to the record therein discloses that a notice to the clerk for the preparation of the record, including a reporter's transcript, had been given under section 953a, and that the clerk, after making such a record certified it himself and sent it up without a settlement by the trial judge. Upon an application for leave to withdraw the transcript for correction, we made an order that the affidavit of defendant in opposition to the motion for summary judgment, which was already in our files and certified by the clerk, be deemed part of the record on appeal. This case was substantially identical with Keck v. Keck, 217 Cal. 280, 18 P.(2d) 338, which had not then been decided, and, had we then had the benefit of that decision, we would doubtless have followed the course there pointed out, and returned the transcript to the trial court for proper certification. But our action there is not authority for the contention that a bill of exceptions or reporter's transcript is not necessary in such a case, because there the appellant had taken the necessary steps to procure such a transcript. However, in view of the assertion of appellant's counsel as to the manner in which he was induced to omit preparation of a bill or transcript, it is perhaps possible that he may obtain from the trial court relief under section 473 of the Code of Civil Procedure from his default in that respect. It is not too late for him to make an application for such relief, and the trial court retains jurisdiction to grant it in spite of the pendency of this appeal. Calif. National Bank v. El Dorado Lime, etc., Co., 200 Cal. 452, 253 P. 704; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380. We are desirous of deciding all appeals upon the merits where it is legally possible so to do, and, in order to give appellant an opportunity to present to the trial court an application for relief from his default in giving notice under section 953a or serving a bill of exceptions, the submission of this appeal on the merits is set aside, and the cause is placed upon the calendar for further hearing on May 3, 1934, at 2 o'clock p. m.

The motion under section 988b of the Code of Civil Procedure, to make certain papers a part of the record on appeal, is denied.

We concur: BISHOP, J.; FOX, J.

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220 Cal. 657

COZAD et al. v. RAISCH IMPROVEMENT CO. et al.

Sac. 4545.

Supreme Court of California.
April 30, 1934.

1. Subrogation ⚷26.

Where employee who recovered judgment against employer entered satisfaction in full as to insurer after insurer paid lesser amount under employer's liability policy, insurer which became surety on appeal bond and paid balance of judgment after affirmance on appeal *held* not "volunteer" so as to prevent subrogation to rights of employee for balance paid against judgment debtor (Code Civ. Proc. § 1059).

[Ed. Note.—For other definitions of "Volunteer," see Words & Phrases.]

2. Subrogation ⚷7(9).

Where surety on appeal bond followed procedure specified by statute for undertaking on appeal after payment of judgment affirmed on appeal, its failure to file notice and claim of contribution under statute dealing generally with sureties *held* not to prevent subrogation against judgment debtor, since specific statutes control general (Code Civ. Proc. §§ 709, 1059).

◆

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by D. W. Cozad against the Raisch Improvement Company. Judgment for plaintiff was affirmed by the superior court, and the judgment was assigned to Guy Le Roy Stevick for the benefit of the Fidelity & Deposit Company of Maryland. From an order quashing execution against defendant, the Fidelity & Deposit Company of Maryland and others appeal.

Reversed.

See, also, 175 Cal. 619, 166 P. 1000; 208 Cal. 496, 281 P. 1017.

Alfred C. Skaife and Edwin H. Williams, both of San Francisco (A. S. Hutchinson, of San Francisco, of counsel), for appellants.

A. B. Weiler and Herbert Choynski, both of San Francisco, for respondent.

PER CURIAM.

In October, 1913, D. W. Cozad recovered a judgment against defendant, Raisch Improvement Company, in the sum of $5,898.95 and costs, which judgment was affirmed on appeal. Fidelity & Deposit Company of Maryland had issued a policy of employer's liability insurance in favor of said defendant in the sum of $5,000, and hence was liable in that amount. The said insurance company also executed an undertaking to stay execution on the defendant's appeal. Upon affirmance, it paid the amount for which it was liable on the insurance policy; i. e., $5,000 and costs and interest, the total amounting to $7,016.93. Defendant, Raisch Improvement Company, was liable for the balance of the judgment, $898.95, and promised to pay the same. Upon its failure to do so, the insurance company paid the balance, and took an assignment of the judgment in favor of Guy Le Roy Stevick, for its benefit. He proceeded to levy execution against the defendant on said judgment, which execution was, upon defendant's motion, later recalled and quashed. This appeal is by Fidelity & Deposit Company of Maryland from the order quashing execution.

The position of appellant is that it occupied two distinct relations with respect to defendant—one as insurer to the extent of the $5,000 liability on its policy; and the other, as surety on an undertaking on appeal. Having paid the amount of the policy, it discharged its liability as insurer. The liability it assumed under the bond to stay execution, however, made it responsible for the full amount of the judgment subsequently affirmed, but with the right of subrogation against the defendant. See Code Civ. Proc., § 1059. Normally, when it paid the balance of the judgment and took an assignment thereof, it could proceed against the defendant to recover the same.

[1] Defendant seeks to escape from this rule, and avoid liability for the balance of the judgment, on the ground that, at the time the surety paid the same, it was not bound to do so, and acted as a volunteer. This contention is based upon the following circumstances: The insurance company paid the sum for which it was liable under the policy on September 29, 1917, and on that date, the attorney for the plaintiff in the action caused to be entered in the judgment book a satisfaction of judgment "in full as against the Fidelity and Deposit Company of Maryland, by payment of $7,016.93." Defendant's position would compel the conclusion that plaintiff's attorney deliberately satisfied a judgment against a corporate surety on an undertaking on appeal for less than the amount of the judgment. This conclusion is unreasonable, and is inconsistent with the subse-

quent acts of the parties, particularly the act of the surety in paying the balance itself, in spite of the above language. The fact that on its face the amount received was less than the amount of the judgment serves as further evidence that the satisfaction was not as to the whole of the judgment, but merely as to the whole of the liability of the Fidelity Company as insurer under the policy. Moreover, the evidence of plaintiff's attorney, contained in an affidavit in the record, corroborates this view, namely, that the satisfaction was partial only, to the extent of $7,016.93, and that, if the surety were compelled to pay the balance, it was agreed that the plaintiff would make an assignment of the judgment to it. We are satisfied that the intent of the parties in making the above entry was to satisfy the judgment in full against Fidelity & Deposit Company as insurer under the employer's liability policy, and that there was no intent to release it from its undertaking on appeal, which was a separate and distinct liability for the whole of the judgment in the event that the defendant failed to pay it. Under this view, the surety was not a volunteer and is entitled to recover from defendant.

[2] Some question is also made as to the failure of the surety to file notice and claim of contribution with the clerk of the court within ten days after payment of the balance of the judgment, as provided in section 709 of the Code of Civil Procedure. This section relates to sureties generally, while section 1059 of the same Code deals specifically with the rights of a surety on an undertaking on appeal, and on principle and authority the specific section must control the general. The procedure followed by appellant was in conformity with the provisions of section 1059, and was a proper method of enforcing its subrogation right.

The order quashing execution is reversed.

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220 Cal. 589

PEOPLE v. HANSON.

Cr. 3716.

Supreme Court of California.
April 25, 1934.

Rehearing Denied May 24, 1934.

Assault and battery 🔑92.

Evidence showing defendant attacked officer attempting to arrest him, snatched officer's gun, and engaged in struggle during which officer was shot in hand, *held* to support conviction of assault with deadly weapon, as against contention that only simple assault was shown.

In Bank.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Harry A. Hanson was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Prior opinion in 25 P.(2d) 997.

Robert E. Crowley and Gerard Remington, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

Defendants were charged with the crime of assault with a deadly weapon. The jury returned a verdict against defendant Hanson of guilty of the offense charged, and against defendant Tillotson, a verdict of guilty of simple assault. Defendant Hanson appeals from the resulting judgment of conviction and from the order denying his motion for a new trial, contending that the record establishes no more than simple assault.

The evidence shows that on the morning of January 3, 1933, defendants, who were driving home in their car, stopped in the rear of a Safeway store in the city of Los Angeles, whereupon defendant Hanson got out, took a box of tomatoes from the platform, and put it in the car. Police Officer Joseph E. Daniels then appeared and placed Hanson under arrest, took him to the car, and, holding his gun in his right hand, attempted to handcuff Hanson to Tillotson. Hanson snatched the officer's gun, called for Tillotson to help, and the three engaged in a struggle during which the gun was discharged; the bullet striking the officer's hand. Defendants succeeded in throwing the officer to the ground and escaped. They were apprehended several weeks later.

Appellant, as already stated, claims that the evidence establishes only a simple assault. The testimony of Officer Daniels shows that he was struck with the handcuffs, and narrowly escaped death from the gun. He said: "The struggle took place between Mr. Hanson, Mr. Tillotson and myself, and the gun was completely away from me before it ever went off." He also testified: "I was trying to keep the gun from going off while it was pointed at my head—was pushing it away." As he pushed it aside, the gun was discharged, with the result stated. One of the defendants then struck the officer on the jaw, knocking him down.

Appellant seeks to transform this vicious attack on an officer of the law, which, by reason of his desperate defense, fell short of murder, into a misdemeanor of the character of a street brawl. He says that he did not intend to shoot the officer. The jury was fully justified in inferring an unlawful intent from the fact that he seized the gun, and that it was discharged when pointed at the officer. People v. Wells, 145 Cal. 138, 78 P. 470, amply supports the judgment.

Police officers daily risk their lives in the protection of lives and property of the public. Their duties are sufficiently hazardous without adding to their danger by condoning conduct such as that of the defendant. A deadly assault on an officer should meet with swift and severe punishment, and this the jury has meted out to appellant. Less than this would amount to an invitation to other dangerous criminals to hold the life of a police officer as cheaply as defendant has held it.

The judgment and order are affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.

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220 Cal. 535

RITTERSBACHER v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

L. A. 14510.

Supreme Court of California.
April 19, 1934.

Rehearing Denied May 17, 1934.

1. Mandamus 🔑187(2).

Order sustaining demurrers to mandamus petitions is not appealable.

2. Taxation 🔑497.

Defendants in mandamus proceedings for cancellation of tax assessments *held* not bound by facts, shown to county board of equalization before it denied plaintiffs' petitions to equalize assessments, because of assessor's failure to file reply until after such denial (Const. art. 13, § 1; Pol. Code, §§ 3617 and 3627, as amended by St. 1929, pp. 124, 126, §§ 1, 2, and § 3804a, as amended by St. 1925, p. 431).

Petitions filed with board alleged merely overvaluation of described realty and prayed equalization of value of petitioners' property and other similarly situated property of like character, but petitioners produced evidence of adoption of lower percentage of value in assessing certain classes of personalty than that applied to realty to unlawful prejudice of and discrimination against latter, whereupon assessor requested and was accorded right to reply later; to "equalize" being to make equal, cause to correspond, or be like in amount or degree as compared with something.

[Ed. Note.—For other definitions of "Equalize," see Words & Phrases.]

3. Taxation 🔑483.

While mere informalities in presentation of petitions for equalization of tax assessments should receive liberal indulgence, statutory requirement that petitioners advise county board of equalization of facts claimed to require reduction of assessments on their property should be complied with (Pol. Code, § 3674).

4. Taxation 🔑466.

County board of equalization cannot raise or lower entire county assessment roll (Pol. Code, § 3673, as amended by St. 1931, p. 2000).

5. Taxation 🔑483.

Petitions to county board of equalization for equalization of assessments on realty *held* properly denied as not referring to petitioners' claim, supported by evidence, that their properties were assessed on unlawfully discriminatory basis (Const. art. 13, § 1; Pol. Code, § 3674, and §§ 3617 and 3627, as amended by St. 1929, pp. 124, 126, §§ 1, 2).

6. Mandamus 🔑172.

Whether mandamus petitions state facts entitling plaintiffs to any relief must be determined on facts existing when petitions were filed as disclosed by allegations thereof.

7. Taxation 🔑497.

Owners conceding that their properties were subject to tax assessments and raising no question of double taxation *held* not entitled to cancellation of all assessments as discriminatory or portion found erroneous and illegal by court (Pol. Code, § 3804a, as amended by St. 1925, p. 431).

8. Taxation 🔑497.

County assessor's report, attached to and made part of mandamus petitions for cancellation of tax assessments after denial of taxpayers' equalization petitions, in connection with which report was made, may be considered as part of case made by petitioners (Pol. Code, § 3804a, as amended by St. 1925, p. 431).

9. Taxation 🔑497.

Showing made to justify denial of petitions for equalization of tax assessments at time of return to alternative writ of mandate to compel cancellation thereof governs, whether matters shown appear as part of petitions for writ or return thereto; demurrers to petitions being sufficient return (Pol. Code, § 3804a, as amended by St. 1925, p. 431).

10. Taxation 🔑497.

Invalidity of practically entire county assessment roll should not be adjudged in mandamus proceeding for cancellation of assessments without clear showing of fraud or equivalent thereof (Pol. Code, § 3804a, as amended by St. 1925, p. 431).

11. Taxation 🔑497.

To procure cancellation of tax assessments on grounds invalidating practically entire county assessment roll, plaintiffs must show such action by assessor as constituted arbitrary, willful disregard of law and constructive fraud on plaintiffs (Pol. Code, § 3804a, as amended by St. 1925, p. 431).

12. Mandamus 🔑154(2).

Allegations of mandamus petitions, of which attached documents counteracting and destroying effect of such allegations are made part, are not sufficient in themselves.

13. Taxation 🔑49.

It is county assessor's duty to see that valuation of various kinds of property for taxation is in proportion to worth thereof (Const. art. 13, § 1; Pol. Code, §§ 3617, 3627, as amended by St. 1929, pp. 124, 126, §§ 1, 2).

14. Taxation 🔑350.

Personal property must be assessed for taxation on basis fair to owners of realty, so that neither shall suffer to other's advantage.

15. Taxation 🔑350.

County tax assessor has large measure of discretion as to depreciation allowance in assessing personal property (Pol. Code, § 3617, as amended by St. 1929, p. 124, § 1).

16. Taxation 🔑441.

To adjudge entire county assessment roll invalid because of too liberal depreciation allowance in assessing personalty, depreciated value applied must be declared as matter of law to be not amount at which property would be taken in payment of just debt from solvent debtor and assessor's rules and methods so unlawful, discriminatory, and inequitable as to constitute constructive fraud on real estate owners (Pol. Code, § 3617, as amended by St. 1929, p. 124, § 1).

17. Taxation 🔑441.

Entire county tax assessment roll *held* not invalid because of assessment of certain personalty at 50% of its value after discounting owners' inventories of merchandise and new automobiles by 20% and allowing 40% depreciation for used automobiles and office furniture and fixtures (Pol. Code, § 3617, as amended by St. 1929, p. 124, § 1).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Consolidated actions by Etta Rittersbacher and others for writs of mandate to compel the Board of Supervisors of Los Angeles County and others to order cancellation of county tax assessments or erroneous portions thereof. From an order sustaining demurrers to the petitions and a judgment of dismissal, plaintiffs appeal.

Appeal from order sustaining demurrers dismissed, and judgment affirmed.

Daniel E. Farr and W. Torrence Stockman, both of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

The plaintiff above named is the owner of unimproved lot No. 22 in block 15, tract No. 8235, in Los Angeles county. By her petition filed in the superior court she sought a writ of mandate to compel the defendants, board of supervisors, county auditor, county tax collector, and county counsel to order and consent to the cancellation of the assessment for general county purposes levied against said lot by the county assessor for the year 1933. On July 17, 1933, through her agent, she filed with the board of supervisors, sitting as a board of equalization, her petition to have the valuation placed upon said property by the assessor reduced from $640 to $385. After a hearing her petition was denied on July 26, 1933. On September 19, 1933, she commenced this proceeding in the superior court to obtain the cancellation of said assessment "or such portion thereof as the court finds to be erroneous."

[1] Through the same agent eight other owners of real property, some of which was improved and some unimproved, filed separate petitions with said board of equalization to have the assessments on their several properties reduced to designated sums. These petitions were denied, and the petitioners therein filed similar petitions in mandamus to compel the cancellation of said assessments, "or such portions thereof as the court finds to be erroneous." To each petition for the writ a general demurrer was filed. Pursuant to a stipulation of the parties and an order of court, all nine causes were consolidated and thereafter treated as one proceeding. The demurrers were sustained without leave to amend and a judgment of dismissal entered, whereupon an appeal was taken both from the order sustaining the demurrers and from the judgment of dismissal. The appeal from the order, which is nonappealable, is dismissed.

[2] On the appeal from the judgment it is contended that the petition for the writ of mandamus, together with the exhibits attached thereto, shows that the uncontradicted evidence before the board of equalization, at the time the petitions for equalization were denied, proved that the assessor had willfully adopted and deliberately pursued an erroneous and discriminatory and inequitable method of assessing different classes of property which resulted in excessively inequitable valuations of the property of the plaintiffs, and therefore that the peremptory writ should have been granted. In this connection it is claimed that the uncontradicted evidence before the board at the time the petitions for equalization were denied was that the assessor adopted a lower percentage in assessing certain classes of personal property than that applied to real estate and improvements, to the unlawful prejudice of and discrimination against the latter. That evidence, as produced by the agent of the several petitioners, was to the effect that, in assessing the property in the county "in proportion to its value to be ascertained as provided by law," as required by the Constitution (article 13, § 1), and by sections 3617 and 3627 of the Political Code, as amended by St. 1929, pp. 124, 126, §§ 1, 2, the assessor adopted 50 per cent. of the value of real property and 50 per cent. of the depreciated value of improvements thereon as the value of said property for the purpose of assessment; that in assessing merchandise the assessor adopted 40 per cent. of the "cost or market value, whichever is lower"; that 40 per cent. was applied to stocks of new automobiles, 30 per cent. to fleets of automobiles in use, 30 per cent. to store fixtures, 40 per cent. to office furniture and fixtures, 30 per cent. to machinery and equipment, and 30 per cent. to used automobiles. After this evidence was produced by the petitioners the assessor requested and was accorded the right to reply at a later date. This reply was filed with the board, but not until after the board had denied the petitions. Therefore the plaintiffs herein contend that the defendants are bound, on the subsequent proceeding for a cancellation of the assessments pursuant to section 3804a of the Political Code, as amended by St. 1925, p. 431, by the showing of the alleged uncontradicted facts made to the board at the time of or prior to the orders of denial of the petitions to equalize. But this is not so. The petitions filed with the board alleged an overvaluation of the described real estate and improvements and nothing more, and the prayer was for an equalization of the value. "To equalize is to make equal, to cause to correspond, or be like in amount or degree, as compared with something." Wells Fargo & Co. v. State Board of Equalization, 56 Cal. 194, 196. What the petitioners before the board were entitled to was that their property be placed "on the same basis of valuation as that applied to other property of like character and similarly situated." Birch v. County of Orange, 186 Cal. 736, 200 P. 647, 649; Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 166, 121 P. 384, 9 A. L. R. 1277. On the hearing on this issue the assessor's office reported to the board, in effect, that there was no disparity between the assessment on the properties of the petitioners and that placed on like property similarly situated, and there was no showing to the contrary on that issue.

[3-5] As above indicated, the petitions for equalization filed with the board made no reference whatever to the claim of the petitioners that their properties were assessed on an unlawfully discriminatory basis. The petitioners failed then to advise the board of "the facts upon which it is claimed such reduction should be made," as required by section 3674 of the Political Code. While mere informalities in the presentation of a petition for equalization should receive a liberal indulgence, nevertheless the above requirement of said section 3674 serves a necessary purpose and should be complied with in order that the board may know, or have some reasonable means of ascertaining, what the claims of the petitioners are, to the end that such claims may be investigated by the as-

sessing authorities prior to the hearing. The proof offered by the petitioners at the hearing might well have taken the assessor by surprise as being entirely without the scope of the inquiry presented by the petitions, and this may account for the fact that the assessor requested time to make a reply to the attempted showing of illegality of the assessments. In this connection it must be noted that the claims of the petitioners on the hearing, if supported to their full import, would invalidate the entire assessment roll of the county, or would require the board to raise or lower the entire assessment roll, a power not possessed by the board under section 3673 of the Political Code, as amended by St. 1931, p. 2000. We therefore conclude that the petitions for equalization as filed with the board were properly denied.

[6, 7] We have discussed the foregoing points because they are elaborately argued in the briefs; but a determination thereof is not determinative of this appeal. The real question is whether the petitions in mandamus state facts entitling the plaintiffs to any relief; and this question must be determined on the facts existing at the time the petitions for the writs were filed as disclosed by the allegations thereof. It may be assumed that the denial of the petitions for equalization would not foreclose the petitioners from later presenting and pursuing their demand for a cancellation of the assessments pursuant to section 3804a of the Political Code, as amended by St. 1925, p. 431. That section would seem to be available in the absence of any previous petition to the board of equalization. Its obvious purpose is to afford relief to a taxpayer whose property is assessed "more than once, or erroneously or illegally" assessed. This section was applied and given effect in Central Mfg. Dist. v. State Board of Equalization, 214 Cal. 288, 5 P.(2d) 424, wherein it appeared that to refuse the relief prayed for would result in an assessment of the property "more than once" and result in double taxation. But that is not this case. Here the plaintiffs concede that their properties are subject to assessment and taxation, and no question of double taxation is involved. If their prayer for the cancellation of each assessment in its entirety be granted, their properties will escape taxation for the year in question. Also, to grant the relief in so far as the cancellation of "such portion as the court finds to be erroneous, illegal and void," is sought, would presuppose that under said section 3804a the defendants herein could order and consent to the segregation of the alleged illegal portion from that which the plaintiffs properly should pay. The assessments in each case are in a lump sum and said section 3804a contains no provision for segregation in the manner proposed.

[8, 9] When the question of the cancellation of the entire amount as illegal is considered, we turn to the allegations on the petitions and the exhibits attached thereto. The petitions allege the percentages adopted by the assessor as to real estate and improvements, and the different percentages adopted in the assessment of the certain classes of personal property above noted, and as shown before the board of equalization, and the consequent alleged unlawful discrimination and illegality of the assessments. Attached to the petitions and made a part thereof is a copy of the statement and report of the assessor made to the board of equalization in connection with the petitions to equalize. This report may properly be considered as a part of the case made by the petitioners herein. It would seem to make no difference whether the matter in justification of the action of the defendants appears as a part of the petition itself or as a part of the return to the alternative writ, as occurred in Bank of Italy v. Johnson, 200 Cal. 1, 28, 251 P. 784. In either event the showing made at the time of the return to the alternative writ would govern notwithstanding an adequate showing of justification for the acts of the defendants be not earlier made. Such justification may appear from the facts presented by the petitions, and the demurrer is a sufficient return.

[10-12] If the plaintiffs were to prevail in this consolidated proceeding, the result would be to invalidate practically the entire assessment roll of Los Angeles county for the year 1933. Such a result may not lightly be contemplated and should not be adjudged except upon a clear showing of "fraud or something equivalent of fraud" on the part of the assessing authorities such as appearing in Mahoney v. City of San Diego, 198 Cal. 388, 245 P. 189, and Southern Pacific Land Co. v. San Diego County, 183 Cal. 543, 191 P. 931. No actual fraud or improper motives on the part of the assessing authorities is charged or intimated. If the plaintiffs are to succeed, they must make a showing of action on the part of the assessor such as would constitute an arbitrary and willful disregard of the law intended for his guidance and be a constructive fraud upon them. Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A. L. R. 1277; Birch v. County of Orange, 186 Cal.

736, 200 P. 647; Hammond L. Co. v. County of Los Angeles, 104 Cal. App. 235, 285 P. 896. The allegations of the petition are not in themselves sufficient if there is attached to and made a part of the petitions documentary evidence which would counteract and destroy the effect of the allegations.

This brings us to a consideration of the lengthy written report of the assessor made to the board of equalization and made a part of the petition. This report shows that there are in Los Angeles county the following: In excess of 1,217,000 parcels of real estate, comprising every type of this class of property on which a valuation must be placed; in excess of 1,150,000 structures of every conceivable nature subject to assessment; in excess of 80,000 dealers in all kinds of tangible personal property upon which valuations must be placed; about 800,000 motor vehicles subject to assessment; and in excess of 1,000,000 taxpayers owning all the types, kinds and classes of other personal property which it is necessary to appraise. All of this property must be appraised and assessed within the limited time between the first Monday in March and the first Monday in July of the same year. To accomplish his task the assessor has about 600 field deputies to assist him. Obviously the enormous extent of the task can afford no justification for an illegal tax. These figures were presented by the assessor merely to demonstrate that it is necessary that he promulgate certain general rules and formulas of percentages of depreciation for general use in order to secure uniformity in valuation as required by law.

[13, 14] In his statement the assessor sets forth the standards set up, the methods applied, and the procedure followed by him in arriving at the value of real property and improvements thereon within his jurisdiction. The methods adopted and rules applied in assessing this class of property are not seriously questioned. In arriving at the value of all property for the purposes of assessment the assessor is guided generally by section 3617 of the Political Code, which defines the term "value" as "the amount at which the property would be taken in payment of a just debt from a solvent debtor." This value is expressed in section 3627 of the Political Code as the "full cash value" for purposes of assessment. It is the assessor's recognized duty to see that the valuation placed on the various kinds of property shall be in proportion to the worth of such properties. If it is proportional and all are treated alike, no one contends that the taxpayers must be charged a full hundred per cent., for such is not required by the law. It is also recognized that the assessment on personal property shall be on a basis which is fair to the owners of real property so that neither shall suffer to the advantage of the other.

[15-17] In dealing with the assessment of personal property the assessor is confronted with a difficult problem. In an endeavor to solve it he recognizes two general classes, viz., "business personal property" and "personal property." The former refers to that class of personal property owned and used in manufacture, commerce, and trade, and the latter to that class of personal property which represents the personal belongings of individuals, usually in their homes. With reference to a stock in trade it is obviously impracticable if not impossible to take an inventory and evaluate each article. The inventories of stocks of merchandise reflected on the books of the company are taken as indicative of their worth. This inventory is discounted 20 per cent. and then 50 per cent. is applied for assessment purposes. It is not pointed out by the plaintiffs, nor does it appear how or in what manner the discount so applied is as a matter of law unreasonable or unlawful. Conceding that 20 per cent. is an arbitrary figure, some discount would appear to be necessary and proper. Depreciation in value of merchandise which has remained upon the shelves must take place, as surely as depreciation of structures. Formerly the same percentage of depreciation was applied to machinery and equipment. But in recent years the replacement cost, which is deemed an important factor, has been found to decline steadily, the percentage of depreciation has been increased accordingly, and the 50 per cent. of the value less this depreciation has been applied for assessment purposes. A dealer's inventory of new automobiles has been discounted 20 per cent. and the remainder assessed on a basis of 50 per cent. Used automobiles, both in the hands of dealers and in use, are depreciated 40 per cent. on a basis of the cost price and the year of manufacture. This is likewise more or less arbitrary, but it must necessarily be so in order to attain a proper degree of uniformity. Office furniture and fixtures are depreciated 40 per cent. and the depreciated value assessed on a basis of 50 per cent.

The schedule of depreciation applied to the various kinds of personal property appears in the instructions given to the deputy assessors and the depreciated value in all cases is assessed on a basis of 50 per cent. The plaintiffs apparently endeavored to show before the board of equalization and now insist that the various kinds of personal property were assessed on a different basis. The allegations of their complaints are subject to that construction, but when the exhibits are taken into consideration it becomes apparent that the basis of their complaint rests upon the different percentages of depreciation applied to the various classes of personal property. If the percentages of deduction for depreciation are not out of line, there can be no room for the claim that the valuations thus fixed are not assessed on the same uniform basis as applied to real estate and improvements. In the determination of the depreciation to be allowed, the assessor is vested with a large measure of discretion. The percentages here shown to have been applied may or may not have been too liberal in favor of the taxpayer, but in order that the entire assessment roll be adjudged invalid it must be declared that the depreciated value applied by the assessor was not as matter of law "the amount at which the property would be taken in payment of a just debt from a solvent debtor," as provided in section 3617 of the Political Code, as amended by St. 1929, p. 124, § 1, and further that the rules prescribed and methods pursued by the assessor were so unlawful, discriminatory, and inequitable as to constitute a constructive fraud on the owners of real estate. We are not justified in so declaring, and conclude that the demurrers were properly sustained.

The judgment in the consolidated action is accordingly affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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220 Cal. 681

SHAEFFER v. STATE BAR OF CALIFORNIA.

S. F. 14959.

Supreme Court of California.
April 30, 1934.

Rehearing Denied May 29, 1934.

1. Attorney and client 🔑57.

Attorney must present any available favorable evidence to local administrative committee conducting disciplinary proceedings, and attorney may not neglect to do so and then demand on petition for review by court that proceedings be remanded to permit him to introduce such evidence.

2. Attorney and client 🔑57.

Reviewing governor, who made confidential communication to other members of Board of Governors of state of record of disciplinary proceedings before local administrative committee, was not thereby disqualified to sit as member of board at its hearing, nor was such communication a part of record on review.

3. Attorney and client 🔑57.

In disciplinary proceedings, Board of Governors need not have served copy of its findings on attorney prior to filing thereof with clerk of Supreme Court.

4. Attorney and client 🔑58.

Suspension of attorney from practice for three years for having written names of others to deed without authority and having procured false certification of acknowledgment thereof, and having himself issued false certificate of acknowledgment and for relations with two opposing interests which were questionably conflicting, *held* not unreasonable.

LANGDON and SEAWELL, JJ., dissenting.

In Bank.

Petition by Fred A. Shaeffer to review the recommendation of the Board of Governors of the State Bar of California that petitioner be suspended from practice for three years. Petitioner also filed a motion to remand the proceedings for rehearing before a local administrative committee.

Motion denied. Petitioner suspended for three years.

Rehearing denied; LANGDON, J., dissenting.

John D. Costello and Bartley C. Crum, both of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

On June 15, 1932, the petitioner was served with an order to show cause in disciplinary proceedings before the local administrative committee of the State Bar for Santa Barbara county. The order contained six charges on account of matters hereinafter discussed. The local committee found true the facts alleged in five out of the six charges, or counts, as they have been termed, and recommended the suspension of the petitioner from the practice of the law for the period of one year.

After hearing before the Board of Governors, the latter body recommended a period of suspension for three years. The petitioner instituted the present proceedings for a review. Subsequently he made a motion to remand the proceedings for rehearing before a local administrative committee. By stipulation the motion is submitted with the petition on its merits.

The petitioner was admitted to the practice of law in this state in 1915 and has practiced his profession in the city of Santa Maria for about fifteen years.

The record of the testimony and the documentary evidence taken before the local administrative committee and before the Board of Governors supports the following statement of the facts as to each of the five counts upon which the findings are adverse to the petitioner and which are substantially the facts found by the Board of Governors.

Count 1: In 1927 the petitioner with R. E. Turner, F. W. Grisingher, and others was interested in a subdivision known as Mt. Pleasanton Square, an addition to the city of San Luis Obispo. Title to the property was taken in the name of the petitioner. A map of the subdivision purporting to dedicate to public use the streets shown thereon had been filed of record. However, the board of supervisors required a dedication by deed. On August 10, 1927, the petitioner signed his own name and, without their authority, the names of R. E. Turner and F. W. Grisingher to such a deed. There is enough difference in the appearance of the three signatures to support an inference that such difference was the result of a studied effort to make it appear that the names had not been written by the same hand. The petitioner procured his secretary, Beatrice L. Brown, a notary public, to attach a certificate that said Turner and Grisingher acknowledged the execution of the instrument of dedication. There is support for the conclusion that at the time Turner and Grisingher would not have consented to the dedication, inasmuch as it involved an assessment amounting to about $440 against each lot for paving work.

Count 3: A department of the superior court of Santa Barbara county was established at Santa Maria. The only jury case pending and ready for trial was one in which the petitioner represented one of the parties. A few days before the date set for the trial of the case, in November, 1931, the petitioner handed to the deputy sheriff a list of names which he designated as names of representative citizens who would make good jurors. No request for such a list had been made. At least one of those on the list was a former client of the petitioner and many were acquaintances of his. The deputy turned the list over to his superior, who instructed him not to call any of the names on the list. In fact, the jury had already been called and none of the persons whose names were on the list acted as a juror in the particular case involved.

Count 4: This count involves alleged violations of rules 4 and 5 of the rules of professional conduct (213 Cal. cxiv), which prohibit respectively the acquisition of an interest adverse to a client and the acceptance of employment adverse to a client or former client relating to a matter in reference to which the attorney has obtained confidential information by reason of or in the course of his employment by such client or former client. In November, 1927, the petitioner accepted employment by one Limbocker to collect judgments in the sum of $2,200 and other obligations in the sum of $11,400 against R. E. Turner and W. L. Harvey, after assuring Limbocker that he no longer represented Turner as his attorney. It is a fair inference from the record that the employment was offered and accepted on the understanding that the petitioner was in a position to know of Turner's holdings and would be able to collect the judgments. He was to be paid for his services a fee representing a percentage of amounts actually collected on the judgments. The petitioner obtained judgment on the $11,400 obligations against Harvey and Turner, but failed to record the judgment. Later developments in divorce proceedings showed that some property in Mrs. Turner's name was community property, and because of the failure to record the judgment no lien was obtained against it. The record shows that the petitioner made some unsuccessful efforts to collect the judgments as against Harvey, but apparently made no attempt to collect as against Turner. The only payment on the judgments was the sum of $500 paid for a partial release of some property of Turner's from the smaller judgment, to which Limbocker consented at the petitioner's request. Prior to the employment the petitioner had represented Turner in at least one matter, and during all of the time and up to the time of the hearing he was his intimate personal friend and close business associate. There is also evidence introduced by the petitioner that he accepted other employments in collections against Turner; also, that he represented Mrs. Turner in the matter of taking some depositions in the Turner divorce proceedings.

Count 5: In 1928 an entity called Shaeffer Associates was conducting negotiations with reference to a certain oil lease owned by Withrow. The petitioner was a secretary or other officer and an attorney for that association. Withrow had executed as lessor a lease to "California-Pacific Company" as lessee. The lease provided that it should not be assigned except with the consent of the lessor. The incorporation of California-Pacific Company was never completed because of some conflict in the proposed corporate name. The lease shows that the words "California-Pacific Company" were erased and "Metro-Grande Oil Company" substituted. It was delivered to the latter company and the Shaeffer Associates received the sum of $8,000 from that company. It is not disputed that the petitioner at least had knowledge of the change, although he did not personally execute it, and that the change and the receipt of the money was without the knowledge or consent of Withrow, who received no copy of the changed lease. It appeared before the Board of Governors that although the amount was deposited to his personal account, the petitioner received no part of it for his personal use but the same was disbursed to creditors of the Shaeffer Associates. It also appeared before the board that in two actions brought by Withrow the petitioner had been exonerated of any charge of receiving or converting the same or any part of it to his personal use and that in a third action in which the petitioner was not a defendant, Withrow obtained a judgment for the amount against the Shaeffer Associates.

Count 6: In 1929 the petitioner was interested in another real property subdivision. The title stood in the name of Beatrice L. Brown, his secretary. It became necessary to convey the title to the unsold lots to a trust company, and to that end Beatrice L. Brown, in June of that year, executed a deed and then went on her vacation. In her absence it was discovered that several lots had not been included in the deed. The petitioner, without holding a power of attorney, signed the name of Beatrice L. Brown to a deed and attached his own notarial certificate purporting to certify to the acknowledgment thereof by Beatrice L. Brown. It appeared, however, that he frequently signed her name with her consent, that no intent to defraud was involved, and in the proceedings before the local administrative committee Beatrice L. Brown ratified his act in the particular instance.

It is upon substantially the foregoing facts that the majority of the members of the Board of Governors recommended suspension for three years. The petitioner presents a voluminous record of forty-eight instruments termed "exhibits" which comprise affidavits by the persons whose names were on the jury list hereinabove mentioned, by the sheriff and deputy sheriff of Santa Barbara county, copies of the findings and judgment in the Withrow action in which the petitioner had judgment in his favor, and other affidavits and letters specifying the good character of the petitioner and other matters not necessary to be noted. The petitioner claims that the receipt in evidence of the matter included in the foregoing proffered record would exonerate him of all charges, and on this ground prosecutes his motion to have the proceedings remanded. The instruments submitted were executed subsequent to the date of the findings and recommendation of the Board of Governors. We do not deem that the course requested is necessary in order fairly to dispose of the questions before us on this review, nor does it appear that the material would serve the end hoped for by the petitioner. Practically all of the material now submitted, at least in substance, was called to the attention of the board and its findings show was given due consideration, and on a reconsideration of the case the additional matter now presented would for the most part be merely cumulative.

[1] The petitioner urges that he is entitled to have his motion to remand granted because the local committee itself should have produced the evidence now offered in the forty-eight exhibits submitted; that its failure to do so was a violation of rule 28 of the rules of procedure of the State Bar, which provides that investigations and hearings before the committee or board shall be informal, but thorough, with the object of ascertaining the truth (293 Cal. cxxix). The language of this rule is not to be construed as permitting the petitioner to remain idle or leaving him without any duty in the premises. If the attorney through neglect or otherwise fails to make a complete disclosure, he may be unable on a review to show that the decision of the board is erroneous. Stafford v. State Bar (Cal. Sup.) 26 P.(2d) 833. Likewise the practice pursuant to such a rule requires that the attorney present any evidence available to him which he deems favorable to himself, to the local committee and the board, where such evidence may appropriately be received, and he may not neglect or withhold his activities in that respect and then successfully demand on his petition for review either that such evidence may properly be considered by this court or that he is entitled to another hearing

in order to have it considered by the appropriate body.

[2] The petitioner makes the contention that Hon. John Perry Wood was disqualified to sit as a member of the Board of Governors for the reason that prior to the hearing before the board he had made a report as a reviewing governor for the benefit of the members of the board; that although he had withheld his recommendation from his report, so it is stated, he nevertheless had prejudged the case against the petitioner. Further, that pursuant to the rules the report of the reviewing governor is a part of the record and, together with the views of the other members of the board, should have been included for the benefit of the court on review. It appears that the report was a confidential communication by the reviewing governor to the other members of the board prior to the hearing before it of the state of the record of the proceedings before the local administrative committee. As such it forms no part of the record and was not a matter to which the petitioner had any right of access. Such a communication is but a step in the private deliberations of the fact-finding body and no question of the disqualification of the members of that body can arise by virtue of its preparation. It appears that the record before us contains all matters which are required to be made a part thereof.

[3] The petitioner complains that he was not served with a copy of the proposed findings prior to the filing thereof with the clerk of the Supreme Court. There is no rule applicable to disciplinary proceedings before the State Bar which requires the service of findings on the attorney prior to their adoption and filing by the board.

[4] The petitioner advances several reasons why the recommendation of suspension for a period of three years is, in his opinion, not sustained by the record. He urges that in some instances the charges are stale, and that in others, as in counts 3 and 6, no one appears to have been hurt. The present case is not one where such extenuating circumstances may be said to condone the major offenses involved. In a case where it appears without dispute that the attorney has written the names of others to a deed without authority and has procured a false certification of acknowledgment thereof, and in another instance he himself has issued a false certificate of acknowledgment, and where, in another instance, his relations with two opposing interests are, to say the least, questionably conflicting, we cannot say that the period of suspension recommended by the board is unreasonable.

The motion to remand is denied, and it is ordered that the petitioner be suspended from practice as an attorney and counselor at law of this state for the period of three years from and after the filing of this order.

LANGDON, Justice (dissenting).

I dissent. I am convinced that the record before us is insufficient to enable this court to do justice in this matter. The motion to remand the proceeding for the taking of further evidence should be granted.

SEAWELL, Justice (dissenting).

I am of the opinion that the motion to remand the proceeding for the taking of further evidence in view of the affidavits and showing made by petitioner should be granted. It is true that the showing which he claims that he is able to make, and which, without very great reason he failed to make, when the cause was properly before the local administrative committee and before the Board of Governors, may fail and result in a recommendation similar in effect to the one now before this court, nevertheless, it would remove all claims of petitioner that he was, for any reason, denied full opportunity to present his defense. If the charges are true as found, and as the record now stands, there is ample evidence to sustain the recommendation of the Board of Bar Governors, petitioner was not harshly or unjustly dealt with. If the evidence which he proposes to present does not support his claim, he surely will not have improved his situation. That contingency is a matter for his determination. Solely to the end that this court may have for review all of the material facts bearing upon the charges preferred against the petitioner I vote for granting the petition to remand the cause for further proceedings.

220 Cal. 578

JOINT HIGHWAY DIST. NO. 13 v. HINMAN, Treasurer.

S. F. 15110.

Supreme Court of California.
April 24, 1934.

1. Taxation 🔑44.

Tax laid by joint highway district must be equal in its burdens and uniform in operation (St. 1931, p. 2072; Const. art. 13, § 1).

2. Municipal corporations 🔑3.

Legislature may, by general law, authorize organization of a special district of state into public corporation, with such powers of government as Legislature may choose to confer thereon (Const. art. 11, § 13).

3. Highways 🔑90.

That incorporated cities situated within joint highway district were included within boundaries of district and thus required to bear proportion of burden of cost of improvement *held* not to render statute or formation of district thereunder unconstitutional (St. 1931, p. 2072).

4. Taxation 🔑44.

That, according to assessed value of property in the two counties embraced within joint highway district, ad valorem tax levy necessary to raise tax to pay proposed bonds of district would not be the same in each county, *held* not to render tax unconstitutional as lacking in uniformity (St. 1931, p. 2072; Const. art. 13, § 1).

5. Constitutional law 🔑278(2).
Highways 🔑122.

Joint Highway District Act *held* not to violate due process clause in providing for organization of district and method of levying and collecting tax for payment of cost of improvement (St. 1931, p. 2072; Const. U. S. Amend. 14).

6. Highways 🔑121.

Highway construction is "public purpose" for which property may be taxed by state.

[Ed. Note.—For other definitions of "Public Purpose," see Words & Phrases.]

7. Constitutional law 🔑229(3), 284(1).

Questions relating to spreading tax to pay for highway construction are matters resting in state's discretion and not controlled by due process clause or equal protection clause if tax is not palpably arbitrary (St. 1931, p. 2072; Const. U. S. Amend. 14).

8. Constitutional law 🔑68(4).

Generally, whether there is such difference between portions of territory to be taxed for highway construction as to warrant difference in taxation is for Legislature to determine (St. 1931, p. 2072).

9. Constitutional law 🔑284(2).

Validating act *held* to have effect of legislatively creating joint highway district organized prior to validating act, thereby obviating necessity of notice or opportunity for taxpayers within district to be heard (St. 1931, p. 2072; St. 1933, p. 519; Const. U. S. Amend. 14).

10. Constitutional law 🔑284(2).

Levy to be made under statute on realty and personalty within joint highway district for payment of bonds *held* "tax," not "assessment for benefits," so that failure to provide for notice and opportunity to be heard on benefits was not violative of due process (St. 1931, p. 2087, § 22; Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

[Ed. Note.—For other definitions of "Assessment" and "Tax; Taxation," see Words & Phrases.]

11. Highways 🔑127(1).

Special Assessment, Investigation, Limitation and Majority Protest Act of 1931 *held* inapplicable to proposed tax levy on property within joint highway district to pay for district's bonds (St. 1931, p. 2087, § 22; p. 1372).

12. Highways 🔑90.

In Joint Highway District Act, provision requiring payment of one-fifth of amount levied by district within 90 days after adoption of resolution for levy by board of supervisors *held* to relate to financing of project without issuance of bonds, and hence such payment was not condition essential to validity of proposed bond issue (St. 1931, pp. 2083, 2087, §§ 19, 22).

13. Highways 🔑127(1).

Board of directors of joint highway district, in levying tax for payment of bonds, has full power to provide for unpaid installments of tax levied or for anticipated delinquencies (St. 1931, p. 2072).

14. Highways 🔑95(2).

Constitutional provision prohibiting certain political subdivisions of state from incurring, without electors' assent, indebtedness exceeding current year's revenue, *held* inapplicable to joint highway district, because not named in provision (St. 1931, p. 2072; Const. art. 11, § 18).

15. Highways 🔑122.

Joint Highway District Act *held* not to violate constitutional provision prohibiting

Legislature from imposing taxes on public or municipal corporations, or inhabitants or property thereof, for municipal purposes (St. 1931, p. 2072; Const. art. 11, § 12).

16. Constitutional law ⚷62.
Highways ⚷90.

Joint Highway District Act *held* not violative of constitutional provision prohibiting Legislature from delegating to any commission power to make or interfere with improvement, money, or property of cities or perform municipal functions (St. 1931, p. 2072; Const. art. 11, § 13).

17. Highways ⚷121.

Legislature, to develop highway system of state, has power to provide for taxation by appointive boards in joint highway districts; collection of tax in such case being for state purpose (St. 1931, p. 2072; Const. art. 11, § 13).

18. Highways ⚷90.

That proposed bonds of joint highway district omitted from caption the words "revenue bond" included in form of bonds set forth in statute *held* not to invalidate bonds or warrant treasurer in refusing to sign bonds (St. 1931, pp. 2085, 2093, 2099, §§ 21, 27, 39).

Such omission was not fatal, since the bonds were not true "revenue bonds," payable exclusively out of proceeds of completed improvement, but were to be paid, both as to principal and interest, by an ad valorem tax levied annually by board of directors of district on all the real and personal property within the district, and to designate such bonds as "revenue bonds" would tend to mislead, and since such bonds were, by St. 1931, p. 2085, § 21, required only to be substantially in form set out in such section. The omission was, moreover, unimportant because of St. 1931, pp. 2093, 2099, §§ 27, 39, providing that no error, defect, irregularity, or informality not affecting jurisdiction of board of directors shall render invalid any bonds issued under terms of act.

◆

In Bank.

Proceeding for a writ of mandate by the Joint Highway District No. 13 against Henry L. Hinman, as Treasurer of the District.

Writ granted.

Orrick, Palmer & Dahlquist, of San Francisco, and Archibald B. Tinning, of Martinez, for petitioner.

Decoto & St. Sure, of Oakland, for respondent.

WASTE, Chief Justice.

The petitioner, joint highway district No. 13, hereinafter referred to as the district, was formed in 1928 by the concurrent action of the boards of supervisors of Alameda and Contra Costa counties, for the purpose of constructing a public highway and tunnel, part of which is in each of those counties, and generally described as beginning in the city of Oakland and running thence northeasterly to, under and through the Contra Costa hills, and connecting with an existing state highway running to Lafayette and Walnut Creek in Contra Costa county. Respondent is treasurer of the district.

The district was reorganized under the provisions of the Joint Highway District Act (St. 1917, p. 46), as revised and amended (St. 1931, p. 2072), hereinafter generally referred to as the act. The Legislature, in 1933, adopted a general "Act validating the formation, organization, reorganization and existence of joint highway districts," previously organized. St. 1933, p. 519.

The reorganized district caused to be prepared, and duly adopted, plans and specifications for, and made a final estimate of the cost of, the highway planned to be constructed. These were submitted to the director of the department of public works of the state of California, and were duly approved by him. The final estimate of the cost of construction is the sum of $3,752,035.44. The Public Works Administration of the United States has agreed to grant to the district 30 per cent. of the cost of the labor and materials included within the cost of construction, to wit, the sum of $1,073,433.82. The state of California, through its state highway commission, has approved the projected construction, and has authorized the granting of a contribution of $300,000 by the state of California toward the proposed work. The board of directors of the district decided and ordered that serial bonds be issued in the amount of the remainder of the estimated cost, or in the sum of $2,378,601.62, for the purpose of providing the funds necessary to finance and complete the construction. Ninety per cent. of the cost of the work, as represented by the bonds, has been allocated by the directors of the district to be raised and paid by a tax levied in Alameda county; the remaining 10 per cent. to be raised by a like tax in Contra Costa county. The assessed valuation of the real and personal property of Alameda county, as fixed by the county assessment rolls for the fiscal year 1933-34, is $385,625,106, and the like assessed value of property in Contra Costa county is $82,663,780. Other than these bonds, ordered to be issued by its board of directors, the district has no bonded indebtedness, has authorized the incurrence of no other obligations, and is ready to proceed with the construction as soon as its bonds are sold.

Petitioner has demanded of the respondent that he sign the bonds; but respondent, on various grounds, has declined and refused to do so, and none of said bonds have been executed or delivered. This proceeding is to compel the respondent, as treasurer of the district, to sign the bonds.

[1] All the acts and proceedings taken for the purpose of forming, organizing, and reorganizing the district were "legalized, validated and declared to be sufficient for all purposes," and the district was declared "to be duly formed, organized and reorganized," by the terms of the validating statute, supra. No objection is offered to any of the various steps leading up to the issuance of the bonds. The major contention of the respondent is that the tax method provided by the act under which the district was formed, and the tax method adopted by it, are unconstitutional and amount to a violation of the provisions of both the State and Federal Constitutions. First, it is contended that such method violates the provisions of section 1 of article 13 of the State Constitution, in that it fails to provide equal and uniform taxation throughout the district. The section provides that all property in the state not exempt shall be taxed in proportion to its value, to be ascertained by law, or as in the Constitution provided. The tax, to be valid, must be equal in its burdens and uniform in its operation.

[2-4] The Joint Highway District Act provides that the board of directors of a district shall annually levy a tax within the district sufficient to meet the principal and interest on its outstanding revenue bonds—the kind the petitioner proposes to issue. The amount of the tax being fixed by the board, the treasurer of the district shall thereupon transmit to the board of supervisors of each county in the district a statement of the total sum to be collected within each county in the fiscal year on behalf of the district. On receipt of such statement, it then becomes the duty of the boards of supervisors to cause the amount to be collected by a tax upon and from the taxable property in the county. The tax must be collected in behalf of the district by the proper county officers in the same time, form, and manner as county taxes. All laws applicable to the levy, collection, and enforcement of county taxes are made applicable to the collection of the special tax, when not in conflict with any of the provisions of the act. We find nothing in the provisions of the act conflicting with the provision of the Constitution cited by respondent. While the Legislature is expressly prohibited by the Constitution from delegating to any special commission, private corporation, association, or individual any power to levy taxes, it is authorized to provide for the supervision, regulation, and conduct, in such manner as it may determine, of the affairs of many forms of districts organized under the laws of the state. Const., art. 11, § 13. Whenever a special district of the state requires special legislation therefor, it is competent for the Legislature, by general law, to authorize the organization of such district into a public corporation with such powers of government as it may choose to confer upon it. In re Madera Irrigation Dist., 92 Cal. 296, 318, 28 P. 272, 276, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. See, also, Stuckenbruck v. Board of Supervisors, 193 Cal. 506, 509, 225 P. 857. Neither does it matter that the incorporated cities situated in Alameda and Contra Costa counties are included within the boundaries of the joint highway district. The cities may be as much benefited as the other sections of the counties, and should bear their proportion of the burden of the cost of the improvement. In re Madera Irrigation Dist., supra, at page 343 of 92 Cal., 28 P. 272, 675. The Legislature has provided for the formation of a recognized legal kind of taxing district. Its discretion in doing so may not be questioned. It has provided a well-recognized, efficient, and tried method and procedure for the levy and collection of the tax for which the district was formed.

Respondent does not claim that any express prohibition against the scheme provided in the act is found in the Constitution; but he does contend that such provisions impliedly prohibit any proceeding other than one by which the levy is spread over the entire district at a uniform rate. This objection goes to the allocation of 90 per cent. of the cost of the work to Alameda county and 10 per cent. to Contra Costa county. According to the assessed value of property in the two counties, it appears that the ad valorem tax levy necessary to raise the tax will not be the same in each county. This situation does not render the tax lacking in uniformity. In 1 Cooley on Taxation (4th

Ed.) § 322, p. 673, the rule on this subject is thus stated: "In case of a public improvement, where the legislature is of the opinion that only a part of a county is specially interested in the improvement, and that of the part thus interested some localities would be more benefited than others it may limit the tax to pay for such improvement to the territory deemed to be specially interested, and may apportion the tax among the different districts within the territory in accordance with their respective interests in the improvement, without violating the constitutional requirement of equality and uniformity. * * * As has been clearly stated, 'different taxing districts, for the same general purpose, may be thus created where there are peculiar reasons why one part of the public should bear a proportion of the burden greater than that which should be borne by another, and a greater rate of taxation be imposed on some districts than others.'" The decided cases support the rule. In Foster v. Pryor, 189 U. S. 325, 23 S. Ct. 549, 47 L. Ed. 835, the Supreme Court of the United States held that in the case before it the legislative act providing for a difference in taxation amounted, in itself, to a provision for a different taxing district within the principles just stated, and that no one would say that it was not a most reasonable and just recognition of a plain difference in circumstances, which ought to lead to a difference in the proportion of taxation between the two places involved. In Gilson v. Board of Commissioners, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835, the court was considering a statute providing for the acquisition by townships of toll roads. The cost was to be divided between the townships in proportion to the assessed value of the toll road purchased in each of the townships. Lafayette, M. & B. Railroad Co. v. Geiger, 34 Ind. 185, related to the levy and collection of a tax in aid of the construction of a railroad. It was contended that, inasmuch as the railroad ran through several counties, it was necessary that each and all of the counties must vote for an appropriation, and assess the same amount of tax in each county, to make it uniform and equal. In each of these Indiana cases the court held that, if the tax assessed was equal and uniform in the county where assessed, it would not violate the requirements of the Constitution as to uniformity in taxation. To the same effect, see Nettles v. Cantwell, 112 S. C. 24, 99 S. E. 765.

[5-8] We are of the view that the Joint Highway District Act does not violate the due process provision of the Federal Constitution (Const. U. S. Amend. 14) in providing for the organization of the district and the method of levying and collecting the tax. The Legislature had full power over the subject-matter of the formation of the district. It delegated this power to the boards of supervisors of the respective counties comprising the district. The construction of the proposed highway is a matter in which the whole community has an interest, and is a typical public purpose for which property may be taxed by the state. Questions relating to spreading the tax are matters which rest in the discretion of the state, and are not controlled by either the due process or the equal protection clause of the Fourteenth Amendment. Memphis, etc., R. Co. v. Pace, 282 U. S. 241, 51 S. Ct. 108, 75 L. Ed. 315, 72 A. L. R. 1096. If the tax can at any time be shown to be palpably arbitrary, thereby amounting to a clear abuse of power, it will fall under the condemnation of the due process clause. Where the difference between the different portions of territory is plain and palpable, the right of the Legislature to recognize that difference and to provide for a difference in taxation cannot be denied without imposing restraints upon the constitutional power of the Legislature, which cannot in reason be justified. Whether there is such a difference would generally be for the Legislature to determine, although it cannot be said that the courts could not, in any possible state of facts, review that determination. Foster v. Pryor, supra, at page 334 of 189 U. S., 23 S. Ct. 549.

[9] As to notice being required to be given to the taxpayers of the district upon its formation, the Legislature expressly validated the creation of all highway districts which had functioned more than six months prior to the taking effect of the validating act (petitioner being one of them), which had the effect of legislatively creating said district, and thereby obviated the necessity of notice or opportunity to be heard.

[10, 11] The tax levy provided by section 22 of the act to be imposed upon the property within the district for the payment of the principal and interest of the bonds is a tax, and not an assessment for benefits, and is imposed upon both real and personal property. Therefore the act does not violate the due process clause of either the Federal or State Constitution (Const. U. S. Amend. 14; Const. Cal. art. 1, § 13) providing for notice and opportunity to be heard on benefits. For the same reason, the Special Assessment, In-

vestigation, Limitation and Majority Protest Act of 1931 (St. 1931, p. 1372) has no application to the tax levy here in question. Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 183 P. 809.

[12] The provision of section 19 of the act, requiring the payment of one-fifth of the total amount levied by the district within ninety days after the adoption of the resolution for levy by the board of supervisors, relates to the financing of a project without the issuance of bonds, and is therefore not a condition essential to the validity of a proposed bond issue under the alternate plan provided by the act.

[13] We do not share the view advanced by respondent that the only provision in the act for a tax is the one found in section 22, which provides for a tax to satisfy merely the obligation created by the proposed bond issue. The power given the board of directors to tax is the power to create a general obligation. All the taxing provisions of the act read together, we are satisfied, give to the board of directors full power to provide for unpaid installments of the tax levied, or anticipated delinquencies in any levy about to be made.

[14] It is contended by the respondent that the proposed bond issue and the enabling portions of the Joint Highway District Act, supra, violate the provisions of section 18 of article 11 of the State Constitution prohibiting certain enumerated political subdivisions of the state from incurring any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided in such year, without the assent of two-thirds of the qualified electors thereof voting at an election. The provision has no application to the petitioner. The prohibition in the Constitution is limited to the public corporations enumerated in the section, and under familiar rules of construction cannot be extended to any others. In re Madera Irrigation Dist., 92 Cal. 296, 342, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Sharp v. Joint Highway Dist. No. 6, 111 Cal. App. 81, 84, 295 P. 841, answering this identical contention. See, also, East Bay M. U. Dist. v. R. R. Commission, 194 Cal. 603, 617, 618, 229 P. 949. The bonds here in question are not county bonds, but are obligations of the district.

[15-17] A further contention of respondent is that the Joint Highway District Act is violative of section 12 of article 11 of the State Constitution which declares that "the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." The section has no application to this case. The act does not grant or delegate to any commission, private corporation, or individual power to make, control, appropriate, supervise, or interfere with any improvement, money, or property of any of the cities within the boundaries of the district, nor does it give to the boards of supervisors of the counties of Alameda and Contra Costa, or either of said boards, or to the directors of the joint highway district, any power to trench upon any of the things mentioned in section 13 of article 11 of the Constitution relating to municipal affairs. Peterson v. Board of Supervisors, 65 Cal. App. 670, 225 P. 28. The collection of the tax in this case is for a state purpose—the development of the highway system of the state—and the Legislature has the power to provide for such taxation by appointive boards in such districts. Golden Gate Bridge, etc., Dist. v. Felt, 214 Cal. 308, 321 et seq., 5 P.(2d) 585. The prior decisions of this court and other authorities supporting such holding are collected and analyzed in that decision.

[18] A minor objection urged against the bonds by respondent remains to be considered. Of the two alternate plans provided in the act for paying the cost of the work, the board of directors of the district elected to finance the project by the issuance of what are denominated in the act "revenue bonds." These bonds are not true revenue bonds, payable exclusively out of the proceeds of the completed improvement, but are to be paid (principal and interest) by an ad valorem tax levied annually by the board of directors of the district upon all the real and personal property within the district. To designate such bonds "revenue bonds" would tend to mislead. The form of the bonds, set forth in section 21 of the act includes the caption "Revenue Bond." This caption was omitted from the printed bonds, which are captioned "Joint Highway District No. 13 Bond Fund." The bonds are only required to be "substantially" in the form set out in the act. For both reasons, we deem the omission immaterial. On another ground, we reach the same conclusion. The act, in sections 27 and 39, declares that no error, defect, irregularity,

or informality which does not affect the jurisdiction of the board of directors of the district shall render void or invalidate any bonds issued under its terms.

Let a writ of mandate issue commanding the respondent to forthwith sign the bonds in question.

We concur: CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

* * *

138 Cal.App. 384

SHEPHERD et al. v. PAUL A. HAUSER, Inc., et al.

Civ. 8943.

District Court of Appeal, First District, Division 1, California.
April 30, 1934.

1. Vendor and purchaser 🔑21.

Land contract under which purchaser made down payment and agreed to pay monthly installments until price was paid down to "incumbrance" of $700 *held* not void for lack of certainty; "incumbrance" meaning the putting of property in pledge for payment of money.

[Ed. Note.—For other definitions of "Incumber; Incumbrance," see Words & Phrases.]

2. Action 🔑6.

Purchaser's assignees *held* not entitled to declaratory relief to have terms of land contract interpreted, where there was no actual controversy existing between parties, who had complied with contract for almost seven years (Code Civ. Proc. § 1060).

3. Vendor and purchaser 🔑46.

Land contract should be given interpretation making it valid rather than void.

4. Vendor and purchaser 🔑335.

Part payment on land contract cannot be recovered by purchaser if he refuses to make genuine effort to reach agreement upon some fancied defect of contract.

◆

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Howard F. Shepherd and others against Paul A. Hauser, Incorporated, and others for declaratory relief for the purpose of having the terms of a contract interpreted. From an adverse judgment, named defendant appeals.

Reversed.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for appellant.

Howard F. Shepherd, of Los Angeles, for respondents.

TYLER, Presiding Justice.

This is an action in the nature of a suit for declaratory relief, for the purpose of having the terms of a contract interpreted by the court. The defendant Paul A. Hauser, Incorporated, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and said defendant answered, denying the material allegations set forth in the complaint. The trial court found that the contract was void for lack of certainty, and rendered judgment for plaintiffs. The said defendant thereupon filed a motion for a new trial, and, the same being denied by the court, it appealed from said judgment. This action was commenced in September, 1929.

On June 13, 1923, an agreement was entered into between Paul A. Hauser and Euretta B. Henderson by the terms of which the said Hauser agreed to sell to said Henderson certain real property in the county of Los Angeles for the sum of $2,750, of which amount said Henderson paid $500 in cash, the remainder of said purchase price to be paid in monthly installments of $10 per month, commencing on July 13, 1923, and continuing thereafter until said purchase price should be paid down to an incumbrance of $700, which incumbrance Henderson was to assume; Hauser, on receiving full payment at the times and in the manner hereinabove set forth, to execute and deliver to said Henderson a good and sufficient deed to said property, free and clear of all incumbrance, except taxes of 1923–24 and the incumbrance referred to. Payments of $10 per month were made on said purchase price from June, 1923, the time the contract was entered into, until January 13, 1930. No payments were made after this date. A balance of $1,416, with interest, remains unpaid from said last-named date. By successive assignments all rights under said agreement are vested in appellant, and by successive assignments Lulu H. Shepherd is the owner of one-half of the interest in said agreement, and Euretta B. Henderson and Howard F. Shepherd are each the owners of one-fourth interest therein. After the execution of the said agreement, Paul A. Hauser executed a mortgage upon said premises in favor of one L. G. Stone to secure a note for $700 due two years after date. Thereafter, on June 26, 1928, the Hauser Real Estate & Building Company (assignee of said agreement) executed a trust deed covering said property to Western Trust & Savings Bank, as trustee for George and Anna Berg, to secure a note for $700 due in three years after date. On December 8, 1928, the said mortgage executed to L. G. Stone was released.

Appellant contended that no actual controversy existed between the parties over the said agreement and that therefore respondents had no cause of action, for the reason that section 1060, Code of Civil Procedure, providing for declaratory relief, is in express terms limited and confined to cases where there has been no breach of the contract, and to cases where a real or actual controversy exists.

Plaintiffs alleged in their complaint: That there is an actual controversy between the parties to said agreement, in that they are informed and believe, and upon such ground allege, that the defendants claim the said language in said agreement relating to said $700 incumbrance gives the defendants the right to have the said property subject to an incumbrance of $700 at all times, irrespective of whether or not such incumbrance is to be secured by a mortgage or deed of trust, and irrespective of the rate of interest or for what period of time the said incumbrance shall run; "that the plaintiffs are unable to ascertain from the language of said contract what their rights and obligations are respecting the said encumbrance of $700; that if these plaintiffs make their payments under said agreement at the rate of $10 per month, in accordance with its provisions, it will be approximately seven years before the said agreement is paid down to $700, and that the note secured by the trust deed above mentioned and executed by the said Hauser Real Estate & Building Co. will mature and be payable as a whole on August 3rd, 1931; and the plaintiffs are further in doubt as to whether or not, in view of the provisions of said agreement relating to said encumbrance, whether such agreement is so indefinite and uncertain as to be in fact no agreement at all."

[1, 2] The trial court found that there was an actual controversy over the validity of the agreement, and found further that the agreement was void for the lack of certainty. Under section 1060 of the Code of Civil Procedure, any person interested in a deed, will, or other written instrument, who desires a declaration of his rights with respect to another, in cases where an actual controversy exists, may bring an action for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract, and such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought. The record in this case shows beyond question that there was no actual controversy existing between the parties over the validity of said agreement for uncertainty or dearth of facts, and that the same was not void for this reason as found by the trial court, but, on the contrary, that the agreement is valid and binding.

[3, 4] The contract contains a sufficient legal description of the property, the names of the parties, the amount of the purchase price, and the manner and time of payment. The record also shows that the parties fully understood the terms thereof, which were fully performed for a period of some six years. During all of this time, and up to the filing of the complaint, nothing was ever said concerning the character of the incumbrance to be placed upon the property, and in fact plaintiffs had not paid the purchase price down to the balance of $700 at which time they were entitled to a conveyance subject to the incumbrance. An incumbrance means the putting of property in pledge for the payment of money. Sullivan v. Barry, 46 N. J. Law, 1. That there was no objection on the part of plaintiffs to the character of the incumbrance to be placed upon the property is evidenced by correspondence had between the parties. Plaintiffs were informed by letter, long before they filed their complaint, that a deed of trust was to be substituted for the existing mortgage and they made no objection to this change, but continued to make their payments in accordance with the contract. There was therefore no controversy between the parties upon this subject. Had there been, defendants might have agreed upon any form desired by plaintiffs, which they here assert they would have done. The fair inference to be drawn from the transaction is that the parties had reference to the mortgage for the sum of $700 that was placed upon the property at or about the time the con-

tract was entered into. Nor is the contract indefinite as to the rate of interest to be paid. It provides that the balance of the purchase price shall draw interest at the rate of 8 per cent. per annum. The incumbrance provided for was part of the unpaid balance. The same may be said as to the period the incumbrance should run. In this connection the contract provided when and in what amounts payments should be made, and the only reasonable inference to be drawn from this provision is that it was to exist during the period necessary to make such payments. It seems clear that this is what was in the contemplation of the parties. An interpretation should be given to the contract which would make it valid rather than void. It would be inequitable and unfair to permit respondents to hold control of the property for the number of years they have, without complaint, and have the advantage during all that period to acquire a profit by reason of the possible advance in value, and then in the event that land values went down to set up the contention that the contract was void for the fancied objections raised and obtain back all the money they had paid. Part payment upon a contract to purchase land cannot be recovered by a purchaser if he refuses to make genuine effort to reach an agreement upon some fancied defect in the contract. Were the position of the parties reversed and defendants were seeking to avoid a conveyance on the grounds here claimed by plaintiffs, they would certainly meet with no success.

We conclude that the evidence fails to show that any real controversy existed between the parties and that the contract was not void for uncertainty as found by the trial court. The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

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138 Cal.App. 241

CURBY v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 8145.

District Court of Appeal, Second District, Division 2, California.
April 24, 1934.

Evidence 🔑441(11).

Purchaser seeking to rescind land contract and recover back money paid thereunder because of fraudulent statements inducing contract *held* bound by statements in contract which she did not read that contract was not induced by any such promises, where she was not tricked into signing document.

◆

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Nora Curby against the Title Guarantee & Trust Company and others to rescind a contract for the purchase of real property and for return of money paid thereunder. From an adverse judgment, defendant Ninon Hudson appeals.

Reversed.

Harold N. Nuzum, of Los Angeles, for appellant.

Henry Brown, Loris V. Cady, and Margaret E. Faires, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

In 1927 defendant Hudson was the sales agent for tract 9597 in the city of Burbank, Cal. The legal title to said tract was vested in defendant Title Insurance & Trust Company, to which it had been conveyed in trust by the owners, defendants W. F. Bonner, Frank Belcher, C. A. Anderson, Orville Meyers, and Dave Hepburn. Defendant Largay was division manager of defendant Hudson's large sales force, and acted as "closer" in the deals in which plaintiff was involved. Defendant De Shields was one of the salesmen, and defendant Hudson and he took plaintiff to the tract where they met Largay. As the result of their efforts, plaintiff entered into three contracts with defendant Title Guarantee & Trust Company for the purchase of three separate lots. The first was dated February 23, 1927, involving the sale of lot 364 of said tract for $1,550; the sum of $387.50 being paid down. This contract was canceled by agreement when plaintiff was induced to purchase lot 6 of said tract on March 10, 1927, and the money paid on lot 364, together with a profit of $100 allowed plaintiff, as well as an additional amount paid by her, made a credit of $750 to her on the purchase price of $3,000. On May 1, 1927, she bought lot 360 for the sum of $1,600; the sum of $400 being paid down. All down payments were made to defendant De Shields. Plaintiff made the monthly payments on lots 6 and 360, more or less in accordance with the terms of the contract, until July 8, 1929, when she stopped. On November 3, 1929, she served on defendants notice of rescission of such contracts on the ground of fraudulent inducement, and demanded repayment of the amounts paid by her on the purchase price. On November 14, 1929, she filed her complaint against the Title Guarantee & Trust Company, the former owners, and defendant Hudson and her agents Largay and De Shields, praying for the return of the money so paid. Prior to the trial of the action, plaintiff filed a dismissal with prejudice as to all defendants except Hudson, Largay, and De Shields. The case was tried on the issues made by the complaint and defendant Hudson's answer thereto. So far as the record shows, Largay and De Shields were not represented at the trial nor interested in it, except that Largay was a witness for defendant Hudson. From the judgment in favor of plaintiff, defendant Hudson has appealed.

The false and fraudulent statements alleged to have induced the various contracts are as follows: (a) That defendants would resell said lots in a short time for plaintiff at a profit; (b) that a beautiful college, known as the College of International Relations, was to be built near the tract, immediately, and that on or before the 1st of the year 1928 a large "movie" studio would be constructed near plaintiff's lots; (c) that Victory boulevard would be fully completed within a short time; (d) that a rapid transit tunnel from Los Angeles would be immediately constructed; and (e) that Whitnall boulevard, intersecting or adjacent to said tract, would be shortly completed.

The complaint alleges that the same representations were made at the time of each purchase. For each lot involved here plaintiff made written application to appellant to reserve such lot for her, stating that she wished to purchase the same for the price and upon the terms named. The owner to furnish a contract of sale on such terms. Each such writing also provided as follows: "I agree that there are no promises, verbal understandings or agreements except as in this application set forth, and that any contract or deed hereinafter executed by me for the above property will supersede and merge this receipt. The owner reserves the right to return the above money to the undersigned at any time before a contract of sale is signed by the undersigned and approved by the owner." After the execution of such written requests for reservations, the owner prepared written contracts on each lot covered thereby, which were executed by the Title Guarantee & Trust Company and respondent and approved by an assistant trust officer of such company and by W. F. Bonner, who was acting for the beneficial owners. Such agreements each contained an express statement on the part of plaintiff that the property therein described had been purchased as a result of her own inspection "and not upon a promise of resale or other representations made by said seller or any selling agent, and said buyer hereby expressly waives any and all claims for damages by reason of any cancellation or foreclosure of this contract because of any representations made by any selling agent or person whatsoever, other than contained in the contract."

A statement similar in effect to that contained in the contracts here was contained in an agreement to purchase personal property in the case of Munn v. Earl C. Anthony, Inc., 36 Cal. App. 312, 171 P. 1082, where appellant's contention that, having finally entered into a written contract of sale which contained terms excluding previous negotiations and statements, the claim that false representations had been made by way of inducement could furnish no ground for a cause of action, was sustained, and the judgment in favor of plaintiff was reversed. Plaintiff's only statement here as to such clauses is that she did not read them. There is no claim that she was prevented from so doing by the agent or that she was otherwise tricked into signing the documents without reading them (Gridley v. Tilson, 202 Cal. 748, 262 P. 322); and under the circumstances shown by the evidence we are of the opinion that plaintiff was bound by each statement. The evidence shows that no promise of resale was made until the last purchase was urged upon plaintiff on May 1, 1927, and it is not claimed that appellant authorized such promise or knew anything about it until, as respondent says, in the late fall of 1927 or early spring of 1928; nor is it claimed that she ever was shown the writing made by her agents. In this connection see, also, the case of Campbell v. Title Guarantee, etc., Co., 121 Cal. App. 374, 9 P.(2d) 264, where a judgment was reversed because of a claim in the agreement to the effect that it contained the entire agreement and that the buyer agreed that neither the seller nor any agent had made any representations or promises affecting the property or contract not expressly contained in the contract. We see no difference in legal effect between that statement and those contained in the various documents signed by plaintiff here.

Judgment reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

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138 Cal.App. 374

CATTON v. KERNS et al.

SHAW v. SAME.

Civ. 1287.

District Court of Appeal, Fourth District, California.

April 28, 1934.

1. Automobiles 🔑245(6).

Under evidence, whether defendant motorist was negligent in passing plaintiffs' car standing at angle near middle of road and immediately thereafter striking plaintiffs, who were standing near traveled portion of highway at night, *held* fact question for court sitting without jury.

2. Automobiles 🔑216.

Where plaintiffs' automobile was standing at angle near middle of road at night, right of plaintiffs to stand on opposite side of road near traveled portion thereof was not absolute, but dependent on existing conditions and proper regard for rights of others and their own safety.

3. Automobiles 🔑245(72).

Where plaintiffs' automobile was standing at angle near middle of road at night, and plaintiffs stood on opposite side of highway near traveled portion thereof, and one of them saw defendants' automobile approaching, question of plaintiffs' negligence when struck by automobile *held* fact question for judge sitting without jury.

◆

Appeals from Superior Court, Fresno County; Stanley Murray, Judge.

Actions by Thomas R. Catton and by Raymond R. Shaw against Claude Kerns and the Pioneer Paper Company. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Gilbert H. Jertberg, of Fresno, and M. G. Gallaher, of Los Angeles, for appellants.

Wakefield & Hansen and Conley, Conley & Conley, all of Fresno, for respondents.

BARNARD, Presiding Justice.

These actions were brought to recover damages for injuries sustained by the respective plaintiffs as a result of being struck by an automobile owned by the defendant corporation and driven by the other defendant. On a former appeal judgments in favor of the defendants were reversed on account of an improper instruction given the jury. 123 Cal. App. 94, 10 P.(2d) 1036. A retrial before the court without a jury resulted in a judgment for the defendants in each case, the court finding that the defendants were free from negligence and that the respective plaintiffs were guilty of negligence which proximately contributed to their own injuries. Separate judgments were entered, and, by stipulation, the cases have been consolidated on this appeal.

[1] About 2 o'clock on the morning of January 1, 1930, the two appellants and their wives left the Sunnyside Country Club and drove westerly along the highway toward Fresno; the car being driven by the appellant Shaw. After proceeding about a mile and a half, they decided to return to the club. The car was stopped, and the two appellants got out and walked into a field on the north side of the highway while Mrs. Shaw took the wheel and turned the automobile around so that it faced in an easterly direction. She stopped the automobile about opposite the place where the appellants had left the road; the car facing slightly in a northeasterly direction and with its left front wheel past the middle of the highway. The appellants returned from the field and walked to the automobile. Just before they entered the car, one of them said to the other, "I want to tell you a story" and the two walked to a point slightly to the rear of the automobile and from one and a half to four feet north of the traveled portion of the highway where they engaged in conversation for about three minutes. Appellant Shaw testified that during that time they stood there talking; that the other appellant had his arm on his shoulder; that he was facing west with his back to any west-bound traffic; that he knew that his car was back of him, standing at somewhat of an angle; that it was a clear night and the visibility was perfect; and that "I didn't expect an automobile and I wasn't looking for one." Appellant Catton testified that as he was talking to Shaw he saw the respondent's car coming down the highway; that this other car might have been a quarter of a mile away when he first saw it; that

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

he did not look at it again nor pay any attention to it; that he knew that the Shaw car was between him and the other automobile, and that it was headed slightly to the northeast; that he continued talking to Shaw; and that "I didn't move. I stood in that position with this car coming west."

Appellants first contend that it must be held, as a matter of law, that the respondents were negligent. It is argued that the driver of respondents' car failed to keep the same under proper control and to drive the same in a prudent manner since he proceeded when he must have been blinded by the lights of the other car, and that this case falls squarely within the rule laid down in Hatzakorzian v. Rucker-Fuller Desk Company, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. In that case, a pedestrian on a highway was struck, and the driver of the automobile in question testified that at the time his mind was not on the matter of whether or not he might overtake a pedestrian, and that he proceeded for a distance of between 150 and 200 feet while he was so blinded by the glare of approaching lights that he was unable to see any object on the highway. In the case now before us, there is evidence that the respondent Kerns was proceeding westerly on this highway at a speed of from 30 to 35 miles an hour; that it appeared to him that the Shaw car was approaching him from the west; that as he proceeded he thought the other car headed over directly toward him; that he slowed down and pulled over to the right; and that he "gave them all the road that was necessary." A man who was riding with him testified: "Well, the car was coming towards us, headed over towards the right-hand side of the road. Mr. Kerns turned gradually to the left, clearing the car by two or three feet, I imagine, and forced him over to the side of the highway. Just after we passed the car Mr. Kerns gave a sudden turn to the left and just after that something hit the side of the car." From other portions of the testimony of this witness it is apparent that his first use of the word "left" was an error, and he plainly testified that Kerns first pulled over to the right. The respondent driver testified that it appeared to him that the other car was moving and that it was coming at an angle over toward him; that he kept getting over to the right; that he first saw the appellants after he had passed through the beams of light from their car; that at this time they were twenty or thirty feet from him; that he pulled sharply to the left to avoid hitting them; that the side of his car struck them; that he stopped within 27 feet of the point where they were standing; and that he was going less than 15 miles an hour at the time he struck them. There is no evidence as to the distance which the respondents' car traveled while it was passing through the beams of light from the other car.

With the car parked at a slight angle across the highway and near the middle thereof, and in the middle of the night, the respondents' explanation of the manner in which the accident occurred is not an unreasonable one. This was an oiled road, the traveled portion thereof being about 16 feet wide, and it cannot be said that, under such circumstances, a reasonable man would not pull over to the right and slow down in passing another car. That people would be standing just off the main traveled portion of the road and slightly to the rear of the parked car, for social purposes, at that hour of the night, is a circumstance that may well have been unexpected. The position of the appellants on the road must be considered in connection with the position of their car, and many things in connection with the somewhat unusual circumstances affect the question as to whether the respondent driver was negligent, and whether his negligence, if any, was a proximate cause of the injuries to appellants. In our opinion, the entire situation presents questions of fact, rather than of law, with respect to negligence on the part of the respondents. Skaggs v. Willhour, 210 Cal. 524, 292 P. 649; Morehead v. Roehm, 118 Cal. App. 312, 4 P.(2d) 995.

[2, 3] The only other point raised is that it must be held, as a matter of law, that the appellants were free from negligence. The appellants rely on certain cases to the effect that a pedestrian has the right to travel anywhere upon a public highway, and it is argued that it conclusively appears that they were standing in a place of safety, and that, in standing where they stood, they were in the exercise of their lawful right to use that part of the highway. The appellants were not pedestrians at the time, and were not walking along the highway. One of them saw the approaching automobile, the other knew that his own car was parked at an angle near the middle of the road and that he was but a few feet away from it, and both were aware of the general circumstances which could reasonably be deemed sufficient to warn them of the possibility of danger. In view of the position in which their car was stopped, it would be natural for an approaching driver to keep well to the right, in

doing which he might easily get slightly off the oiled portion of the road. They assumed and maintained this position when some attention or use of care would have apprised them of its danger. Their right to use that particular spot on the road in that particular manner was not absolute, but was dependent upon existing conditions and a proper regard for the rights of others and for their own safety. It cannot be held as a matter of law that no duty rested upon them to exercise any care for their own protection and whether or not a degree of care was exercised which was reasonable at the time and place was, to say the least, a question of fact.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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136 Cal.App. 783

LENT v. THACKLEBERRY.

Civ. 8207.

District Court of Appeal, Second District, Division 2, California.
Feb. 20, 1934.

Negligence 🔑**136(18).**

Evidence in action for employee's injuries from use of electrical apparatus *held* insufficient to make issue for jury of negligence of one furnishing apparatus to employer.

◆

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Bert R. Lent against Marcus N. Thackleberry. From an order granting a nonsuit and from the judgment thereon, plaintiff appeals.

Affirmed.

Lasher B. Gallagher and A. P. G. Steffes, both of Los Angeles, for appellant.

C. F. Jorz and E. E. Morris, both of Los Angeles, for respondent.

CRAIG, Justice.

From an order granting a motion for nonsuit and judgment entered accordingly, the plaintiff appealed.

Briefly stated, the complaint alleged that the defendant negligently furnished for the use of employees of the plaintiff's employer a defective electrical apparatus knowing the same to be defective and dangerous, that plaintiff in using the same for said employer was injured thereby, and that said negligence was the proximate cause of his injury.

Admitting that the implement had been rented to plaintiff's employer, the uncontradicted evidence showed that it had been overheating and leaking oil, that the defendant repaired the same, and that when used it was connected to a cable carrying exceedingly high voltage which could have caused its leaking of current. There was no showing that the apparatus was constructed or intended for such use, nor that the same was in any way defective after the repairs were made thereto. Upon this state of the case there could be nothing more than conjecture that negligence of the defendant contributed to the injury for which damages were prayed.

We find no evidence in the record upon which a judgment for the plaintiff could have been founded.

Judgment affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

PEOPLE v. ROLLER.

Cr. 1793.

District Court of Appeal, First District, Division 2, California.
April 24, 1934.

Rehearing Granted May 9, 1934.

Criminal law 🔑**1182.**

Conviction should be affirmed where defendant failed to file brief and did not appear when cause was placed on calendar for argument (Pen. Code, § 1253).

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Robert Roller was convicted of robbery, and he appeals.

Affirmed.

Nicholas Barron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant and appellant was convicted in the superior court of the city and county of San Francisco of a felony, to wit, robbery, and the jury fixed the crime as of the first degree. Judgment on the verdict was entered February 8, 1934, and the transcript on appeal was filed in this court on February 26, 1934. The cause was regularly placed on the calendar for oral argument on April 9, 1934. No appearance was made for appellant at that time and no brief has been filed in his behalf.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and order denying a new trial are affirmed.

* * *

138 Cal.App. 289

GAUDIO v. GAUDIO.

Civ. 9347.

District Court of Appeal, First District, Division 2, California.
April 25, 1934.

Divorce 🔑238.

Where husband was granted divorce, and interlocutory decree awarding wife permanent alimony referred to contract settling property rights, which provided only for support of minor children, temporary alimony, and counsel fees, court was without jurisdiction to award wife permanent alimony.

◆

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action for divorce by Gaetano Gaudio against Rosina Gaudio, who filed a cross-complaint. From an order denying plaintiff's motion to modify interlocutory decree awarding wife permanent alimony, plaintiff appeals.

Reversed.

Albert K. Lucas, of Los Angeles, for appellant.

James A. Houlahan, of Beverly Hills, for respondent.

NOURSE, Presiding Justice.

Plaintiff was granted an interlocutory decree of divorce for offenses of the wife. In the decree the wife was awarded permanent alimony. Before the decree became final the plaintiff moved for a modification on the ground that this portion of the decree was beyond the court's jurisdiction. The motion was denied, and this appeal was taken from the order of denial. Other orders were made from which appeals have also been taken, but we do not consider them except to include them in the order of reversal.

The award of permanent alimony to the offending wife was void. Section 139, Civil Code; Everett v. Everett, 52 Cal. 383; Lampson v. Lampson, 171 Cal. 332, 153 P. 238; In re McKenna, 116 Cal. App. 232, 2 P.(2d) 429; Johnson v. Superior Court, 128 Cal. App. 584, 17 P.(2d) 1055.

The allowance to the wife was not based upon a binding contract settling the property rights of the parties. The decree recites that such a contract was made and approved except as to paragraph 5, which covered the matter of alimony pendente lite. This reference to the contract warranted an examination of the contract in its entirety upon the motion to modify the decree. Such examination discloses that there was no agreement to pay any sum as permanent alimony. There is no mention in the contract of permanent support of the wife, but there is a specific provision for the support of the minor children, temporary alimony, and counsel fees. The large bulk of the real and personal property is given the wife. The only sound inference to be drawn from the contract is that the parties did not contemplate permanent support in the event of a divorce upon the fault of the wife.

The award of permanent alimony being beyond the jurisdiction of the court to make, the motion to modify the decree should have been granted.

The order denying modification of the interlocutory decree is reversed. The orders denying the motions to quash and to recall execution, and to dissolve the restraining order, are each and all reversed.

We concur: STURTEVANT, J.; SPENCE, J.

138 Cal.App. 143

FARMERS' & MERCHANTS' NAT. BANK OF LOS ANGELES et al. v. BAILIE et al.

Civ. 8979.

District Court of Appeal, First District, Division 1, California.

April 20, 1934.

Hearing Denied by Supreme Court June 18, 1934.

1. Landlord and tenant ⟹148(1), 213(5).

In action to terminate lessee's rights under lease in which lessee was in default, lessee was not entitled to recover amount of rent and taxes he had paid.

2. Contracts ⟹274.

Generally in case of mutual abandonment of contract, or its rescission, amounts paid may be recovered, but party in default cannot recover where his adversary not in default stands on contract notwithstanding that contract provides that violation of its terms shall work forfeiture and contract thereupon becomes void.

3. Contracts ⟹318.

Contract provision that violation of terms shall work forfeiture and that contract thereupon becomes "void and of no effect" means only that rights of party violating it shall cease, and it remains effective to protect innocent party.

[Ed. Note.—For other definitions of "Void and of no Effect," see Words & Phrases.]

4. Landlord and tenant ⟹185.

Tenant may be bound by covenant to pay rent although he does not enter into possession of demised premises.

5. Appeal and error ⟹1008(1).

Where construction given instrument by trial court is consistent with true intent of parties, appellate court will not substitute another interpretation though it seems equally tenable.

6. Landlord and tenant ⟹49(1).

Lessee offering to perform contract must act in good faith and be able and willing to perform, notwithstanding that other party charged with performance of concurrent condition is unprepared to perform.

7. Evidence ⟹588, 594.

Ordinarily, uncontradicted testimony of witness cannot be disregarded, but most positive testimony may be contradicted by circumstances in evidence which satisfy court of its falsity.

8. Landlord and tenant ⟹49(2).

Evidence *held* to justify conclusion that lessee's offer to perform contract was not in good faith, in view of previous continued default.

9. Landlord and tenant ⟹49(2).

In suit to declare lessee's rights under lease terminated and for possession, allowance of attorney's fee as part of judgment against lessee *held* proper in view of lease provisions, where breach of lease gave rise to proceeding.

Lease provided that if it should become necessary for lessors to maintain any action or proceeding to enforce terms or conditions, or covenants of lease, or to protect their rights thereunder, lessee should pay in addition to costs, reasonable attorney's fee to be fixed by court.

◆

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Actions by Farmers' & Merchants' National Bank of Los Angeles, as trustee for Minnie Olive Caswell, also known as Minnie Caswell Hofmeister, and others against Roy C. Bailie and others to terminate rights under a lease and to quiet title. From an adverse judgment, named defendant appeals.

Affirmed.

Henry Trowbridge, of Los Angeles, for appellant.

Howard F. Shepherd and John F. Bender, both of Los Angeles, for respondents.

PER CURIAM.

An action to terminate defendant's rights under a written lease and to quiet plaintiffs' title to the premises described therein.

The lease was for a term of ninety-nine years commencing on June 1, 1923, and was executed by Edward Caswell, now deceased, and Minnie M. Caswell, his wife, to Roy C. Bailie (who will be hereinafter referred to as the lessee). In addition to all taxes and assessments levied on the property after the date of the lease the lessee agreed to pay upon its execution the sum of $350 as rental for the month of June, 1923, and the same amount on the first day of each month thereafter for a period of ten years, and from then on the sum of $450 each month during the remainder of the term; further that he would within five years from June 1, 1923, commence the erection upon the property of a building which should be worth not less than $20,000, and complete the same at the earliest practicable time thereafter, it being stipulated that the building should cover the entire frontage of the premises on a certain street and extend back not less than 60 feet. At the date of the lease there were upon the premises certain structures, which it was agreed the lessors might remove at any time, but the rents of which they were to retain until such removal. It was also agreed that the lessee might at any time after June 1, 1923, by a sixty-day notice require the removal of the structures at the lessors' expense within sixty days after the giving of such notice, and that upon such removal the lessee would within ninety days thereafter commence the excavation work for the foundation of the new building. The lessee further agreed to deposit with the lessors the sum of $1,000 as security for the performance of the terms of the lease pending the construction of the building, it being stipulated that if in the meantime there should occur a default in the payment of rent, the deposit might be applied thereon; and that in such case the lessee would renew the deposit, and the failure to do so within five days after written notice should be deemed a violation of the terms of the lease. The lease also provided that should the lessee fail to pay the rental provided for, or to perform any other covenant or condition contained therein, the lessors might at their option, upon thirty days' notice prior to the erection of the new building and upon sixty days' notice after its completion, be entitled to declare the lease terminated and the rights of the lessee ended.

The lessee paid the rent to and including September 1, 1927, but no longer, and on or about January 1, 1928, the lessors applied said deposit to that extent on the rent which became due in October, November, and December, 1927, leaving a balance unpaid of $50. On January 6, 1928, written demand was made upon the lessee that he replenish his deposit fund, but this he failed to do. No payments of rent have since been made, nor were the taxes paid after the year 1927. Following their demand the lessors brought suit to terminate the lease, but it appears that no notice of election to terminate the same had been given, and the suit by stipulation was subsequently dismissed.

Following their said demand and after the suit had been commenced defendant on February 6, 1928, gave notice to the lessors to remove the buildings on the property in order that he might proceed with the erection of the new building. The buildings were not removed, and no further action appears to have been taken except in connection with the suit mentioned until October 1, 1930, when the lessors served upon the lessee a demand for the installments of rent for the months of January to September, 1930, inclusive, with a notice of default, and declared their intention in case of nonpayment to commence proceedings to adjudge a forfeiture of the lessee's rights under the lease.

On November 8, 1930, they served a further notice reciting the above facts, and that they elected to forfeit the lessee's rights "for breach of the obligations contained therein to pay said rental. * * *" The present action was commenced in November, 1930.

The lessee filed an answer and cross-complaint, alleging defaults by plaintiffs, and sought to recover the rentals and taxes which he had paid.

After a hearing the trial court found for plaintiffs, and entered its interlocutory judgment providing that, should the lessee within thirty days pay the unpaid installments of rent with interest, certain taxes, and an attorney's fee fixed by the court, he should be then restored to his rights under the lease; otherwise that a final judgment be entered declaring his rights terminated. The lessee failed to comply with the interlocutory judgment, and a final judgment, from which he has appealed, was recorded.

The court found that the lessee failed to perform any of his obligations after September, 1927, or to commence the erection of said or any building on the premises before the expiration of five years, from June 1, 1923, or at all. It was further found that although he never had physical possession of the premises it was untrue, as alleged by him, that plaintiffs had exclusive possession thereof, except the buildings mentioned, of which under the lease they were to retain the use; further, that the lessee on February 6, 1928, gave notice to said plaintiffs to remove said buildings in order that he might proceed with the erection of the new building, but in this connection that the notice, which was after his breaches of the lease, was not given in good faith, and that plaintiff's failure to remove the buildings was due to such breaches, and that, had the lessee performed, the same would have been removed; further, that "it was intended by the respective parties * * * that the right of the lessee to have the buildings on said premises removed was contingent and dependent upon the full and faithful performance by the lessee * * * of the obligations of said lease up to the time of the demand for the removal of said buildings. * * *"

[1-6] The lessee contends that the proceeding, being one to declare a forfeiture and to

terminate his rights under the lease, was necessarily an action to rescind, and that he is therefore entitled to recover the amount of rent and taxes which he had paid.

It is the general rule that in case of a mutual abandonment of a contract or its rescission the amounts paid may be recovered. Such were the facts proved or admitted in the decisions cited by the defendant lessee. But a party in default cannot recover where his adversary who is not in default stands upon the contract (Bradford v. Parkhurst, 96 Cal. 102, 30 P. 1106, 31 Am. St. Rep. 189; Glock v. Howard, etc., Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17); and this is true notwithstanding a contract provides that a violation of its terms or conditions shall work a forfeiture and the contract thereupon become void and of no effect. Such a provision means only that the rights of the party violating it shall cease, and it remains in effect so as to protect the rights of the innocent party. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P. 177; List v. Moore, 20 Cal. App. 616, 129 P. 962; Hyman v. Harbor View Land Co., 46 Cal. App. 98, 188 P. 828; Winter v. Kitto, 100 Cal. App. 302, 279 P. 1024. If as urged by defendant lessee, the plaintiffs wrongfully neglected to remove their buildings, and thus in effect refused to deliver possession of that portion of the premises, it has been held that there can be no recovery of rent and the lessee is entitled to relief. Camarillo v. Fenlon, 49 Cal. 202; Skaggs v. Emerson, 50 Cal. 3; Kelley v. Long, 18 Cal. App. 159, 122 P. 832; Cal. C. F. Corp. v. International, etc., Co., 119 Cal. App. 738, 7 P.(2d) 349; 36 Cor. Jur., Landlord and Tenant, §§ 1108, 1109, pp. 308, 309. Here, however, the lessee was not entitled to full possession until he gave notice of his readiness to perform his covenant to erect a new building, and in the meantime he was not excluded from possession of the portion of the premises not occupied by the old buildings. This was exactly in accordance with the express provisions of the lease; and it is well settled that a tenant may be bound by a covenant to pay rent although he does not enter into the possession of the demised premises. 36 Cor. Jur., Landlord and Tenant, § 1107, p. 307. The lease did not expressly make the payment of rent and taxes a condition precedent to or concurrent with the lessors' obligation to remove the old buildings; but the court found that this was the intention; and it has been held that while the question depends somewhat upon the technical terms of the agreement, it rests more on the nature of the things to be done and their relation to each other. South Congregation Meetinghouse in Lowell v. Hilton, 11 Gray (Mass.) 407; Connolly v. Haines-Ce Brook, 277 Mass. 423, 178 N. E. 650. Here it appears that the lessors were entitled to receive the rents and profits from these buildings until the lessee was ready to build, and their removal would have irrevocably terminated this income. That it was the intention that this should be sacrificed though the lessee at the time of his demand was in default would not in our opinion be a fair or reasonable interpretation of the lease in view of the circumstances shown. Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties, the appellate court will not substitute another interpretation though it seems equally tenable. Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 582, 300 P. 34. Moreover, the court found that the lessee's demand and implied offer to perform was not made in good faith. It is essential in such cases that a party act in good faith and be able and willing to perform; and this is true notwithstanding the other party charged with the performance of a concurrent condition be unprepared to perform. 6 Cal. Jur., Contracts, § 241, p. 405; Doak v. Bruson, 152 Cal. 17, 91 P. 1001.

[7, 8] As a general rule, the uncontradicted testimony of a witness may not be disregarded. Nevertheless the most positive testimony may be contradicted by circumstances in evidence which satisfy the court of its falsity [Jenks v. Carey (Cal. App.) 28 P.(2d) 91, and cases cited therein]; and in view of the lessee's previous and continued default, and that a suit to terminate his rights was pending, together with the facts, as testified, that he had caused to be prepared no architectural plan for the proposed building (such a plan being required by the lease) although he had a plan in mind, and that he relied upon his wife's resources to furnish part of the necessary capital, which, however, so far as shown, she had not agreed to furnish, the court was reasonably justified in concluding that he was not acting in good faith.

[9] He also complains of the allowance of an attorney's fee as part of the judgment.

The lease provided that "should it become necessary for the lessors to maintain any action or proceeding * * * to enforce any of the terms or conditions or covenants of the lease, or to protect any of their rights hereunder," the lessee should pay in addition to costs a reasonable attorney's fee to be fixed by the court. The court heard testimony as to the services rendered in this connection, and fixed the sum of $1,000 as a reasonable fee. Unlike the case of Prichard v. Kimball, 190 Cal. 757, 214 P. 863, where the action was not to enforce a term of the lease, here the action was brought to declare the lessee's rights thereunder terminated and for possession. A breach of the lease properly gave rise to such a proceeding, and the attorney's fee was properly allowed.

Plaintiffs claim that the interlocutory judgment determined all the points in controversy, that the appeal should have been taken therefrom rather than from the final judgment, and was consequently filed too late. In view of our conclusions on the merits of the case it will be unnecessary to determine this question.

We are satisfied that the findings are fairly sustained, and no error has been shown which would warrant a reversal of the judgment.

The judgment is affirmed.

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138 Cal.App. 379

PEOPLE v. FONTANA et al.

Cr. 1346.

District Court of Appeal, Third District, California.

April 30, 1934.

1. Criminal law 🔑622(2).

Where defendants allegedly jointly seized and transported prosecutrix to a place where each in succession raped her in immediate presence of the other and they were jointly charged with rape, denial of separate trials *held* not reversible error (Pen. Code, §§ 31, 1098).

2. Criminal law 🔑877.

Where information jointly charged two defendants with rape perpetrated by force on same female by each in succession, and jury, in separate verdicts, found each guilty of rape as charged, verdicts *held* not void as not disclosing whether jury unanimously agreed that each defendant was guilty of rape by force or whether some jurors merely found them guilty as aiding and abetting crime committed by associate.

3. Criminal law 🔑1044.

In prosecution against two defendants for rape on same female committed by each defendant in succession, where there was no motion by either to strike out evidence relating to the separate crime committed by the other nor to limit application thereof to particular party, defendants waived right to complain of prejudicial nature of such evidence.

4. Criminal law 🔑824(1).

Where defendants were jointly charged with rape perpetrated by force on same female by each defendant in succession, and defendants were not charged with aiding or abetting commission of rape by associate, failure to instruct, on court's own motion, that prosecution must establish rape or aiding and abetting accomplishment of rape by associate, *held* not error.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lennon, Judge.

Vincent Fontana and Joe Shiro were convicted of rape, and they appeal.

Affirmed.

Lawrence J. Skirving, of Sacramento, Clinton W. Johnson, George E. Foote and George J. Raymond, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The appellants were jointly charged, tried, and convicted of the crime of rape perpetrated upon the same female and accomplished by each defendant in succession at the same time and place by means of force.

The defendants were riding together in an automobile at night along Twelfth avenue in Sacramento. They overtook Mrs. Donna Roberts, a young married woman eighteen years of age, who was a total stranger to them. She was walking along the sidewalk. They accosted her, stopped and forced her into the car. She was taken to a secluded field in North Sacramento, where, by means of force, first Vincent Fontana and then Joe Shiro had sexual intercourse with her. Both defendants were present during the commission of the offenses. The defendants admitted having intercourse with the prosecutrix, but contend that it was accomplished with her consent. The testimony is conflicting regarding the use of force, but there is ample evidence to support the implied finding that the crimes were committed by means of force. After the defendants had successively completed their access, the prosecutrix was returned to the place where she was picked up and released. She found a policeman in a restaurant nearby to whom she related her story. He testified that she was hysterical. The defendants were subsequently arrested, jointly charged with rape, and convicted. From the judgments which were pronounced against them, the defendants have each appealed.

[1] At the beginning of the trial the defendants demanded separate trials, which were denied. In support of these motions, it was contended that the defendants were jointly charged with separate crimes of rape, and that incidentally each might also be found guilty of aiding and abetting the crime of the other, under the provisions of section 31 of the Penal Code. While each defendant was guilty of separate access to the prosecutrix, for the purpose of determining whether they were entitled to separate trials under the provisions of section 1098 of the Penal Code, they may be deemed to have been charged with but one public offense. Both defendants co-operated in one unlawful transaction of jointly seizing by force and transporting the prosecutrix to a secluded spot, where in succession each raped the victim in the immediate presence of the other. The facts of the case are so intermingled that, for the purpose of determining their right to separate trials, both offenses may be considered one crime. It would be unreasonable to hold that two burglars who conspired to enter a building to commit larceny, and because one stole a suit of clothes and another robbed the cash register, which constitute different offenses, that they are therefore entitled to separate trials. It would be equally absurd to hold that two individuals, who are jointly charged with robbery, would be entitled to separate trials as a matter of law, merely because it appeared that the highwaymen fell upon their victim and one stole his pocketbook while the other took his watch. Each would be guilty of robbery and also of the offense of aiding and abetting his associate in the commission of the same crime. That fact, however, does not entitle them to separate trials. Pursuant to the provisions of section 1098, supra, it was discretionary with the court under the circumstances of this case to grant or deny separate trials to the defendants. It was not reversible error for the court to deny the motions for separate trials.

[2, 3] It is urged that the verdicts are void for the reason that it is impossible to determine whether all of the jurors agreed to verdicts finding either of the appellants guilty of rape, or whether some of them may not have merely found them guilty of aiding and abetting the commission of that crime by their associate. We are of the opinion there is no merit in that contention. The defendants were jointly charged with the commission of the crime of rape accomplished by means of force and violence. The information does not charge either of them as an accessory. The jury rendered separate verdicts against each defendant. The form of the verdicts which were rendered reads as follows: "We, the jury in the above entitled cause, find the defendant Vincent Fontana guilty of the crime of rape as charged in the information." A separate verdict in the same language was rendered against the defendant Joe Shiro. This leaves no doubt as to the fact that the jury unanimously agreed that each of the appellants was guilty of rape accomplished by means of force. In the introduction of evidence, it is apparent that the case was tried upon the theory that each defendant was charged with rape accomplished by means of force, and that the prosecution was not attempting to prove or rely upon a crime based upon mere evidence of aiding and abetting the commission of the associate's crime, as an accessory. The evidence shows without conflict or objection that the appellant Fontana drove the car in which the prosecutrix was taken to a secluded field, and that he first forcibly had access in the automobile while Shiro stood near by. After these facts had been related by the prosecutrix, she continued without interruption or objection, "Then he (Vincent Fontana) got out of the car and Joe Shiro was standing right there, and he got in right after Vincent Fontana got out," and accomplished his purpose. There is ample evidence of the exercise of force on the part of both appellants. There was no motion to strike out this evidence relating to the separate crimes committed by the respective defendants, nor to limit its application to a particular party. The appellants therefore waived their right to complain of the prejudicial nature of the evidence of the separate offenses of rape accomplished by their associate.

The only real defense which is disclosed by the record in this case is the question as to whether intercourse with the prosecutrix was accomplished by means of force, or whether it was the result of voluntary submission on her part.

This case does not present circumstances like the case of People v. Castro, 133 Cal. 11, 65 P. 13, relied upon by the appellants, where several different acts of intercourse by the same defendant took place upon different dates, and were proved at the trial over his objection. Only one principal act is charged against each of the appellants in this case, and evidence of the commission of a separate offense by their associate was admitted in evidence without objection.

[4] Nor was it error for the court, upon its own motion, to fail to instruct the jury "that it was incumbent upon the prosecution to establish one of the two acts"; namely, rape, or aiding and abetting the accomplishment of that crime by an associate. No such instruction was offered by the defendants. The appellants were not charged with aiding or abetting the commission of rape by an associate. That issue was not really involved in the trial of the case. The jury was fully and fairly instructed on all the necessary elements of the offense with which the appellants were charged.

The judgments and orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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138 Cal.App. 370

HARRISON v. MIKELSON.

Civ. 9307.

District Court of Appeal, First District,
Division 2, California.
April 27, 1934.

1. Appeal and error 🔑673(2).

Contention that plaintiff was contributorily negligent because she violated ordinance by failing to obey stop sign before entering street intersection where automobiles collided *held* not available where record contained no evidence that such ordinance was adopted (Gen. Laws Supp. 1925–1927, Act 5128).

2. Automobiles 🔑206.

Motorist, who entered street intersection with due care, was not bound to presume that motorist on intersecting street would violate speed law and cause automobiles to collide.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Dorothy Harrison against Otto Mikelson. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Roland W. Schoettler and E. Foster Brigham, both of Los Angeles, for appellant.

Entenza & Gramer, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action to recover damages for injuries suffered in an automobile collision. The defendant answered denying certain allegations contained in the complaint and pleading contributory negligence of the plaintiff. The trial court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

The defendant makes several points, but they are but different methods of asserting that the plaintiff was guilty of contributory negligence. The record discloses that on the 9th day of August, 1929, the plaintiff was driving an Essex coach, and some members of her family were riding with her. They were driving westerly along Riverside-Redondo boulevard in Los Angeles county. They continued their course until they reached Main street, which crossed their path at right angles. The plaintiff testified that she reached a point where the east line of Main street, if extended, would cross the street on which she was driving. As she approached that point, she slowed down until she was traveling about 5 miles an hour. She looked to the left and there was no traffic; she looked to her right and could see the defendant's car some distance back of a tree that stands in or near Main street. At the time of the trial it was stipulated that the tree was 250 feet north from the northerly line of Riverside-Redondo boulevard. The plaintiff estimated that each of said streets is 60 or 70 feet wide. The street is paved in the middle. The paved portion is about 40 feet wide, and on each side there is a gravel border. When the plaintiff observed the defendant, she thought he was driving approximately 35 miles an hour. Assuming that the defendant would obey the law, the plaintiff proceeded to cross the intersection. As she did so, she increased her speed first to 12 miles an hour and then to 15 miles an hour. As she did so, she changed her gears from second to high. At about the time she was in the middle of the street she again observed the defendant approaching without having reduced his speed, and at that time he was approximately 125 feet from her. When, as she contended, her car had proceeded to a point where the front end was across the paved portion of the highway and merely the rear end of it was on the paved portion, the defendant's car continuing forward collided with the right-hand end of her rear bumper. The force of the impact was such as to cause plaintiff's car to swerve to her right and at the same time turn over on its left-hand side. Having done so, the front end rested within the border of the lot on the northwest corner of the intersection and the rear portion rested on the street south of the north property line of Riverside-Redondo boulevard. The plaintiff testified to facts showing there were no obstructions preventing the plaintiff from seeing the defendant, or preventing the defendant from seeing the plaintiff at the time the plaintiff's car reached the intersection. The record also discloses that the northeast corner of the intersection was occupied by a gas station. The improvements thereon were so located that they did not obstruct the view from points on Main street to points on Riverside-Redondo boulevard except at points a considerable distance back.

[1] In contending that the plaintiff was guilty of contributory negligence, the defendant calls attention to some evidence in the record to the effect that, as the plaintiff reached the east line of Main street, there was a stop sign immediately to her right. Thereupon the defendant claims the plaintiff was guilty of contributory negligence because she violated an ordinance of the board of supervisors of Los Angeles county. The point is not supported by the record, as there is no evidence in the record that an ordinance has been adopted by the board of supervisors of Los Angeles county. True it is that under chapter 253 of the Statutes of 1929 (page 508) authority now exists for the erection of stop signs by the department of public works, but that statute was not in force at the time this accident happened. We are here concerned with the provisions of the California Vehicle Act as they existed on the 9th day of August, 1929. Those provisions are set forth in Deering's Consolidated Supplement 1925–1927 at page 1509 (Act 5128).

[2] The defendant cites and relies on California Jurisprudence Supplement 1928, "Automobiles," § 106, and cases there cited. An examination of those authorities discloses that they are not applicable to the facts of this case. When the plaintiff proceeded to enter the intersection, the record discloses that she was exercising all proper care. She was not bound to presume that the defendant would violate the law. In 19 California Jurisprudence, 596, the rule is stated as follows: "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty on the part of another." See, also, Crabbe v. Rhoades, 101 Cal. App. 503, 519, 282 P. 10; Leblanc v. Coverdale, 213 Cal. 654, 657, 3 P.(2d) 312.

As recited above, the defendant in his answer pleaded the contributory negligence of the plaintiff. In finding No. 9 the trial court found the facts against the defendant. In finding No. 7 the trial court found that the injuries suffered by the plaintiff did not arise out of, and were not caused by, her acts of contributory negligence. Continuing, the last clause of the finding is that plaintiff was not guilty of any contributory negligence whatsoever. The defendant objects to finding No. 7. We think it is clear that the contention is but a different presentation of the point we have just discussed.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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138 Cal.App. 343

KOCH et al. v. BOARD OF SUP'RS OF ORANGE COUNTY.

Civ. 1502.

District Court of Appeal, Fourth District, California.
April 26, 1934.

Hearing Denied by Supreme Court June 25, 1934.

Schools and school districts 🔑42(2).

Where, at time orders excluding grammar school district from high school district and creating new high school district were made, the 1933–1934 assessment roll had not been passed on by state board of equalization, use of 1932–1933 assessment roll to determine whether such exclusion would reduce assessed valuation of high school district below statutory minimum *held* proper (School Code, § 2.451a, as added by St. 1931, p. 2454, § 1; Pol. Code, § 3692, subd. 8, as amended by St. 1931, p. 1434, § 1).

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding by A. J. Koch and others for certiorari to review certain orders entered by the Board of Supervisors of Orange County. From a judgment for defendant, petitioners appeal.

Affirmed.

Hearing denied by Supreme Court; Tyler, J., dissenting.

West & McKinney, of Santa Ana, for appellants.

S. B. Kaufman, Dist. Atty., and W. F. Menton, Asst. Dist. Atty., both of Santa Ana, and T. L. McFadden, of Anaheim, for respondent.

JENNINGS, Justice.

The plaintiffs herein made application to the superior court of Orange county for the issuance of a writ of review for the purpose of having certain orders of the defendant, board of supervisors, vacated and annulled. The trial court, after evidence on behalf of the respective parties to the proceeding had been submitted to it, refused to issue the writ and entered judgment in favor of defendant for costs. The plaintiffs thereupon prosecuted this appeal from the judgment thus entered.

It is conceded that there is no dispute between the parties as to the facts which are involved in this appeal, and a brief statement of them will be of assistance in the consideration of the legal problem which is here presented.

On July 31, 1933, an election was held in the Placentia Union Grammar School district of Orange county. The question submitted to the electors on the aforesaid date was whether or not the above-mentioned district which then constituted a portion of the territory included within the territorial boundaries of the Fullerton Union High School district should be withdrawn from said high school district and formed into another high school district which should bear the name of "Valencia High School District of Orange County." On August 2, 1933, the county superintendent of schools of Orange county filed with the respondent board his certificate as required by law certifying to the fact that a majority of the votes cast at said election were in favor of the withdrawal of said grammar school district from the Fullerton Union High School district and the formation of such new high school district. Thereupon, on August 2, 1933, the respondent board of supervisors acted upon the certificate of the superintendent of schools and made two orders, one of which excluded the Placentia Union Grammar School district from the Fullerton Union High School district, and the other created a new high school district whose boundaries are coterminous with the former boundaries of the Placentia Union Grammar School district. The name of the new high school district thus formed is "Valencia High School District of Orange County." The aforesaid orders of the respondent board are the orders which were sought to be vacated by the petition for the writ. It is undisputed that in making these orders the board used the assessment roll of the year 1932–1933 in determining the "assessed valuation" of the Fullerton Union High School district and the newly created Valencia High School district. This assessment roll showed that the assessed valuation of taxable property within the former district, after excluding therefrom the assessed valuation of property in the Placentia Union Grammar School district, was $21,524,870, and that the assessed valuation of taxable property in the Placentia Union Grammar School district was $9,510,140. The assessment roll for the year 1933–1934, after the board of equalization of the county had completed its equalization on the third Monday in July, 1933, showed that the assessed valuation of taxable property in the Fullerton Union High School district, including the Placentia Union Grammar School district, was $27,090,170, and that the assessed valuation of property in the Placentia Union Grammar School district was $8,270,145. A deduction of the last-mentioned figure from the former demonstrates that, as shown by the assessment roll for the later year, the assessed valuation of property in the Fullerton Union High School district was $18,820,025.

Section 2.451a of the California School Code (as added by St. 1931, p. 2454, § 1) provides as follows: "No order excluding territory from any high school district under the provisions of this article shall be made if the exclusion of the territory would reduce the assessed valuation of the high school district to twenty million dollars or less." It was the contention of appellants in the trial court, and it is the sole contention advanced by them on this appeal, that the respondent board, in determining the assessed valuation of the Fullerton Union High School district, should have used the assessment roll of the year 1933–1934, which would have shown that the assessed valuation of the high school district, after the Placentia Union Grammar School district was excluded, was $18,820,025, and the respondent board would then have been prohibited by the plain mandate of the above-mentioned statute from making the two orders sought to be annulled.

In the final analysis, the determination of the question which is here presented depends upon the completeness or incompleteness of the 1933–1934 assessment roll. If on the date on which the two orders were made this roll was complete, and it must be declared that the assessed valuation of the high school district exclusive of the assessed valuation of the grammar school district, was then less than $20,000,000, it is evident that the respondent board disregarded the statutory mandate in making the orders, and the application for the writ should have been granted. It is conceded that the respondent board, sitting as a board of equalization, had completed the task of equalization prior to the date of the two orders. Appellants urge that the accomplishment of this task was the last step in completing the assessment for the year 1933–1934, and therefore on the date of the two orders the assessment for this year was final and complete, and, being the most recent assessment, should have been used. Respondent concedes that, if it may properly be declared that the assessment for the year 1933–1934 had been completed on the date of the orders, the trial court erred in refusing the writ. It is, however, contended that the assessment for the later year was not complete, for the reason that the state board of equalization had taken no action upon it, and it is contended that, prior to the time this latter body had acted, the assessment roll was unfinished and incomplete, and the respondent board was therefore not authorized to use it as a basis for determining the assessed valuation of the high school district.

Section 3650 of the Political Code as amended by St. 1929, p. 128, § 5, requires the assessor to "prepare an assessment book, with appropriate headings, as directed by the state board of equalization, in which must be listed all property within the county." By the provisions of section 3652 of the same Code the assessor is required to complete this assessment book on or before the first Monday in July of each year. Section 3654 of the Political Code provides that, as soon as the assessment book is completed, it must be delivered to the clerk of the board of supervisors, who must then immediately give notice thereof and of the time when the board of supervisors will meet to equalize assessments by publication. Section 3672 of the Political Code, as amended by St. 1933, p. 1278, § 2, provides that the board of supervisors must meet on the first Monday of July in each year to examine the assessment book and equalize the assessment of property in the county, and that the board must continue in session for such purpose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July. It appears that appellants make no contention that the assessment in any year is finally accomplished until after the board of supervisors has completed the business of equalization, but that it is contended that, when the board of supervisors has finished the task of equalization, the last step in the process of assessment has been taken and the assessment roll is final and complete. However, it appears that there is another agency which must examine the assessment roll before it may be said to be complete. This agency is the state board of equalization, which by subdivison 8 of section 3692 of the Political Code, as amended by St. 1931, p. 1434, § 1, is expressly empowered to "increase or lower the entire assessment roll of any county so as to equalize the assessment of property within the state." The last-mentioned subdivision provides that the state board shall meet at the state capital on the first Monday in August, and that it shall remain in session from day to day, holidays excepted, until the third Monday in the same month, and that it may, after notice has been given to the clerk of the board of supervisors of the county affected, increase or lower the assessment roll of any county. So long, therefore, as the assessment roll of a county is subject to examination by the state board, which is specifically empowered to order it to be increased or lowered, we think that it can hardly be maintained that it is complete. We entertain the opinion, therefore, that the respondent board used the proper basis for determining the assessed valuation of the two school districts in accepting the assessment roll of the year 1932–1933 when it made the aforesaid orders on August 2, 1933. The calendar for the year 1933 shows that the first day of August in that year fell on Tuesday. The state board of equalization could not, therefore, have taken any action with respect to increasing or lowering the assessment roll of Orange county on the date on which the orders sought to be vacated were made.

We are fortified in this opinion by certain authorities to which our attention has been directed by the briefs of counsel. In Baldwin v. Ellis, 68 Cal. 495, 9 P. 652, the principal question which was presented for consideration was thus stated: "Has or not the state board of equalization the lawful right to increase or lower the assessment roll of the county of Los Angeles, so as to affect taxes for county purposes?" The Supreme Court answered this question in the affirmative. It was pointed out that section 3692 of the Political Code empowered the state board of equalization to "increase or lower the entire assessment roll," and that there is no language used in the section which can be construed into meaning that the power of the board is limited to the raising or lowering of the assessment roll for state purposes alone. It was also observed that the date specified by the Political Code for fixing the rate of county taxes was subsequent to the time when the state board of equalization has ordered placed upon the assessment roll the true value of all property subject to taxation, if it had taken any action with respect to raising or lowering the assessment roll. It was remarked that this was significant as indicative of the scheme of the law that there should be but one true valuation, and that the one fixed by the state board, and that it was apparent that the true rule in the matter was that the valuation fixed by the state board was the true valuation, since it could only be definitely known upon what total amount the rate of taxation would be based after the state board had acted.

In Miller v. County of Kern, 137 Cal. 516, 70 P. 549, the plaintiff had brought an action under section 3819 of the Political Code to recover a certain sum which had been paid under protest by plaintiff for state and county taxes on real and personal property for the fiscal year ending June 30, 1896. It was alleged in the complaint that the entire tax which had been assessed against plaintiff for the aforementioned year was void. A general demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was entered in favor of defendant, and plaintiff appealed. In reversing the judgment, the Supreme Court made the following observations: "The assessment of property and the levying and collecting of taxes thereon are proceedings in invitum and are stricti juris (Weyse v. Crawford, 85 Cal. 196, 24 P. 735; Dranga v. Rowe, 127 Cal. 506, 59 P. 944). Boards of Supervisors have power, sitting as boards of equalization, to increase or lower any individual assessment. Pol. Code, § 3673, as amended by St. 1931, p. 2000; Allison, etc., Co. v. Nevada County, 104 Cal. 161, 37 P. 875. And the state board may increase or lower the entire assessment roll. Pol. Code, § 3692, as amended by St. 1931, p. 1434, § 1; Baldwin v. Ellis, 68 Cal. 495, 9 P. 652. The assessment book cannot be said to be completed ready to be transferred to the tax collector until after the county board of supervisors has acted on the assessment as a board of equalization, and until after the auditor has 'corrected it and made it to conform to the requirements of the state board of equalization.'"

Appellants place much reliance on the decision in Madary v. City of Fresno, 20 Cal. App. 91, 128 P. 340. In this case the plaintiff had brought an action to recover a sum of money alleged to have been paid by him under protest for taxes illegally levied and collected by the city of Fresno for the year 1909. It appeared that the defendant city had by ordinance elected to avail itself of the services of the necessary county officers in the matter of the collection of taxes as it was permitted to do by statute. It also appeared that on August 16, 1909, the board of trustees of the city had by ordinance determined the amount of money to be raised by taxation for the needs of the city for the succeeding fiscal year; that prior to the above-mentioned date the county auditor had certified to the city trustees the value of taxable property within the city as equalized and corrected by the county supervisors acting as a board of equalization; that on August 16, 1909, the city trustees had calculated and by ordinance had established the rate of city taxes, and levied the same at such per cent. of the value of the taxable property within the city as would produce the amount required for the city's needs; that thereafter the state board of equalization by order increased the assessment roll or value of taxable property in Fresno county by adding 20 per cent. thereto, and upon notification thereof the county auditor made a corresponding increase in the value of all property assessed to each taxpayer and entered upon the assessment books as being due from the taxpayers of the city for city taxes an aggregated sum one-fifth greater than the amount originally fixed by the city trustees as necessary for the city's requirements. It was this 20 per cent. excess or that part thereof which the plaintiff had paid under protest for the recovery of which the suit was brought. The judgment of the trial court was in plaintiff's favor, and on appeal by the city this judgment was affirmed. It was pointed out that by statute the city trustees of the defendant city were required on the first Monday of August in each year to determine and fix by ordinance the amount of money required to be raised by taxation for the governmental needs of the city for the current fiscal year, provided that on or before the first Monday of the preceding February the city had elected to have the duties of the city treasurer performed by the county treasurer, and that by the same statute the county auditor was required, on or before the second Monday of August, to transmit to the city trustees a statement of the assessed valuation of all property in the city as equalized by the county supervisors, whereupon the city trustees were required, on the first Monday of September, to compute the rate of taxation, using the aforesaid valuation of the county auditor as the basis therefor. It was remarked that it was evident that it was not the intent and purpose of the act which permitted the defendant city to avail itself of the services of necessary county officers in the collection of its taxes to merge and confound city and county business and that in discharging the duties of the city assessor, city tax collector, and city treasurer, the corresponding county officers became ex officiis city officers. It was then pointed out that in the matter of the assessment and levy of state and county taxes the procedure is different from that which is required to be followed in the assessment and levy of city taxes. In the former proceeding the county auditor was required, at the same time that he transmitted to the city trustees the statement of taxable property of the city as equalized by the county supervisors, acting as an equalization board, to send a duplicate thereof to the state board of equalization. When the statement thus sent to the state board, as changed and corrected by the state board, was returned to the county auditor at a time not later than the second Monday in September, the county supervisors were required on the third Monday in September to fix the county tax rate, using the finally corrected assessment valuation as the basis of computation. However, prior to any action by the state board of equalization, it had become the duty of the city trustees to fix the city tax rate, and in determining this rate they were obliged to use the assessed valuation of city property as equalized by the county supervisors. It was declared that, under these circumstances, the contention that the amount of taxes to be paid by the several taxpayers of the city for city purposes was to be computed, not upon the assessed valuation which was used for the determination of the city tax rate, but upon the valuation as finally corrected and equalized by the state board, was not warranted, and that to sustain such a contention would not only lead to inconsistencies and absurdities but would also amount to saying that there could be two valid assessments for the same purpose. It was further observed that any change in the assessed valuation of city property by the state board of equalization would have, as to the defendant city, one of two equally intolerable effects. If the valuation were lowered, the city government would thereby be deprived of necessary funds for its maintenance. If the valuation were increased, the city would be given what it neither needed nor asked, thereby unjustly adding to the burdens of its citizens. From this line of reasoning the conclusion was reached that the judgment of the trial court permitting plaintiff to recover the amount for which the suit was brought was correct.

It is our opinion that the decision in the Madary Case is not of assistance in the solution of the problem which is here presented. The holding in that case was that, under the circumstances which were there shown to exist, the city taxes which had been properly computed on the assessed valuation of property within the city, as equalized by the county board of supervisors, could not be affected by a subsequent change in the assessed valuation of such property for state and county purposes made by the state board of equalization. We do not understand that in the situation presented on this appeal there is involved any question of the legality of city taxes levied by any city that may be located within the boundaries of the high school district or the effect that might be produced upon the assessed valuation of taxable property within such a city by action that might subsequently be taken by the state board of equalization in raising or lowering the entire assessment roll of Orange county. It is significant that the court in the Madary Case specifically noted that the procedure which then obtained in the matter in the assessment and levy of state and county taxes was different from that which the statute required the city of Fresno to pursue in the assessment and levy of taxes for municipal purposes, and that it is expressly noted that in fixing the rate of county taxes the board of supervisors is required to use the assessment valuation as changed and corrected by the state board of equalization as the basis of its computation.

For the reasons herein stated, we think that the respondent board used the proper assessment roll in determining the "assessed valuation" of the two school districts, and that appellants were not entitled to the writ which they sought for the purpose of vacating the two hereinabove mentioned orders of the respondent board.

The judgment from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

138 Cal.App. 133

BROWN v. BOZEMAN, County Superintendent of Schools, et al.

Civ. 1256.

District Court of Appeal, Fourth District, California.

April 19, 1934.

1. Statutes ⟹231.

Sections of School Code bearing on same subject must be read and construed together (School Code, §§ 3, 6.30 to 6.35, and § 6.36 as added by St. 1931, p. 2364).

2. Schools and school districts ⟹80(2).

Where total cost of labor and materials used in particular "job" for school purposes exceeds $500, school board must advertise for bids; "job" being piece of work done or to be done as a whole (School Code, §§ 3, 6.30 to 6.35, and § 6.36, as added by St. 1931, p. 2364).

Board must advertise for bids in such case, notwithstanding that in School Code, § 6.30, conjunction "or" is used between clauses concerning doing of more than $500 worth of work and using of $500 worth of materials or supplies, since last paragraph of section 6.36 (as added by St. 1931, p. 2364) gives board right to have work done without advertising "whenever the total cost of the job does not exceed $500."

[Ed. Note.—For other definitions of "Job," see Words & Phrases.]

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by C. D. Brown against Elsie I. Bozeman, Superintendent of Schools of Kings County, and another for a writ of mandate to compel payment of warrants for labor and materials furnished. From an adverse judgment, petitioner appeals.

Reversed.

Sidney J. W. Sharp, Roger R. Walch, and M. Wingrove, all of Hanford, for appellant.

Clarence H. Wilson, Dist. Atty., of Hanford, for respondents.

MARKS, Justice.

Appellant brought an action against Elsie I. Bozeman as superintendent of schools of Kings county and D. Bunn Rea as auditor of that county, upon four assigned claims against the Reefe school district, seeking to compel them to audit and order paid the warrants issued by the board of trustees of the district for labor performed and materials furnished. Judgment went for respondents, and this appeal followed.

The Reefe school district is an elementary rural school district situated in Kings county. It had scheduled the commencement exercises of its graduating class to take place on May 27, 1932. There was no school or assembly room on the school premises, nor in the district, large enough to accommodate the guests who desired to be present at these exercises. Members of the board of trustees discussed various plans for accommodating the audience. There was a baseball field on the school grounds upon which indoor baseball was played. No seats had been provided for spectators. The trustees decided to build movable bleachers to be made in sections. They placed the sections so that they formed three sides of a quadrangle, the fourth being the entrance to the school building. The commencement exercises were held before the audience seated on the bleachers. These bleachers were later moved onto the baseball grounds.

About the time of the completion of the bleachers, the trustees decided to improve an old handball court on the school grounds. This they did by reconstructing the floor and walls with cement. During this construction, and upon the suggestion and request of the school janitor, the cement was extended up to one of the entrances of the schoolhouse through which the pupils passed when assembling for daily instruction. This enabled them to form in line on the concrete instead of on the ground as they had previously done. It prevented their tracking dirt, and mud during wet weather, into the schoolhouse.

The trustees then decided to erect new posts and new backstops for the basketball courts. When this work was in progress, or about completed, they considered building one or two tennis courts. Figures were submitted by their building superintendent showing that two tennis courts could be constructed at a cost proportionately less than one court. During the course of construction of these courts, they extended this improvement to the construction of four courts. They then decided to beautify the grounds with shrubs and plants. This necessitated the installation of water piping. The school grounds were not level, and at some time during the latter part of these different improvements they decided to have the grounds leveled. The ball grounds were unlighted, and, after they were completed, the trustees decided to install floodlights. This was extended to the placing of floodlights in the various other courts which had been built or reconstructed. The total cost of all these improvements was $8,714.13. The trustees did not advertise for bids for any of the labor or materials used in making the improvements.

The trustees audited and allowed the demands for the various items of expenditure, but the respondents refused to order them paid for the reason, as they maintained, that the expenditures were illegally made in violation of sections 6.30 to 6.35, inclusive, and § 6.36 as added by St. 1931, p. 2364, of the School Code. The trial court upheld their contention and refused a writ of mandate.

The judgment of the trial court is based upon the following findings of fact:

"That the warrant issued to R. McQuaid in the amount of $8.00 on which said first cause of action is based, together with the warrant in the amount of $32.75 issued to J. Pitchford on which said second cause of action is based, and together with the warrant in the amount of $36.74 issued to The Republic Supply Company of California, a corporation, on which the third cause of action set forth in said petition is based, and the warrant in the amount of $496.85 issued to the Brown Materials Co., a corporation, on which the fourth cause of action set forth in said petition is based, were all issued in payment of labor and materials contracted for by said Reefe School District as part of a general scheme and plan of the Board of Trustees of said district to construct on the school grounds of said district situated in the town of Avenal, Kings County, California, four lighted concrete tennis courts, two concrete handball courts, one lighted indoor baseball diamond, one basketball court, wooden bleachers for said baseball diamond, and to plant shrubbery around the school building on said school grounds, and to install a pipe irrigation system to irrigate said shrubbery.

"That at the time of commencing said work said Board of Trustees of said school district knew that said work would cost far in excess of $500.00 and that it was estimated at the time of the commencement of said work that the cost of said work would be about $6,500.00. That upon completion said work has cost said school district in excess of $8,714.13, and that the Board of Trustees of said school district has duly and regularly issued warrants amounting to the total sum of $8,714.13 in payment of labor and materials used in the construction of said work. That a detailed list of said warrants giving the number of each warrant, the name of the payee, the date of the issuance of each warrant, the amount of each warrant and what said warrant was issued for is hereto annexed and marked 'Exhibit A.'

"That said Board of Trustees of said district did not let any contract for the performance of said work or any part thereof and did not advertise for bids for the performance of said work or any part thereof, as required by sections 6.30 and 6.31 of the School Code of the State of California. That the Board of Trustees of said district employed a foreman to supervise said work and that said Board employed numerous laborers by the day to perform said work under the supervision of said foreman and bought the materials used in the construction of said work from different supply houses. That no part of said work was done by contract but that all of said work was done by day labor under the direct supervision and control of the foreman employed by said Board of Trustees."

Appellant attacks these findings as not being supported by the evidence, and contrary to all of the evidence. He bases his contention upon the argument that each improvement made was a separate and distinct undertaking and not related to any of the others; that each improvement cost less than $500, and therefore the trustees of the district were not required to advertise for bids, and the contracts were legal obligations of the district. The decision of this question is determinative of this appeal.

The undisputed evidence in this case shows conclusively that, when the work on the bleachers was started, the trustees had no idea of undertaking any other improvement on the school grounds; that each improvement suggested itself separately to the members of the board and was separately undertaken, either at the close of construction or during the progress of construction of the prior improvement; that, when each improvement was considered, it was discussed at an informal meeting of the board members and estimates of costs were obtained by the building superintendent; that each job was separate and distinct from the others; that the materials were separately ordered and that at no time did any of the members of the board of trustees have any general scheme or plan to construct all of the improvements; that the separate improvements came to the minds of the board members over a period of time; and that each one was decided upon separately and independent of the others. There being no contrary evidence in the record, it seems clear that those portions of the findings which we have quoted, conflicting with this evidence, are not supported by any evidence and are contrary to all of the evidence in the record.

It was stipulated at the trial that the labor was performed and materials furnished, at fair and equitable prices; that the materials were of good quality, suitable for the purposes for which they were used, were actually used by the district in the improvements; that the members of the board of trustees, the laborers, and the materialmen all acted in good faith and were innocent of any fraudulent or wrongful intent; that the improvements constructed on the school grounds resulted in benefit to the school district and are being used for the advantage of the district; that the demands were properly filed and allowed by the board of trustees and warrants issued.

The sections of the School Code which we must consider are as follows:

"6.30. Boards of school trustees and city boards of education shall have power, and it shall be their duty, to let all contracts involving an expenditure of more than five hundred dollars for work to be done or for materials or supplies to be furnished to the lowest responsible bidder who shall give such security as the board may require, or else reject all bids.

"6.34. The board may repair old buildings and improve school grounds by day's labor.

"6.36. In each school district governed by a city board of education, the governing board may make repairs, alterations or additions to school buildings, repair or build apparatus or equipment, make improvements on the school grounds and erect new buildings by day's labor, whenever the total cost of labor on the job does not exceed one thousand dollars.

"In any school district not governed by a city board of education, the governing board may perform similar work as elsewhere herein provided, whenever the total cost of the job does not exceed five hundred dollars."

Section 3 of the School Code furnishes a rule of construction to be used in interpreting the provisions of that Code. It provides: "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

[1, 2] Appellant stresses that in section 6.30 of the School Code the disjunctive conjunction "or" is used between the clauses concerning the doing of more than $500 worth of work, and the using of $500 worth of materials or supplies. He urges that this means that a project involving $500 worth of labor, and $500 worth of materials or supplies, may be undertaken by the school board without its being required to advertise for bids. If the section stood alone, there might be some merit in this contention. The sections of the School Code bearing on the same subject must be read and construed together. The last paragraph of section 6.36 gives the board the right to have work done without advertising for bids "whenever the total cost of the job does not exceed five hundred dollars." We conclude that the fair construction to be put upon these sections must be that set forth in the unequivocal language of the sentence just quoted, and that, where the total cost of the labor and materials used in a particular "job" exceeds in value the sum of $500, the board must advertise for bids. Reams v. Cooley, 171 Cal. 150, 152 P. 293, 294, Ann. Cas. 1917A, 1260; Gamewell Fire Alarm Tel. Co. v. Los Angeles, 45 Cal. App. 149, 187 P. 163; Strauch v. San Mateo Junior College Dist., 104 Cal. App. 462, 286 P. 173; In Reams v. Cooley it was said: "Undoubtedly a school board, like a municipal corporation, may, under some circumstances, be held liable upon an implied contract for benefits received by it, but this rule of implied liability is applied only in those cases where the board or municipality is given the general power to contract with reference to a subject-matter, and the express contract which it has assumed to enter into in pursuance of this general power is rendered invalid for some mere irregularity or some invalidity in the execution thereof, and where the form or manner of entering into a contract is not violative of any statutory restriction upon the general power of the governing body to contract nor violative of public policy. In the absence of such restriction on the mode or manner of contracting, the same general rule applies to such inferior political bodies as to individuals, and the former will be held responsible on an implied contract for the payment of benefits it receives under an illegal express contract not prohibited by law. This is the effect of the cases cited by appellant and relied on by him, notably Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670, Sacramento v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, and Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189. But while the doctrine of

implied liability applies where general power to contract on a subject exists and the form or manner of doing so is not expressly provided by charter or statute, the decided weight of authority is to the effect that, when by statute the power of the board or municipality to make a contract is limited to a certain prescribed method of doing so, and any other method of doing it is expressly or impliedly prohibited, no implied liability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode. Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all, and can be exercised in no other manner so as to incur any liability on the part of the municipality. Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract, and the doctrine of implied liability has no application in such cases."

Appellant relies upon the cases of Perry v. City of Los Angeles, 157 Cal. 146, 106 P. 410; Sittig v. Raney, 53 Cal. App. 709, 200 P. 824; and Warren Brothers Co. v. Boyle, 42 Cal. App. 246, 183 P. 706, as supporting his theory of the case and justifying a reversal of the judgment.

Perry v. City of Los Angeles, supra, involved an interpretation of the city charter of Los Angeles. This charter contained no provisions identical with the sections of the School Code which we have quoted. The decision was based on the right of the city to make the improvement involved and the absence of express statutory prohibition against the manner of making the contract. The Perry Case is not authority here under the reasoning appearing in the above quotation from Reams v. Cooley, supra. In Sittig v. Raney, supra, the court held that it was not necessary to advertise for bids where there were twelve separate contracts for road materials delivered on twelve separate roads; each contract being independent of the other and no one being for an amount which would require advertisement for bids under the provisions of subdivision 11 of section 2643 of the Political Code as then in effect. If the decision in Warren Brothers Co. v. Boyle, supra, conflicts with the decisions in Reams v. Cooley, supra, Gamewell Fire Alarm Tel. Co. v. Los Angeles, supra, and Strauch v. San Mateo Junior College District, supra, we feel impelled to follow what we consider the better rule announced in these cases.

Funk and Wagnalls Practical Standard Dictionary defines "job" as "a piece of work done, or to be done, as a whole." We think this definition expressive of the sense in which the word is used in section 6.36 of the School Code (as added by St. 1931, p. 2364). With this in mind we are satisfied that the evidence shows the following separate "jobs" undertaken by the school district: (1) Building the bleachers; (2) repairing the handball courts; (3) constructing the cement walkway to the entrance of the school house; (4) repairing the basketball courts; (5) planting the shrubs and installing water pipes. Each was complete in itself and in no manner dependent upon any other.

It is also evident that one or more "jobs" were included in building the tennis courts and one or more "jobs" in the installation of the lighting system or systems. We cannot determine from the evidence whether each of these undertakings included one, or more than one, "job," nor can we determine the cost of any of them. The same is true of the grading. It may be that part of this work was done in connection with the building of the tennis courts and should be charged there. The balance of the grading might have been a separate "job," or separate "jobs," or the grading might have been one "job." This cannot be determined from the evidence in the record.

We cannot determine from the evidence on what particular "job" or "jobs" the labor and materials involved in this action were used. If they were used on a "job" or "jobs" costing less than $500, the district should pay for them. If they were used on a "job" or "jobs" costing more than $500, the district cannot pay the bills because of the board having failed to advertise for bids. These matters must be left for determination at a future trial.

The evidence is clear that the bleachers cost $490 complete, and that the "jobs" which we have already numbered 2, 3, 4, and 5 each cost less than $500. It was not necessary to advertise for bids on any of them, and there is no good reason why the bills for labor and materials furnished on these "jobs" should not be paid.

It is probable that much of the difference between the materialmen and the respondents was caused by the manner in which bills were rendered and the demands made out. This may be illustrated by the demand made for materials used in the construction of the bleachers. The materialman submitted a bill for $461.20. Of this sum $380 was for materials used in the bleachers, and the balance, $81.20, was for materials used in the manual training department of the school and other general school activities. It should be possible to segregate the items of the various accounts so that the cost of each "job" could be shown. If this be done, the trial court should order respondent Bozeman to approve such portions of the warrants involved in this action as are shown to have been for labor or materials used on any of the "jobs" not costing in excess of $500, and the respondent Rea to approve, allow, sign, and order the same paid. Further, there is no good reason why any portion of any bill of a materialman which may be shown to have been for materials used in general school work, such as the bill for $81.20 for the manual training department and other school supplies which we have just mentioned, should not be paid if it be shown that such bill was legally contracted.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

138 Cal.App. 253

NORTON v. PUTER.

Civ. 4933.

District Court of Appeal, Third District, California.

April 24, 1934.

Hearing Denied by Supreme Court June 22, 1934.

1. Automobiles ⇨245(87).

Whether automobile guest was contributorily negligent in not protesting against speed of 55 miles an hour in rain where driver's son had warned driver against speed *held* for court in trial without jury (St. 1931, pp. 2120, 1693, §§ 113, 141¾).

2. Automobiles ⇨244(20).

Evidence in automobile guest's action sustained finding of willful misconduct in approaching dangerous turn at 55 miles an hour in rain without windshield wiper (St. 1931, pp. 2120, 1693, §§ 113, 141¾).

3. Automobiles ⇨245(24).

Whether 55 miles an hour in rain without windshield wiper constituted willful misconduct toward automobile guest *held* for court in trial without jury (St. 1931, pp. 2120, 1693, §§ 113, 141¾).

4. Automobiles ⇨181(1).

Motorist's "willful misconduct" toward guest necessarily involves deliberate, intentional, or wanton conduct in doing or omitting acts with knowledge or appreciation of likelihood of resulting danger (St. 1931, p. 1693, § 141¾).

> "Willfulness" necessarily involves performance of deliberate or intentional act or omission regardless of consequences, and "misconduct" is defined as wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance.
>
> [Ed. Note.—For other definitions of "Misconduct," "Willful Misconduct" and "Willfulness," see Words & Phrases.]

5. Appeal and error ⇨1071(6).

Failure to adopt specific finding is not reversible error, where omitted finding would necessarily be adverse to appellant.

◆

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by Bertha Norton against Floyd Puter. Judgment for plaintiff, and defendant appeals.

Affirmed.

Colding, Hale, Crawford & Myers, of San Francisco, for appellant.

John L. Childs and Hersch & Peterson, all of Crescent City, and Charles Reagh, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $3.500 which was rendered against him for willful misconduct in the operation of his automobile, resulting in an accident and serious injuries sustained by the plaintiff, who was riding as a guest in his machine.

The plaintiff and her roommate, Miss Nichols, together with a number of other persons, attended a party the night of November 18, 1931, at the defendant's home, 3 miles south of Crescent City near the Redwood highway. At 5 o'clock the following morning the defendant and his son, Rex, together with the plaintiff and Miss Nichols, started to return to Crescent City in his machine. The defendant drove the car. The plaintiff sat with him in the front seat. His son and Miss Nichols occupied the rear seat. It was raining, and the paved highway was slippery. The defendant drove from his home very rapidly along a private lane to the highway. The plaintiff testified in that regard, "When he got in the car he backed out and shot down the lane." There is substantial evidence that, when they reached the highway, the defendant drove northerly along the pavement at the rate of 55 miles an hour. The car was swerving from side to side. As they approached a turn in the highway, where the defendant's car had previously skidded, his view of the highway was obscured by rain which had accumulated on the windshield; the automatic wiper having ceased to operate. The defendant was warned by his son not to drive so fast. The defendant admitted that he "was going pretty fast all right." In spite of the warning and the danger of the turn in the road where he admitted "I have had one or two pretty close calls on that road that I had not forgot," in spite of the slippery condition of the highway, the swerving of the car, and his obscured vision on account of the rain and the blocking of his windshield wiper, the defendant failed to diminish his speed. The machine skidded at the turn of the road and ran into the ditch by the side of the highway. Miss Nichols testified that the car rolled over three times, although it finally landed on its wheels. The plaintiff was seriously injured, including a fractured and dislocated pelvis and numerous lacerations.

The complaint fails to allege in terms that the defendant was guilty of willful misconduct, but paragraph III of the amended complaint does charge that "it was dark, rain was falling and the said highway and the pavement thereon were wet and slippery, * * * Defendant drove and operated his automobile at said time and place * * * at a speed of 55 miles per hour or thereabouts, and that as a proximate result of said rate of speed * * * under the circumstances as hereinabove alleged, said automobile left the paved portion of said highway and overturned * * * causing her (the plaintiff) great and grievous injuries as hereinbelow set forth" The cause was tried by the court sitting without a jury. Findings were adopted by the court that "all the allegations set forth in paragraphs I, II, III and IV of plaintiff's amended complaint, as amended to conform to the proof, are true," that the allegations of the answer in conflict therewith are untrue, and that "plaintiff is entitled to judgment against defendant in the sum of $3,500." Judgment was rendered accordingly. From that judgment the defendant has appealed.

In announcing the decision, the judge suggested that an amendment to the amended complaint be filed to conform to the proof adduced, to the effect that the accident occurred as a result of the drunkenness of the defendant in addition to the charge of willful misconduct. There was no finding of drunkenness adopted by the court. If that amendment was filed in compliance with the suggestion of the court, it does not appear in the record. The omission to file the amendment is immaterial and harmless. On appeal, the respondent concedes, "There was no proof that the defendant was drunk." Drunkenness is therefore not an issue to be determined on appeal. The cause rests solely upon the question as to whether the defendant's manner of operating his machine at the time of the accident amounts to willful misconduct.

The appellant contends that the judgment is not supported by the evidence for the reasons that the record fails to show that he was guilty of willful misconduct, thereby relieving him from liability to a guest under the provisions of section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), as that law existed at the time of this accident, and upon the contrary that the accident occurred on account of the contributory negligence of the plaintiff.

[1] There is no merit in appellant's contention that the plaintiff was guilty of contributory negligence. In his brief, the defendant argues elaborately that the record discloses no evidence of his intoxication. The respondent concedes this to be true. It may therefore not be held that the plaintiff was guilty of contributory negligence in riding in an automobile with knowledge or belief that the driver thereof was intoxicated. Nor do we believe the evidence shows as a matter of law that the plaintiff was guilty of contributory negligence in failing to personally protest against the excessive speed at which the defendant was driving the automobile under the circumstances of this case. The evidence does not show that the plaintiff knew the windshield wiper was not

operating. It does not appear she knew of the dangerous curve in the highway which they were then approaching. She did know the machine was traveling at an excessive rate of speed in a rainstorm, and that it was swaying from side to side, but the defendant's son warned his father against his rapid rate of speed. Under such circumstances, it may not be held at a matter of law that the plaintiff was guilty of contributory negligence.

[2, 3] We are of the opinion the facts of this case show that the defendant was guilty of willful misconduct in the manner in which he operated his automobile, which conduct proximately contributed to the accident resulting in the injuries sustained by the plaintiff. The defendant knew the pavement was wet and slippery; his vision was obscured by the falling rain and the water on his windshield; the windshield wiper was not operating; he knew he was approaching a dangerous curve in the highway where he had previously had "one or two pretty close calls" in escaping similar accidents; he had been warned several times by his son to diminish the speed of his car; the machine was running 55 miles an hour, and was swaying from side to side—yet with a full appreciation of these dangerous conditions, the defendant recklessly attempted to drive around the curve without slackening the excessive speed of his machine in violation of section 113 of the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), thereby endangering the "lives and limbs" of the occupants of his car. It was the exclusive province of the court to determine whether the defendant was guilty of willful misconduct in recklessly driving his machine at the rate of 55 miles an hour under the circumstances of this case. Walters v. Du Four, 132 Cal. App. 72, 22 P.(2d) 259.

[4] Since the amendment of section 141¾ of the California Vehicle Act, which took effect August 14, 1931, before this accident occurred, the driver of an automobile is liable only for injuries sustained by a guest while riding in his car, resulting from his intoxication or willful misconduct. Since intoxication of the defendant is not an issue on this appeal, the sole remaining question is whether the conduct of the defendant in operating his machine at the time of the accident amounts to willful misconduct. Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; Olson v. Gay (Cal. App.) 27 P.(2d) 922; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279. Webster's New International Dictionary, p. 1379, defines misconduct as "wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance." 40 C. J. p. 1221. Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences. In Helme v. Great Western Milling Co., supra, it is said:

> "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, Ann. Cas. 1916A, 787, 105 N. E. 601. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792."

The conduct of the driver of an automobile was held to constitute willful misconduct in the case of Olson v. Gay, supra, under circumstances showing that his machine approached from the rear a string of three trucks with trailers traveling at night at close intervals along the highway. He was running at the rate of 55 or 60 miles an hour. Without reducing the speed of his car, Gay passed the rear truck on the left-hand side. The guest protested against his rate of speed. Declaring that he was in a hurry to reach San Francisco, the driver turned out and passed the second truck. Again the passenger protested. Without slackening the speed of the car, he attempted to pass the third truck, failing to observe an automobile approaching from the opposite direction. A collision occurred, and the guest was injured.

The verdict of a jury based upon willful misconduct was sustained in the case of Walker v. Bacon, supra, under circumstances showing that the owner of an automobile drove his car 66 miles an hour over a rough road knowing that the steering knuckle of his machine was worn and dangerously defective, which facts contributed to the accident causing the injuries sustained by his guest, who was riding in the machine. This was held to be willful misconduct.

In the present case, the known dangerous condition of the pavement, the obstruction of the driver's view on account of the rain and the water on the windshield, the defective windshield wiper and the excessive speed of the car, furnish evidence of willful misconduct sufficient to support the judgment.

Although the complaint fails to allege in specific language that the defendant was guilty of willful misconduct, the facts which are alleged in the amended complaint sufficiently informed him of the misconduct upon which the plaintiff relied to constitute a good cause of action. The appellant is in error in asserting that the case was not tried on the theory of willful misconduct. During her examination in chief, the plaintiff was asked how fast the automobile was traveling at the time of the accident. Mr. Hale, one of the attorneys for the defendant, objected to this question, saying: "The charge of wilful misconduct was abandoned, and the charge now against this defendant is one of intoxication" only. To this objection Mr. Peterson, one of the attorneys for plaintiff, replied: "We take issue with Mr. Hale. It alleges both wilful misconduct and intoxication." The court overruled the objection. It is immaterial that the court remarked: "These cases to a certain extent have gotten back to the old rule [of] gross negligence." It is apparent the parties were definitely informed that the plaintiff did rely on her charge of willful misconduct.

[5] While the court failed to adopt a specific finding to the effect that the defendant was guilty of willful misconduct, it did find that the allegations of paragraph III of the amended complaint are true, and that the plaintiff is entitled to judgment. It is therefore apparent that the adoption of more specific findings would have necessarily been adverse to the appellant. A judgment will not be reversed for failure to adopt a particular finding when the record discloses the fact that such omitted finding would necessarily have been adverse to the appellant. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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138 Cal.App. 362

NEEL v. RAMELLI et al.

Civ. 9327.

District Court of Appeal, First District, Division 2, California.
April 27, 1934.

1. Appeal and error 🔑1008(1).

Where issue whether grantors of plaintiff's predecessors intended to convey to thread of stream, notwithstanding fact that metes and bounds descriptions were short of that point, was fairly tried by trial court and appellants did not point to any error, appellate court will accept trial court's finding.

2. Appeal and error 🔑901.

If appellants cannot find error, appellate court will not search for it.

◆

Appeal from Superior Court, Ventura County; Frank C. Collier, Judge.

Action to quiet title by Edith Foster Neel against William C. Ramelli and others. From the judgment in respect of defendant Thomas S. Molloy, plaintiff appeals.

Affirmed.

Blackstock & Rogers, Sheridan, Orr, Drapeau & Gardner, and Louis C. Drapeau and C. F. Gerard, all of Ventura, for appellant.

Thomas S. Molloy, of San Francisco, in pro. per.

NOURSE, Presiding Justice.

This appeal presents a controversy over the title to a narrow strip of land at the common boundary line of two Mexican grants in Ventura county—the Rancho Ex-Mission of San Buenaventura and the Rancho San Miguelito. The disputed strip is divided into ten separate parcels of land described in the evidence as A–X to K–X, inclusive. Plaintiff is the owner of lot H, of which the disputed parcel H–X is claimed to be a part. Immediately prior to the commencement of the action she took quitclaim deeds from the adjoining owners of the other nine disputed parcels for the purpose of bringing the suit. The owners of the San Miguelito Rancho were joined as parties defendant for the purpose of establishing the boundary line between the two ranchos. Thomas S. Molloy was joined as party defendant, as he claimed the greater part of the disputed strip. Before trial the issues were severed and the plaintiff took judgment against the owners of the San Miguelito Rancho establishing the boundary line upon the line surveyed by one Terrill and designated on all the maps as the "Terrill line." That judgment has become final.

In the trial of the case from which this appeal is taken, evidence was produced showing that in both grants the common boundary line was the thread of the San Buenaventura river; that the Terrill survey was made in 1860; that in 1862 the then owners of the Rancho Ex-Mission caused a survey to be made by one Leighton, who prepared a map dividing the rancho into subdivisions described by metes and bounds; that this map was duly filed and by reference to it all the parcels were sold to plaintiff's predecessors in interest; that in 1895 the then owners of the Rancho San Miguelito caused their property to be surveyed by one Barry; that the lines of these three surveys are not in accord. The Terrill line is the westerly boundary of the disputed strip, the Leighton line is the easterly boundary, while the Barry line is in between both. The defendant Molloy claims as the residuary of a deed of trust created by the owners of the Rancho Ex-Mission for the subdivision and sale of the rancho. His claim is based upon the theory that, as all the parcels of the Rancho Ex-Mission were sold by metes and bounds and according to the Leighton map, the portions of the rancho not included in these lots went to him as grantee of all the "remains of right, title and interest * * * in * * * any fractions of parcels" of the rancho as the same was confirmed by United States patent.

The issues as confined to the present appeal are: The common boundary line between the two ranchos is conceded to be the Terrill line; the disputed parcels lie between the Terrill and the Leighton line; plaintiff claims that her predecessors in interest acquired all the property running to the common boundary line; defendant Molloy claims that they acquired the property described on the Leighton map only because their purchases were made dependent upon the map and that he, as residuary, acquired the disputed strip as property undisposed of to these purchasers.

The amended judgment confirmed title in plaintiff to parcels A–X, B–X, C–X, G–X, H–X, and J–X, and to portions of parcels E–X, F–X, and I–X. Portions of parcels E–X, F–X, and I–X and all of parcel K–X were awarded to defendant Molloy. On November 4, 1929, the defendant Molloy gave written notice of appeal from certain designated portions of the judgment. That appeal is presented separately in (Cal. App.) 32 P. (2d) 177, filed herewith. On November 6, 1929, the plaintiff gave written notice of her intention to appeal "from the judgment" under the provisions of section 953a, Code of Civil Procedure.

Though the appeal is thus taken from the entire judgment, appellant's brief seems to be in support of rather than against the judgment. She makes no assignments of error. She states that three issues were involved in the proceeding. As to the issue "adverse possession and judgment," she reserves for further discussion the findings favorable to her and states that she would not have appealed from the judgment favorable to Mr. Molloy if he had not taken an appeal.

[1] As to the issue of "paramount title" she concedes that the parties claim from a common source of title as of January 23, 1866, and that her predecessors in interest acquired their title through deeds describing the properties by metes and bounds with reference to the Leighton map. This is the same position with respect to the record title that the respondent Molloy takes. The difference in their positions is this: The respondent relies on the line of the river delineated on the map as the boundary of each parcel conveyed and supports his position by reference to the metes and bounds descriptions in the deeds. The appellant argues that this line was a meander line only and that the parties intended to convey to the thread of the stream notwithstanding the metes and bounds descriptions were short of that point as afterwards established. The issue was fairly tried by the trial court and, as the appellant has not pointed to any error, we will accept the court's finding.

[2] As to the issue of the "Argabrite Title," covering parcel K–X, appellant frankly concedes that "the lower Court properly sustained objections as to the muniments of title in the plaintiff * * * because at the time of the commencement of the action the plaintiff was not the owner of any part thereof." She then states that before trial a corrected deed was executed, but that this deed "did

not correct the difficulty which the plaintiff faced." Our attention is not directed to any finding which is objected to nor to any evidence which would support a finding favorable to appellant. If an appellant can find no error, we will not search for it.

For the reasons stated herein and for the further reasons stated in the opinion on the companion appeal, the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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138 Cal.App. 366

NEEL v. RAMELLI et al.

Civ. 9326.

District Court of Appeal, First District, Division 2, California.
April 27, 1934.

Hearing Denied by Supreme Court June 25, 1934.

1. Appeal and error 🔑839(1).
Finding not attacked in plaintiff's appeal and not included in portions of judgment from which defendant appealed *held* not open to controversy on defendant's appeal.

2. Adverse possession 🔑114(1).
In action to quiet title, evidence *held* to sustain finding that plaintiff acquired title to certain portions of property by adverse possession of plaintiff and predecessors.

3. Appeal and error 🔑1008(1).
In quiet title action tried without jury, question of plaintiff's adverse possession *held* one of fact for trial court, as against contention that railroad right of way running through tract destroyed claim of exclusive possession.

4. Appeal and error 🔑1039(13).
Where complaint in quiet title action pleaded ownership in plaintiff and defendant was fully apprised of issues to be tried and given ample opportunity to present defense, defendant *held* not prejudiced by plaintiff's failure to plead elements of adverse possession and by introduction of evidence of adverse possession.

◆

Appeal from Superior Court, Ventura County; Frank C. Collier, Judge.

Action to quiet title by Edith Foster Neel against William C. Ramelli and others. From the judgment, defendant Thomas S. Molloy appeals.

Affirmed.

Thomas S. Molloy, of San Francisco, in pro. per.

Blackstock & Rogers, Sheridan, Orr, Drapeau & Gardiner, Louis C. Drapeau, and C. F. Gerard, all of Ventura, for respondent.

NOURSE, Presiding Justice.

This is a companion case to Neel v. Ramelli (Cal. App.) 32 P.(2d) 175. The trial court found adversely to appellant as to certain parcels of the land in dispute and appellant has directed his appeal to the portions of the judgment covering such findings. Many issues are raised which are discussed at great length, appellant's brief consisting of more than eight hundred pages. We will endeavor to limit these issues to such as we deem essential to a determination of the controversy.

Appellant urges that the evidence is insufficient to support the finding that plaintiff acquired the strip lying between the Barry line and the Terrill, or grant, line by adverse possession. By a reference to the statement of facts in the other opinion it will be recalled that the boundary line between the two ranchos was the thread of the San Buenaventura, a typical Southern California stream which was dry the greater part of the year and which changed its bed frequently, depending upon the extent of winter storms. In the original survey in 1860 this boundary line was fixed by what is called the Terrill line which is the most westerly of the three survey lines covering the land is dispute. In 1862 the subdivision survey was made and the Leighton line established. This is the most easterly line. In 1895 the Barry line was established and this cuts the disputed strip approximately in the middle.

The issue between the parties to this appeal arises in this way: The plaintiff is the successor in interest to purchasers of the Leighton subdivision of the old Rancho Ex-Mission and her record title runs to the Leighton line. Defendant Molloy claims under a quitclaim deed to all the residue of that rancho. Hence, if the strip lying west of the Leighton line did not pass to plaintiff and her predecessors in interest it is claimed by this defendant under this deed. Further narrowing the issues on this appeal we find that the trial court found that the extreme western boundary of plaintiff's record title was the Leighton line; that the true grant line or boundary between the two ranchos was the Terrill line; that the defendant Molloy had record title under his deed to the strip lying between these two lines, but that plaintiff had acquired title by adverse possession to certain parcels of this strip.

[1] The last finding is the only one that presents a material controversy on this appeal. The finding relative to plaintiff's record title is not attacked here and was not attacked in plaintiff's appeal from the judgment in a manner which would justify a determination of the issue. In establishing the Terrill line as the true grant line, the trial court satisfied both parties. The finding covering defendant Molloy's record title was not attacked in plaintiff's appeal from the judgment and is not included in the portions of the judgment from which this appeal is taken. It must, therefore, be deemed a matter adjudicated and not open to controversy on this appeal. This leaves for discussion the finding that plaintiff acquired title to certain portions of the disputed strip by adverse possession.

[2] As to parcel A–X the evidence is that the property was fenced to the grant or Terrill line from 1898 to 1914 when the fence was taken out by a flood, but that a new fence was then erected; that gum trees had been planted on this parcel in 1884, and the whole tract was used for pasture; that all taxes assessed to the property were paid by plaintiff or his predecessors in interest. There was no conflicting evidence and the finding is conclusive. Parcels B–X and C–X were awarded to plaintiff on similar findings as to adverse possession. Parcel E–X was divided between the parties. The findings covering these three parcels are not attacked. As to parcel F–X the evidence of adverse possession of the portion east of the railroad awarded to plaintiff is clear. Plaintiff's predecessor in interest held the property under intensive cultivation and paid all taxes assessed to it since 1912. The award of the portion west of the railroad to appellant is not open to attack on this appeal because the appeal is limited to the properties described in paragraph one of the decree in which this parcel is not included.

[3, 4] The findings covering parcels G–X, H–X, and I–X are all attacked on the same grounds. Appellant makes two points in his attack upon these findings: (1) That the railroad right of way running through these tracts destroys the claim of exclusive possession; and (2) that plaintiff could not recover as an adverse claimant because she did not specially plead such claim. The easement of this railroad did not follow any one of the survey lines which are the subject of this litigation. It was apparently granted by plaintiff's predecessors in interest without any intention of abandoning property to the west of it. In any event, the possession of plaintiff here was a question of fact for the trial court to determine.

As to the second point, the complaint pleaded ownership in plaintiff. The appellant now argues that plaintiff could not offer evidence of adverse possession without affirmatively pleading all the elements of adverse possession and that the findings on that claim are outside the issues. Richert v. City of San Diego, 109 Cal. App. 548, 293 P. 673, holds that it is not necessary to find on all the elements essential to make the possession adverse—that the ultimate fact of title is sufficient. For the same reason the general allegations of the complaint should be sufficient to raise the issue. But, if not, the appellant was not prejudiced because he was fully apprised of the issues to be tried and was given ample opportunity to present his defense.

Parcel J–X involves what is termed the Akers title. The entire parcel was awarded to plaintiff. It is precisely the same land as that involved in Taylor v. McConigle, 120 Cal. 123, 52 P. 159. In the record title under which plaintiff claims this parcel, the description calls as its west boundary line the easterly grant line of the Rancho San Miguelito. In the McConigle Case the court finally determined that, as to this particular parcel, the claimant held to the old Terrill line —that such line was the thread of the stream and the true grant line. That decision came down in 1898. Defendant Molloy took his deed to the residue of the Rancho Ex-Mission in 1907. Plaintiff produced evidence that she and her predecessors in interest had held possession of the entire parcel for more than thirty years and had paid all taxes assessed to the property.

Summing up the controversy between the respective parties in a review of the evidence at large we find that for more than fifty years a large part of the land in dispute lay idle, covered with rocks, gravel, and débris from torrential rains and floods; that during all this period the plaintiff and her predecessors in interest paid all taxes assessed against the property believing that they owned to the center thread of the stream; and that the land in dispute was of no value until 1924, when oil was discovered under the river bed. Then new surveys were made and descriptions upon the assessment rolls were changed to accord with what the landowners claimed to hold. No taxes were assessed to or paid by the defendant Molloy covering any of the land in dispute. And no claim of ownership was asserted by him until these proceedings were commenced.

We have not overlooked the points raised by appellant relating to the order of proof and the admission or rejection of testimony. We are mindful that the cause is in equity and was tried before the court without a jury. Every opportunity was given all parties to present their issues and these have been fully argued and considered in this appeal. Hence, without discussing these points separately, it is sufficient to say that we find no error which was prejudicial to appellant and that we think the decree conforms to the equities prevailing between the parties.

The portions of the judgment from which this appeal was taken are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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138 Cal.App. 162

In re EDWARDS' ESTATE.

EDWARDS et al. v. RILEY, Controller.

Civ. 9321.

District Court of Appeal, Second District, Division 1, California.

April 20, 1934.

Rehearing Denied May 19, 1934.

Hearing Denied by Supreme Court June 18, 1934.

Taxation 🔑900(2).

Where statute empowering superior court to modify or reverse order fixing inheritance tax within 2 years thereafter was amended by provision that court should not have any right to modify or reverse such order in addition to rights provided in Code of Civil Procedure and such Code provided no procedure for modification or reversal of judgment by such court, order fixing inheritance tax could not be modified by superior court some 16 months later (St. 1929, p. 1846, § 11, subds. 1, 3).

◆

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Godfrey Edwards, deceased. Proceeding by Olive Rotha Edwards and the California Trust Company against Ray L. Riley, Controller of the State of California, for modification of an order fixing inheritance tax. From an order sustaining demurrer to petition, without leave to amend, petitioners appeal.

Affirmed.

Hearing denied by Supreme Court; Preston and Tyler, JJ., dissenting.

Todd W. Johnson and Philip D. Johnston, both of Los Angeles, for appellants.

David Tannenbaum, Clyde C. Triplett, and Donald R. Peck, all of Los Angeles (W. H. H. Gentry, of Sacramento, of counsel), for respondent.

HOUSER, Justice.

As far as they may concern a determination of the question presented herein, the pertinent facts are that, in the course of the administration of the estate of Godfrey Edwards, deceased, pursuant to an order that was made by the superior court, a certain sum of money therein determined to be due to the state as an inheritance tax was paid by said estate. Some sixteen months thereafter, for what would appear to be just and equitable reasons therefor, in accordance with that which was assumed to be the statutory provisions affecting the matter, the sole beneficiary of the estate petitioned the superior court for an order by which, if granted, its former order in the premises would be reversed, or at least modified in the amount therein ordered to be paid by said estate on account of said inheritance tax. A demurrer to said petition having been sustained by the court "without leave to amend" the petition, the instant appeal was taken from the ensuing judgment.

The principal and deciding issue in the case relates to the power of the superior court either to reverse, or to modify, its former order by which the amount due from the estate as an inheritance tax to the state of California was fixed and determined.

Apparently, the statutory provisions present an anomalous situation in that subdivisions 1 and 3, respectively, of section 11 of the Inheritance Tax Act (St. 1921, p. 1500), as amended August 14, 1929 (St. 1929, pp. 1834, 1846), furnish the foundation not only for the presentation of the petition to the superior court for the reversal or the modification of the original order by which the tax upon the inheritance in the estate was authorized, but as well for the order by which the demurrer to such petition was sustained. Broadly speaking, by subdivision 1 of section 11, when it is made to appear that any debts have been proved against the estate of a decedent "after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, * * *" a foundation is laid, by reason of which a refund to the person entitled thereto may be ordered; and by said subdivision 3 of section 11 it is provided: "If, after the payment of any tax in pursuance of an order fixing such tax, made by the superior court having jurisdiction, such order be modified or reversed by the superior court having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state controller, the county treasurer shall refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of tax fixed by the order modified or reversed * * *."

But, in addition to that which hereinbefore has been set forth, the concluding sentence of said subdivision 3 of section 11 (which forms the basis for the order by which the demurrer to the petition addressed to the superior court was sustained, and which is an amendment to the original statute) is as follows: "This subdivision shall not be construed as giving any right to have such order modified or reversed in addition to those provided in the Code of Civil Procedure for the modification or reversal of judgment."

It may thus be noted that, although by provision of the foundational subdivision of the section of the statute a modification or a reversal of the original order made by the superior court is authorized to be made by such court at any time "within two years from and after the date of entry of the order fixing the tax" (In re Estate of Brown, 196 Cal. 114, 121, 236 P. 144), by an amendment to the same subdivision of the section of the statute, in effect it is provided that the preceding language of "this subdivision" of the statute "shall not be construed as giving any right to have such order modified or reversed in addition to those provided in the Code of Civil Procedure for the modification or reversal of judgment."

By the parties to the instant appeal it seems to be agreed that at the time when the petition was presented to the superior court, by the terms of no section or statute contained within the Code of Civil Procedure was the superior court authorized to modify or to reverse its original order in the premises. The question before this court is, therefore, narrowed to a determination of the effect which the concluding provision of subdivision 3 of section 11 had, or has, upon its preceding provisions. In that connection, it appears that, in circumstances analogous to those herein, in Re Estate of Brown, 196 Cal. 114, 121, 236 P. 144, 147, the Supreme Court of this state construed the language of the statute as it existed prior to its amendment, and defined the remedy or the remedies which accrued to an interested party in an estate. In part, it was there said: "The party complaining has, under subdivision 3, an alternative remedy, one by appeal from the original order and the other by application to the superior court for a modification or reversal thereof. A party may take an appeal from the original order in the manner and within the time prescribed by the Code of Civil Procedure (part 2, tit. 13, c. 1, §§ 939–959), without applying to the superior court for a modification or reversal of the original order, or apply to the superior court for a modification or reversal thereof without taking an appeal; the court having continuing jurisdiction for two years after the making of the original order within which, either on its own motion or on the application of the complaining party, to modify or reverse it. With regard to the latter remedy, the subdivision does not provide, in terms, that a party complaining may apply to the superior court for a modification or reversal of the original order but, as that court is given power to modify or reverse within two years, it would follow that the party complaining would have the right to invoke its action."

It would thus appear that at the time such decision was rendered the law of this state was that at any time within "two years after the making of the original order" the superior court had jurisdiction "to modify or reverse it." And it is not only interesting, but as well important, to note that the ruling to which attention has been directed was made in the face, and with full knowledge on the part of the court, of the existence and the application to the situation then before the court of the provisions of section 18 of the statute by which it was then, and still is, provided in part that, "except as otherwise herein provided, the provisions of the Code of Civil Procedure relative to judgments, new trials, appeals, attachments and execution of judgments, so far as applicable, shall govern all proceedings taken under this act. * * *" St. 1917, pp. 880, 900.

Also, notice should be taken of the fact that at the time when the rule in Re Estate of Brown was promulgated the statute did not contain the concluding sentence which now appears in subdivision 3 of section 11, to which attention hereinbefore has been directed, and by which in substance the remedy for the *modification or the reversal* of an original order by which an inheritance tax is fixed is limited to such provisional statutes as may be found in the Code of Civil Procedure. The decision in Re Estate of Brown was rendered in the month of May, 1925, and it was not until more than four years later, to-wit, in the month of August, 1929, that the restrictive language of the statute which by its terms is made applicable solely to subdivision 3 of section 11, was added thereto. But perhaps, notwithstanding the fact that the amended statute was not enacted at the session of the Legislature next following the date of the decision in Re Estate of Brown, nevertheless it may be assumed that the statute was enacted in recognition of the effect of the rule therein announced.

From a consideration of the language contained within the opinion in Re Estate of Brown, 196 Cal. 114, 121, 236 P. 144, it would seem that the ruling therein included the point that the remedy for which provision is made by section 18 of the statute relates to a situation wherein an appeal from the order either has been taken or is contemplated by the aggrieved party; but at any rate, that the remedial provision of the statute has no reference or application to a petition that may be presented to the superior court for a modification or a reversal of the order in question. On the other hand, by the express language of the 1929 amendment to subdivision 3 of section 11, its application is limited to "this subdivision," and specially relates, not necessarily to an appeal, or to any procedure incident to the enforcement or the collection of a judgment, as is intimated in section 18 of the statute, but to "any right to have such order modified or reversed" by any procedure other than, or in addition to, that "provided in the Code of Civil Procedure for the modification or reversal of judgment." The former provision of the statute is necessarily general in its nature; the latter, special.

By the direct terms of the amendment in question, the remedy of an aggrieved party is expressly limited; and being later in time than the original statute, the language of the amendment is controlling.

However apparent it may be that the effect of the amendment is to abrogate, or to repeal, that provision of the statute by which, theretofore, for a period of two years after the making of the original order, by his application to modify or to reverse such order, an aggrieved party had the right to invoke the "continuing jurisdiction" of the superior court therein, nevertheless it is just as clear that in the exercise of its constitutional powers the Legislature was possessed of the authority to do just what it did in the premises. And since the Code of Civil Procedure admittedly provides no procedure for the "modification or reversal of judgment," such as was sought to be exercised by the petitioner in the superior court, it should follow that the judgment of that court which ensued pursuant to its order by which the demurrer to the petition was sustained should be affirmed by this court. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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138 Cal.App. 233

OLNEY et al. v. CAVELL.

Civ. 7810.

District Court of Appeal, Second District,
Division 2, California.
April 24, 1934.

1. Physicians and surgeons 🔑14(4).

Physician or surgeon taking charge of case impliedly represents that he possesses that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in locality where he practices.

2. Justices of the peace 🔑130.

Justice's court judgment in favor of physician for services rendered *held* bar to malpractice action by defendants in suit for services, who therein had interposed defense of negligent treatment, which defense was presented to jury, since former adjudication was conclusive not only as to matters actually decided, but as to all matters which might have been decided (Code Civ. Proc. § 1911).

◆

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Frank D. Olney and another against R. W. Cavell. Judgment for defendant, and plaintiffs appeal.

Affirmed.

John C. Miles, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Action by plaintiffs to recover damages from defendant physician for alleged malpractice in treating a child of plaintiffs. Defendant denied all material allegations of the complaint except that of the death of such child, and set up as a bar to the action a judgment for $75 in his favor and against plaintiffs for the reasonable value of the services rendered by him in treating the child. Such judgment was entered on the verdict of a jury in the justice's court of Gardena township, and in their answer filed in said court plaintiffs here interposed the defense that said services were valueless, in that the defendant herein did not exercise the degree of care, skill, and intelligence required of physicians and surgeons in the locality in treating such cases. The foregoing facts were stipulated by the parties in the instant case, and it was further stipulated that the judgment rendered in said justice's court "does not on its face show that the question of whether or not Dr. Cavell had been guilty of negligence or carelessness, in treating Jeanne Olney, was litigated," but that "the reporter's transcript, pleadings and instructions to the jury do show that this question was presented to the court and jury." It was also stipulated that the question raised as to the bar of such judgment could be submitted to the court before impaneling a jury with the same effect as if said jury had been impaneled.

The trial court, on such stipulation, after hearing argument of counsel, adjudged that said justice's court judgment was a bar to the prosecution of the present action and gave judgment against plaintiffs. From such judgment the latter has appealed.

Appellants urge that a justice court not being a court of record, it is impossible to tell what matters were actually litigated, and that it is easy to imagine a situation where a doctor might be guilty of negligence and yet be entitled to recover the reasonable value of his services. We are not interested in speculating on whether or not there could be such a case. The fact remains that in the case of the judgment urged here as a bar, the stipulation clearly shows that the alleged negligent treatment was set up as a defense and was actually presented for the decision of the jury. Whether it had been or not, in our opinion, it was necessarily involved.

[1, 2] A physician or surgeon taking charge of a case "impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices." Hesler v. California Hospital Co., 178 Cal. 764, 766, 174 P. 654, 655. If he does not possess such learning and skill, or if, possessing it, he fails to use it, he is guilty of malpractice; and in every action to recover for services rendered by a physician or surgeon in which either the lack of skill and learning are necessarily involved, it needs no argument to demonstrate that a physician or surgeon who does not show at the trial that he possesses such skill by proving that he is licensed to practice his profession, and at least by presumption that he used the same in performing the services rendered, would not be entitled to recover. In other words, in our opinion, such questions are actually and necessarily included in an adjudication of his right to recover even in a default case, and particularly so where, as here, an answer is filed which expressly raised an issue thereon, which was presented for decision as here shown.

This case seems to come squarely within the meaning of section 1911 of the Code of Civil Procedure. The same question between the same parties being necessarily involved in the present case, the former adjudication was conclusive "not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy * * * which also might have been raised and decided." Minnis v. Equitable Life Assur. Soc., 204 Cal. 180, 183, 267 P. 538, 539; Estate of Bell, 153 Cal. 331, 95 P. 372; Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.(2d) 1003. "It is not what was actually done, but what might have been done, that is concluded by a former judgment." Henderson v. Miglietta, 206 Cal. 125, 127, 273 P. 581, 582. See the case of Bellinger v. Craigue, 31 Barb. (N. Y.) 534, where the physician filed suit to recover for his services after issue joined in the malpractice case, and where the judgment in his favor was held to be a bar to the malpractice action, notwithstanding that defendant in the justice's court withdrew a defense similar to that interposed in the justice court action here.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

137 Cal.App. 299

JAMES MILLS ORCHARD CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Sac. 4821.

Supreme Court of California.
May 9, 1934.

In Bank.

Appeal from Superior Court, Butte County; R. M. Rankin, Judge.

On rehearing.

Prior opinion, 30 P.(2d) 626.

W. T. Belieu, of Willows, and C. H. White, Louis Ferrari, and W. E. Johnson, all of San Francisco, for appellant.

George R. Freeman, of Willows, for respondent.

PER CURIAM.

The petition to have this cause heard and determined by this court after judgment in the District Court of Appeal of the Third Appellate District was denied on May 7, 1934. In that connection it should be said:

The statement in the opinion of the District Court of Appeal "that it does not appear that the collateral security for the payment of the $8,000 note which is held by the defendant is insufficient with which to satisfy that obligation" was unnecessary for the decision and should be disregarded. The finding of the trial court, approved by the decision, that "prior to and at the time of debiting said account (of Kitrick and Hall Warehouse Company) and thereafter, the defendant had notice of the fact that neither said W. S. Hall nor Kitrick & Hall Warehouse Company, a corporation, was the owner of the grain represented by said warehouse receipts and had notice that said warehouse receipts and the proceeds to be collected on said draft, * * * was the property of the plaintiff * * * and had notice that said W. S. Hall was acting as an agent for plaintiff in the transaction for the sale of said barley," leaves the case in harmony with the decision of this court in Arnold v. San Ramon Valley Bank, 184 Cal. 632, 194 P. 1012, 13 A. L. R. 320, and other cases to like effect.

220 Cal. 566

AMERICAN SECURITIES CO. v. FORWARD et al.

S. F. 14958.

Supreme Court of California.
April 23, 1934.

Rehearing Denied May 22, 1934.

1. Municipal corporations ⚷451.

City council rather than county board of supervisors *held* proper body to levy assessment tax to pay bonds of improvement district where city council initiated proceedings (St. 1925, p. 849, as amended; p. 850, § 2).

2. Municipal corporations ⚷451.

City council levying assessment tax to pay bonds of improvement district *held* to have mandatory duty to levy tax sufficient to pay principal and interest already due and delinquent as well as that to become due in ensuing tax year (St. 1931, pp. 1554, 1558, § 41, subds. 1, 6, 7).

3. Municipal corporations ⚷407(1).

Cumulative levies of assessment tax, to pay bonds of improvement district sufficient to pay amount already due and delinquent as well as that to become due, are constitutional.

4. Municipal corporations ⚷956(1).

Obligation to levy ad valorem tax such as tax to pay bonds of improvement district is continuing one, and where time for levy elapses, duty remains and tax must be levied in subsequent year.

5. Mandamus ⚷154(4).

Petition praying for mandamus requiring levy of tax to pay bonds of improvement district at time of making general tax levy and for each succeeding year thereafter in sufficient amount to pay past due and accruing principal and interest *held* sufficient.

6. Municipal corporations ⚷907.

Enforcement of bonds of improvement district already issued is not affected by repeal of statute under which they were issued (St. 1933, p. 948).

7. Mandamus ⚷115.

Mandamus is proper remedy for unpaid bondholders to require city council to levy assessment tax to pay bonds of improvement district.

◆

In Bank.

Application by American Securities Company for a writ of mandate prayed to be directed to John F. Forward, Jr., and others, as the City Council of the City of San Diego, or as members of the Board of Supervisors of the County of San Diego, to compel them to levy a special assessment tax to pay the principal and interest on certain bonds.

Writ granted.

Prior opinion, see 24 P.(2d) 810.

Hearing denied by Supreme Court; Shenk, J., dissenting.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

C. L. Byers, City Atty., and Gilmore Tillman, Asst. City Atty., both of San Diego, for respondents John F. Forward, Jr., et al., as constituting City Council of City of San Diego.

Thomas Whelan, Dist. Atty., and Frank T. Dunn, E. I. Kendall, and J. B. Abbey, Deputy Dist. Attys., all of San Diego, for respondents Edgar F. Hastings, T. Le Roy Richards, Ray Hurley, as and constituting Board of Supervisors of County of San Diego.

Harold Jacoby, of Oakland, amicus curiæ.

PER CURIAM.

A hearing was granted in this case in order to give further consideration to the question whether the statute imposes a mandatory duty to levy a tax sufficient to cover past-due principal and interest on the bonds as well as that to become due prior to the next annual levy. We hereby adopt the following portion of our former opinion as a proper statement of facts and determination of other issues:

Mandate to compel either the respondent city council of the city of San Diego or the respondent board of supervisors of the county of San Diego to levy, at the time of the next general tax levy for municipal or county purposes, upon all of the lands within municipal improvement district No. 1 in said city, a special assessment tax in an amount clearly sufficient to pay all of the principal and interest which has become due or will become payable on bonds of the district heretofore issued, before another tax levy for municipal or county purposes can be made available for the payment of principal and interest on said bonds.

Municipal improvement district No. 1 was organized under the Acquisition and Improvement Act of 1925 (St. 1925, p. 849 as amended), and pursuant to a resolution of intention adopted by the city council of the city of San Diego on August 20, 1928. The purpose of the proceedings was to acquire rights of way and to construct two bridges and a causeway over Mission bay with street improvements at the approaches of said bridges. The estimated cost of the improvement was $725,000 and upwards. The proceedings were carried forward by the city council of said city, the contract was let, and the contractors entered upon the performance of the work. Certain property owners affected commenced an action to enjoin the performance of the contract. After trial on the merits the court found for the defendants and entered judgment accordingly. On appeal by the plaintiffs the judgment was affirmed on February 25, 1931. Southlands Co. v. City of San Diego, 211 Cal. 646, 297 P. 521. Bonds were issued by the city treasurer as provided in the act in the principal sum of $737,418.34, all dated January 21, 1931. The first principal amount of $46,000 will accrue on January 21, 1936, and the last on June 21, 1951. On July 2, 1932, the first semiannual interest coupons attached to said bonds matured and there became due and payable on account of said interest thereon the sum of $64,030.01. On September 1, 1931, the board of supervisors of said county, for the purpose of raising funds for the payment of said interest when it should become payable, levied against the property in the district a special assessment tax at a rate calculated to raise the sum of $71,835.95, or 11.2 per cent. more than required if collected in full.

On January 2, 1933, there became due and payable on account of interest coupons then maturing the sum of $22,122.55 and a like sum on July 2, 1933, or a total for this year of $44,245.10. On September 1, 1932, the board of supervisors for the purpose of paying interest coupons maturing in 1933 levied a special assessment on lands in the district sufficient to raise, if collected in full, the sum of $49,288.34, or approximately 11.2 per cent. more than the amount required to pay the 1933 interest coupons. Of said levies made in 1931 and 1932 there remain unpaid and delinquent at this time certain individual assessments totaling approximately $31,259.18, or about 25.8 per cent. of the total levies made for the two years. The petitioner is the owner of said bonds in the principal amount of $74,000, and it is alleged in the petition that the total now unpaid on account of the interest coupons on all of the bonds of the district, including its own, is $28,660.

The petitioner prays that the court determine which legislative body, the city council of the city or the board of supervisors of the county, is the legislative body required by law to levy assessment taxes to satisfy the principal and interest on said bonds, also that when the proper legislative body is determined upon, the court compel said legislative body to levy a tax for the year 1933–1934 sufficient to pay not only the interest coupons maturing on January 2 and July 2 in the year 1934, but also to pay the amount unpaid on the interest coupons for the years 1932 and 1933.

[1] The question as to which legislative body is the proper one to levy the assessment tax is not difficult of solution. The city council of the city initiated the proceedings and all of the steps taken thereafter in carrying the improvement to completion were taken by it or under its direction or by officers of the city, including the establishment of the extent of the assessment district and the several assessment zones therein, the hearing and passing upon protests on behalf of numerous property owners in the district, the letting of the contract and supervision of the work as it progressed, the acceptance of the work, the issuance of the bonds to represent the cost of acquiring property and of the improvement. The board of supervisors had nothing to do with the proceeding until, for some unaccountable reason, that board assumed the power to levy the assessment taxes in 1931 and again in 1932. Section 2 of the act of 1925 provides "that the legislative body initiating the proceeding and adopting the resolution of intention therefor, as hereinafter provided, shall thereafter have exclusive jurisdiction of the proceeding." That the levy and collection of the assessment taxes to satisfy the coupons for interest and principal on the bonds issued to represent the cost of the improvement are part and parcel of "the proceeding" as contemplated by the act can admit of no doubt. A reading of the statute demonstrates that the legislative body which initiates the proceeding is the only one having jurisdiction to complete it and the provisions of the act with reference to the issuance of bonds for the cost of the work and the levy of assessment taxes to satisfy the same are inseparably a part of the plan for the accomplishment of which the statute was created.

Of course "the legislative body initiating the proceeding" must be the legislative body duly constituted under the terms of the act in order that the proceeding be regular. Whether the city council of the city of San Diego was authorized under the act to initiate and carry forward this particular proceeding was one of the main issues determined in Southlands Co. v. City of San Diego, supra. It was contended by the city in that case that its legislative body was the proper one to initiate and conduct the proceeding. This contention was upheld. A holding to the contrary would have required a reversal of the judgment in that case. The city is in no position to relitigate that question. It has become definitely settled. Price v. Sixth District, 201 Cal. 502, 258 P. 387. It therefore appears beyond question that the respondent city council is the legislative body having exclusive jurisdiction to levy said assessment taxes.

[2-5] The important question presented by this appeal is whether there is a mandatory duty on the part of the appropriate legislative body, which is, as we have seen, the city council, to levy a tax sufficient to pay principal and interest already due and delinquent, as well as that to become due in the ensuing tax year. In other words, does the act require the "cumulating" or "pyramiding" of the assessments? The constitutionality of such cumulative levies is beyond question. See Municipal Improvement Co. v. Thompson, 201 Cal. 629, 258 P. 955; O. T. Johnson Corp. v. County of Los Angeles, 128 Cal. App. 440, 17 P.(2d) 792; Roberts v. Richland Irr. Dist., 289 U. S. 71, 53 S. Ct. 519, 77 L. Ed. 1038. The question is therefore to be answered by a construction of the terms of the statute.

A preliminary point raised by respondents, which should first be disposed of, is that the time for making the annual tax levy for the fiscal year 1933–1934 expired on August 29, 1933, and that consequently the right to the relief demanded in the petition is a moot question. It is well settled that the obligation to levy such an ad valorem tax is a continuing one; and where by reason of the negligent or willful refusal of the city to perform its duty during a particular year, or for other reasons the time for the levy of such tax elapses, the duty remains and the tax must be levied in the following or any subsequent year when it is possible to do so. This point was given thorough consideration by us in Pasadena Junior College Dist. v. Board of Supervisors, 216 Cal. 61, 13 P.(2d) 678, and the holding therein is determinative in the instant case. The petition prays for a writ requiring the levy at the time of the next general tax levy "and for each succeeding year thereafter" in a sufficient amount to pay past due and accruing principal and interest. This is a proper pleading to secure the relief demanded, if such relief is appropriate.

Section 41 of the statute before us (St. 1925, p. 890, amended by St. 1931, p. 1554), which is the principal section dealing with the enforcement of the bonds, provides in subdivision 1, that "there shall each year at the time of levying taxes for general municipal purposes be levied by the legislative body of such municipality against and upon all of the lands within said district a special assessment tax *in an amount clearly sufficient*, together with any moneys which are or may be in said fund, to pay all the principal which *has become* or will become payable and all interest which *has become* or will become payable on the bonds issued under the proceeding *before the proceeds of another tax levy* made at the time of the next general tax levy for general municipal purposes *can be made available* for the payment of said principal and interest." This section in express terms makes it mandatory upon the city to levy a tax, the amount of which must be "clearly sufficient," when added to certain other moneys, to pay delinquent principal and interest, as well as principal and interest to become due during the year. The phrase "has become * * * payable" unquestionably covers delinquencies. The duty to cumulate assessments, therefore, is laid down in section 41, subdivision 1.

This duty is neither qualified nor limited by other provisions. Section 41, subdivision 7, provides that whenever the bonds or payments of interest or principal thereon "shall become due," and there is not sufficient money in the interest and sinking fund to pay the same, the legislative body "may, *pending the levy and collection of a special assessment tax therefor*, order the amount of money necessary to pay said bonds, or payment of principal or interest so falling due, to be transferred from the *general fund* * * * to said interest and sinking fund, and the amount of money so transferred shall be deemed a *loan* * * * and shall be repaid to the general fund from the first money coming into said interest and sinking fund thereafter." The purpose of the discretionary power thus given the municipality to make a loan to a depleted special fund is apparent from the express language of the provision. It is to prevent a default, and is temporary, "pending the *levy and collection*" of the tax. No intent to substitute the loan for the tax is indicated. Instead, the duty to levy the tax, imposed by subdivision 1, is again recognized by the language above quoted, and by the introductory sentence of subdivision 7, which states that, "*In any event*, it shall be the duty of the legislative body, which is required by this section to levy the special assessment tax, to levy a special assessment tax upon all of the said lands within such district clearly sufficient to pay the principal and interest of said bonds as the same shall become payable, and said legislative body is *hereby vested with power and jurisdiction to do all and singular the things which in this section aforesaid it is declared shall be done by it.*"

The same insistence upon the mandatory duty to tax, in spite of provision for other methods of securing moneys temporarily, is found in section 41, subdivision 6, which provides that the municipality "may" transfer from the general fund or from any fund which may be used for acquisitions or improvements of a similar character, to the interest and sinking fund, such amount as in its judgment should be transferred. Subdivision 6 then states: "It is the intention of this provision that *further assistance* in addition to that * * * which may be given as elsewhere provided in this act, may be given by such * * * municipality * * * and apart from the loans, and apart from the advances under the revolving fund elsewhere in this act provided."

In spite of the unqualified duty thus imposed by section 41, subdivision 1, recognized and not limited by other sections or subdivisions, respondents contend that the municipality is not required to cumulate the assessments for the reason that in determining the amount of the tax they may take into account "any moneys which are *or may be*" in the fund. They assert that the duty of the landowner to pay his delinquent assessment may be relied upon by the city, and that the city may legitimately indulge the presumption that such delinquencies will be eliminated and that the money will come into the fund. Hence, they say, the legislative body has made an honest determination that a tax to cover payments *to become due*, will, together with moneys which *may be* in the fund, meet all requirements, including delinquencies.

We are unable to agree that the purpose, language and effect of the rest of the act can be nullified by an assumption of this sort. The legislative intention to require levy of a sufficient tax is unmistakable. A reasonable construction of the phrase relied upon by respondents must therefore be that it applies to such moneys as must *necessarily* be in the fund, or are, at least, so likely to be there that they may, for the purpose of exercising the taxing power, be considered as already in. Perhaps an example would be transfers or loans from the general fund, or advances from the revolving fund under section 43 (St. 1925, p. 892). The city, in contemplation of the availability of such moneys as a result of their transfer being ordered, may regard them as moneys which "may be" in the fund, and may take into consideration such specific, definite sums in computing the tax. There may be other situations in which specific sums are to be regarded as highly likely to be in the fund at the necessary time. But this cannot be said of the unpaid assessments due from taxpayers, which are neither definite in amount, nor, in the present case, likely to be collected. The so-called "presumption" has no foundation in fact, and is wholly improbable. The very fact that for some time delinquencies have increased and past due assessments have accumulated shows that there is little chance of a substantial amount thereof being paid up "before the proceeds of another tax levy" can be made available, that is, during the taxable year. All of the indications are that there will be additional delinquencies instead of the elimination of past delinquencies.

The foregoing discussion to the effect that the assessments must be cumulated is supported by the weight of available authority from other jurisdictions, as well as by strong expressions in our own decisions. The Acquisition and Improvement Act of 1925 was largely based upon the Road District Improvement Act of 1907 (Deering's Gen. Laws, 1931, Act 3276), and the enforcement provisions contain practically the same language. Section 26 of the latter statute requires the levy of a special assessment tax "in an amount clearly sufficient, together with any moneys which are or may be in said fund, to pay all the principal which has become or will become due and all interest which has become or will become payable on said bonds, before the proceeds of another tax levy * * can be available." The same arrangement is provided for a temporary loan from the general fund pending the levy and collection of a tax, and it is similarly declared that "in any event it shall be the duty" of the taxing authority to levy a sufficient tax. This statute was before the court in Municipal Improvement Co. v. Thompson, 201 Cal. 629, 258 P. 955, and we held it valid against constitutional attack. One of the grounds of invalidity urged in that case was that under section 26 the property owner may not know the amount of the tax to be paid by him until the final installment on the bonds is due, "because the tax on some of the lots in the district may become delinquent and *some of the landowners be required to pay an undue proportion* in order to make up a sufficient fund to pay said installments." 201 Cal. 636, 258 P. 955, 958. We said in answer to this objection that it was not essential to the validity of the statute that the property owner be advised in advance of the precise amount he will be required to pay each year, and that the duty to levy and collect sufficient funds to satisfy installments of principal and interest as they became due was mandatory. We added (201 Cal. 637, 258 P. 955, 958): "If some of the special assessment payments become delinquent from year to year, it would not follow that the lands of the delinquent owners would be relieved from paying the charge. It would be merely postponed. With the penalties and costs accruing to the bond fund, it is reasonable to assume that the burden is equalized during the period that the bonds are outstanding." In County of San Diego v. Childs, 217 Cal. 109, 17 P.(2d) 734, this court held invalid the Refunding and Reassessment Act of 1931 (St. 1931, p. 1861), which sought to refund the bonds of such districts as the one involved herein by substituting for the ad valorem tax on all the lands a specific lien on each parcel of land in the district, and the issuance of a new bond to represent such lien. In commenting upon the difference between the two systems, we said of the provisions of the Acquisition and Improvement Act of 1925 under which the bonds had already been issued (217 Cal. 115, 17 P. (2d) 734, 736): "The bondholder must look for payment from the special fund maintained by the annual assessments. If the fund becomes depleted and is insufficient to pay the interest or principal on the bonds *it is the duty of the board of supervisors to provide for the deficiency in the subsequent levy.*" (Italics ours.) See, also, O. T. Johnson Corp. v. Los Angeles, 128 Cal. App. 440, 17 P.(2d) 792; Robinson v. Supervisors of Butte County, 43 Cal. 353.

The majority of the cases from other jurisdictions support the conclusion that a statutory duty to "levy and collect" taxes is not discharged by their mere levy, but requires that they be actually collected. These cases likewise declare that a mandatory duty to cumulate assessments exists in situations analogous to that presented in these cases. See Rountree v. State, 102 Fla. 246, 135 So. 888; Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 70 A. L. R. 156; Norris v. Montezuma Valley Irr. Dist. (C. C. A.) 248 F. 369; Gates v. Sweitzer, 347 Ill. 353, 179 N. E. 837, 79 A. L. R. 1151; In re Dancy Drainage Dist., 190 Wis. 327, 208 N. W. 479.

We have been asked to consider the hardship which may result where the landowners who are not in default are forced to pay an additional tax to meet the deficiency caused by other defaulting taxpayers; and it has been urged that to cumulate the levies will result in the building up of a huge and unnecessary surplus fund in the event that ultimately the delinquencies are met by money from redemption or sales of the property. To each objection it must be answered that the Legislature has expressed its intention in a manner sufficiently clear, and that this court is without the power to change the terms of that expressed intention. The evil complained of is, indeed, inescapable in any system of ad valorem taxation. See In re Dancy Drainage Dist., supra; Burnett v. City of Grand Rapids, 264 Mich. 593, 250 N. W. 320. But it has been pointed out that there is good reason to believe that over the period of thirty years during which the bonds are to be retired, the temporary inequalities arising from cumulative assessments will be ironed out and equalized; that is, that by reason of revenue from redemptions and sales, the future tax levied will be decreased and the burden on the nondefaulting owner eased. See Municipal Improvement Co. v. Thompson, supra. As to any surplus money remaining in the fund after the bonds are retired, the act (section 41, subd. 7) provides that they are to be used for repairing public ways in the district, and thus they serve to meet the cost of improvements which the landowners would otherwise be forced to pay for by further taxes.

[6] That respondents' arguments were properly addressed to the legislature would appear from the fact that the act under discussion was repealed in 1933 (St. 1933, c. 346, p. 948); but the enforcement of the bonds already issued is not and of course cannot be affected by the repeal.

[7] Under the statute as we have interpreted it, the right to mandamus inevitably follows. The only effective remedy of unpaid bondholders in a case such as this is a writ of mandate, and to deny that remedy is practically to render the obligation unenforceable. State ex rel. Buckwalter v. Lakeland (Fla.) 150 So. 508, 90 A. L. R. 704; Rountree v. State, supra.

It is therefore our conclusion that a peremptory writ of mandate should issue to compel the respondent city council to levy a special assessment tax upon all the lands in Acquisition and Improvement District No. 1 of the city of San Diego in an amount clearly sufficient, together with moneys which in some specific amount are or will necessarily be in the bond fund before another tax levy for municipal purposes can be made available, to pay all principal and interest now due, and which will become due before the proceeds of another tax levy made at the time of the next general tax levy for municipal or county purposes can be made available for such payment; such levy to be made at the time of the next general tax levy for county or municipal purposes and for each succeeding year thereafter.

It is so ordered.

220 Cal. 689

KILPATRICK v. STATE BAR OF CALIFORNIA.

S. F. 14989.

Supreme Court of California.
April 30, 1934.

As Modified May 24, 1934.

Attorney and client 🔑53(2).

Evidence in disciplinary proceedings *held* insufficient to sustain finding that attorney induced witness, whose testimony would favor adversary, to secrete himself during trial (Code Civ. Proc. § 287, subd. 5).

In Bank.

Petition by Frank E. Kilpatrick to review the action of the Board of Governors of the State Bar of California in recommending petitioner's suspension from the practice of law for a period of two years.

Proceedings against petitioner dismissed.

Edwin V. McKenzie, of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

Application is made for a review of the action of the board of governors of the State Bar of California in recommending the suspension of the petitioner from the practice of the law for a period of two years. On October 20, 1932, Frank E. Kilpatrick and Booth B. Goodman, his partner in the practice of law in Oakland, were served with a notice to appear before local administrative committee No. 3 of Alameda county and show cause why they should not be disciplined for professional misconduct. The misconduct charged was in connection with the actions of Katherine M. Baldwin v. The Peerless Stages System, a corporation, and Harry Baker, numbered 120,420, and S. S. Baldwin v. The Peerless Stages System, a corporation, and Harry Baker, numbered 120,421, in which the firm of Kilpatrick & Goodman were attorneys for the plaintiffs. The charged misconduct consisted of violations of rule 15 of the rules of professional conduct of the State Bar and of subdivision 5 of section 287 of the Code of Civil Procedure by the commission of acts involving moral turpitude, dishonesty and corruption. The charges were set forth in five counts, alleging: That Kilpatrick and Goodman secured King, a material witness whose testimony would tend to establish a material fact, to avoid service and secrete himself, and sought to make his testimony unavailable by allowing their agents to keep him away from the trial and away from the representatives of the defendants in these actions; that, by and through their agents, they took charge of King during the trial, and prevented his attendance as a witness, and prevented the defendants from procuring him as a witness, well knowing that he would prove to be a valuable witness for the defendants; that, knowing his testimony would prove favorable to the defendants if produced, the petitioner and Goodman attempted by their agents to advise King to testify falsely should he be called; that, subsequent to the rendition of judgment in the damage actions, and while a motion for new trial was pending, they sought to procure from King an affidavit to the effect that he knew nothing about the facts involved in the actions, although they well knew that he had knowledge of the facts, and, if produced, would give testimony favorable to the defendants; and that, for the purpose of procuring King to absent himself from the trial, Kilpatrick and Goodman, through their agent, offered King the sum of $200, and thereafter paid him $77 for remaining away and secreting himself, and that they further offered to pay him if he would refuse to sign any affidavit produced by the defendants in their efforts to secure a new trial.

The local committee was of the opinion that the charge against Kilpatrick was sufficiently established, but that the charge against Goodman failed, and it therefore recommended that the charge against Goodman be dismissed, but that Frank E. Kilpatrick be suspended for the period of three years. By a vote of eight to six the board of governors adopted the findings of fact of the local committee and recommended that Kilpatrick be suspended for a period of two years; the six dissenting votes being placed upon the ground that the corroborating testimony was insufficient.

The Baldwin actions arose out of a collision between the Baldwin Chevrolet and one of the Peerless Stages System busses. The trial began on Friday, January 22, 1932, and continued until Thursday, January 28. There is some doubt whether King actually saw the accident, but, at any rate, he was on the spot immediately after it occurred, and the next morning signed a statement, obtained by T. N. Hay, investigator for the bus company, which was definitely in favor of the driver of the bus on the question of negligence. Shortly thereafter he moved from Oakland, and at the time of the trial he was living in Saratoga, but was engaged in the operation of an automobile cleaning and paint shop in San Jose. Both sides had been trying to locate him, but neither was successful until Monday, January 25, the second day of the trial, when Nimmo, the investigator for Kilpatrick & Goodman, found him at his paint shop and interviewed him there. So far there is practically no conflict in the evidence; it being conceded that up until this interview Nimmo could not have known what the testimony of King would be. But from this point on the stories of King and Nimmo vary greatly; King's story being that, after learning what his testimony would be, Nimmo told him that he would be well paid if he kept away from the trial or if he would "forget" about the accident if he were subpœnaed by the defendants. On the other hand, Nimmo insists that he regarded King's testimony as favorable to the plaintiffs, and that all his activities were in furtherance of an attempt to persuade King to come to the trial and testify, but that King was reluctant to do so, particularly because he had given Hay a signed statement contrary to the true facts which he excused on the ground of sympathy for the bus driver (and King has admitted that the reason he signed the statement was to save the bus driver's job), and also because he did not want to leave the shop he was just opening.

The report of the local committee points out that the hearing was extended and the testimony voluminous and incapable of complete reconciliation, the complainant, King, in particular being "indefinite and confused as to the order of time in which events occurred" but that nearly all material portions of his testimony with regard to dealings with Nimmo and Kilpatrick are corroborated by other witnesses, although there is some contradiction by reputable and apparently uninterested witnesses. But, "viewing the testimony as a whole, and disregarding some contradictions by apparently disinterested witnesses," the committee concluded that "Nimmo's activities were directed toward keeping King away from the trial rather than getting him to court as a witness; that Nimmo did promise King money for staying away and did pay him substantial sums for that purpose"; and "that the respondent Kilpatrick was entirely aware of what Nimmo was doing with respect to this matter."

King's testimony is substantially as follows: He signed a written statement the morning after the accident for an investigator of the bus company, and signed it of his own free will and without compensation therefor, and, with the exception of the dates, it is true. He first saw Nimmo in San Jose when he came to King's shop and said he was from Kilpatrick & Goodman and came to see about the accident. He (King) drew a diagram on the floor of the shop for Nimmo, whereupon Nimmo exclaimed, "My God, we can't have you in this!" Nimmo then took him out to lunch, at which time he asked him if there was not some way he could forget something about the accident, and said he would pay him well if he would keep away from the trial. King later testified that Nimmo never at any time asked him to be a witness. On this same occasion Nimmo told King that the investigators for the bus company were looking for him and asked if they had seen him. King then told of the statement, but said he had seen no one since. He also told Nimmo he was going to Oakland in a day or so, and Nimmo gave him his card and told him to call him when he got there and not to let "the boys" see him, referring to Jimmy Buck and one Lydon, who are not identified. King went to Oakland the following day with his brother-in-law to look at a restaurant, and telephoned Nimmo from there. He testified that Nimmo arrived about fifteen minutes later, alone in a Ford coupé, and that Nimmo gave him $10 and said he would see him later, but no conversation was had about the accident. (It seems to be conceded that King's trip to Oakland was on Tuesday of the trial.) The next day Nimmo came to Saratoga around 7 a. m. and inquired for King at the house of Mrs. Graham, a neighbor of King's who, with her husband, was interested in the San Jose shop and through whom King received his telephone messages. Mrs. Graham got King, and he agreed to meet Nimmo in San Jose at the paint shop. At this conversation King told Nimmo he did not want to appear, and Nimmo said, "What would you do if we had to subpœna you?" King replied that he would tell the truth, and Nimmo asked if he couldn't "forget a lot of this," and King repeated that he would tell the truth if subpœnaed. Nimmo then insisted upon taking King to the office of Randall O'Neill, a lawyer in San Jose, who, he said, was a good friend of Kilpatrick's. Nimmo talked with O'Neill first alone, and then King asked O'Neill if he would get into trouble by staying away from the trial, and O'Neill said he would not if he were not subpœnaed. O'Neill further said that he knew Mr. Kilpatrick well and that Kilpatrick would back up whatever Nimmo said. King said he had not told O'Neill at the time of the offer to pay him, and no mention of money was made at this interview, and, in fact, he later testified that the first definite offer of money was made on a subsequent occasion. King next saw Nimmo when he came to the home of Mrs. Graham at 8 o'clock that night (this would be Wednesday evening, according to King's version), and said the inspector from the bus company was coming down to see him and he wanted King to come and spend the night with him in a San Jose hotel. He told the Grahams he was taking King with him for the night, and they all had a drink of whisky supplied by Nimmo. King was taken out and introduced to Kilpatrick, who was waiting in the car outside (Kilpatrick's car), and they all drove to San Jose where Kilpatrick was left at a hotel, Nimmo and King returning to the Grahams, where they had a party on liquor furnished by Nimmo. On the way in to San Jose with Kilpatrick nothing was said about the accident or King's testimony. There were present at the Graham home the Grahams and King's two brothers-in-law, Smith and Barnett. The accident and King's value as a witness were the main subjects of conversation. Nimmo told them that he was going to take care of King, that they could win if he were kept away from the trial, and that they would all have money when the trial was over. Nimmo thanked Mrs. Graham for answering the phone, and said he would give her $50. On another occasion he is said to have promised her a motorcycle to be used in connection with the paint shop. Nimmo returned about 6 or 7 o'clock the next morning (Thursday), and told King the bus company investigators were in San Jose and not to wait for breakfast. He took King to Los Gatos for breakfast and then to Santa Cruz. On the way they discussed the accident, stopping for King to draw a map on the highway by Holy City, and Nimmo promised King "between $200 and $500" not to go to the trial or "know too much" if subpœnaed. Arrived in Santa Cruz, Nimmon telephoned the office from a gasoline station and then went to a dairy where the Bohns (King's niece and her husband) worked. There they all discussed the trial and King's staying away from it, which Nimmo gave as the reason for their appearing so early in the morning. Nimmo then wanted to go to Livermore, but King refused. They reached Saratoga again about 2:30 in the afternoon. Mrs. Graham said two men had been to see King and described them. Nimmo said one was Mr. Licking, the attorney for the bus company. However, Hay said their first trip to Saratoga to see King was on the 30th of January.

The next day (this would be Friday, January 29) Hay and Licking came and asked King to sign an affidavit, which he refused to do, but made an appointment for noon the next day at the paint shop. The next day (Saturday) Nimmo arrived at the paint shop, and, having heard about the appointment with Hay, tried to get King to go to O'Neill's office to sign an affidavit to the effect that he knew nothing about the wreck, but, on King's refusal, he asked him to go for a ride, and, when he got him in the car, took him to San Francisco, stopping at the Hood Tire Company to see some men Nimmo knew, and then across the bay to Oakland about 4 o'clock. Nimmo said he had to go to the office and arranged to meet King on Twelfth street about 5 o'clock. After that they went to Hayward and had dinner, then back to Saratoga, arriving about 8. King was called to the telephone, but Nimmo insisted on answering it for him. Nimmo said he was King, and then: "You fellows high-powered me into signing this statement, and I don't want another damn thing to do with it, so you might as well leave me alone." When he had hung up, he said: "By God, I guess that will hold them." King said he did not ask Nimmo to answer for him.

A few days later Nimmo came down and said the case was won, and about three days after that he tried to get King to sign an affidavit to the effect that he knew nothing about the accident, saying it was to be used in case of a new trial. King refused. The next day King tried to call Nimmo from Saratoga to tell him some one had been trying to get in touch with him, but Nimmo was out and he talked to Goodman (which, of course, Goodman denies). Later Nimmo came and had his car washed and made another attempt to secure an affidavit, and said that the plaintiffs had moved for a new trial. King said Nimmo promised him money at least six or eight times, that he gave him $10 in Oakland and $10 the second time they went to Santa Cruz, and $7 at Mrs. Graham's. King could not fix the time of the second trip to Santa Cruz, and admits that $7 was the charge for washing and polishing Nimmo's car, but says that was paid at another time and place. Barnett testified to this payment, which was made in the evening in the driveway near his house. Nimmo on several occasions told King he would be paid as soon as the case was settled. In June or July King went to the office of Kilpatrick & Goodman, and, Nimmo being out, he saw Kilpatrick. He asked for the rest of his $200, and said he had been paid only $27. Kilpatrick said he would have to wait and see Nimmo that afternoon, as he understood he had been paid $150, but he finally agreed to pay him $50 and find out about the rest, and told King to come back at 3 o'clock and he would have it in cash, that he could not give him a check. This visit was in the morning, and Barnett was with him. Barnett returned with him at 3, and Kilpatrick sent them into another office to see Nimmo; when Nimmo came in, Barnett left, and Nimmo paid King $50 and said he could have the rest in two or three weeks. After two or three weeks King went to see O'Neill and told him he had not received all his money. O'Neill reassured him, and some time later, when King again went to see him with the same complaint, O'Neill telephoned Kilpatrick at King's request and in his presence, and reported that Kilpatrick wanted King to go to Oakland and see him. King again went to Oakland, having a woman telephone because Kilpatrick was never in when he called. Kilpatrick being out and expected back about one, King and the lady went to the office about that time. Neither Kilpatrick nor Nimmo were in, and they left a number for him to call. Nimmo finally called and said Kilpatrick would have nothing more to do with King. Thereafter King went to the office of another attorney in San Jose, to whom he explained the matter and who wrote Kilpatrick and Goodman demanding the remainder of the $200. Goodman replied to this letter in Kilpatrick's absence, saying that King had rendered them no services and had no money coming to him. King further testified that he was advised by him to take the matter up with the Bar Association.

Frank E. Kilpatrick testified that the first he heard of King was from Nimmo when he had located him. He knew there was some man who had seen the accident and that Nimmo was looking for him. Nimmo telephoned and said he had found King and thought he would make a good witness, but he was reluctant to testify because of his previous statement and wanted legal advice. Kilpatrick telephoned Randall O'Neill and said he was sending King in to see him. Nimmo's instructions were to bring King in to testify, and these instructions were never changed. All during the trial he was attempting to do so, and Kilpatrick, himself, made one trip to Saratoga for the same purpose. However, when he got there Nimmo told him in King's presence that it was all right now, and King was coming, so nothing more was said about King's testifying. He explains this by saying that Nimmo was an experienced investigator upon whose judgment both he and Goodman relied, and that Goodman was handling the entire trial, so that his purpose was merely to get King to come in so Goodman could talk to him and call him if he wanted to. Neither he nor the firm paid King any money, although he admitted that, if Nimmo paid him, he must have gotten it from him (Kilpatrick) or else out of his own pocket, as he had no drawing account. He did not know the defendants were looking for King until after the trial, when Licking told him they were trying to get an affidavit for use on a motion for new trial. With regard to the firm accounts, the testimony of both Kilpatrick and Goodman shows that the record of what was spent in connection with any one matter was extremely casual, and there was a possibility that money spent on this case might not appear on the register of actions under this case or on the sheets submitted to the committee's inspection. Kilpatrick further testified that he saw King only once in his office at about 2 o'clock in the afternoon, that Barnett was with him, but stayed outside in the reception room when King came into his office and that the door was closed. King asked for money, but did not ask for any particular sum or mention $27. Kilpatrick told him he did not owe him anything because he had not testified. As King left the office, Nimmo entered the reception room and King followed him into Goodman's office. Nimmo told Kilpatrick that King had said he wanted some of the money made in this case or he would make it hot for everyone. Kilpatrick denied sending King in to see Nimmo, denied he ever talked to O'Neill about paying King, and denied he had told Smith, examiner for the State Bar, that he had paid King $77 to testify, but King had failed to do so.

Randall O'Neill testified that he first heard of King when Kilpatrick telephoned and said he was having Nimmo bring him in to see him for legal advice. When they came, King's main concern was whether he would get into trouble by testifying contrary to a statement he had signed immediately after the accident to save the bus driver's job. He understood King wanted to testify for the plaintiffs. He did not assure King that Kilpatrick would stand back of Nimmo's promises; the first he heard of the $200 was several months later when King came in and said he had received $77 and had $123 coming. O'Neill at King's request telephoned Kilpatrick in King's presence, and Kilpatrick said he owed him nothing. O'Neill then suggested to King that he go see Kilpatrick. This was not at Kilpatrick's suggestion, but was his own idea. King on cross-examination admitted having told Nimmo before he went to O'Neill's office that he would not do anything or go anywhere until he had had the advice of an attorney. O'Neill testified that King only came into his office with Nimmo once; he later came several times about money he claimed was due him. Nimmo asked O'Neill later to prepare an affidavit about the accident for King's signature, but did not come back because King refused to sign it. He saw King a number of times (apparently in connection with King's shop) between the time he came with Nimmo and the time, several months later, when he first mentioned the money.

Steven Nimmo's story is that he was looking for King and knew the bus company were looking for him also, that he first found him on Monday, January 25, at his wash rack in San Jose. He does not recall King's drawing a diagram, but his impression was that his testimony was valuable to the plaintiffs, he tried to get King to go to Oakland, but he was too busy getting his shop started, that he was also worried about the statement he had already made for Hay, and in addition he did not want to appear around the courthouse because he was wanted by the Oakland police on a check charge. He did not subpœna him because he was afraid of antagonizing him. King said several times he would go to Oakland but Nimmo did not get him there until Wednesday, January 27, when the trial was almost over. He picked him up early in the morning of that day to take him to Oakland, but King insisted on going to Santa Cruz, and, when he got there, Nimmo let him out to see some people, and when he came back he was practically drunk. King then insisted on going to San Francisco to a tire shop, and, when Nimmo finally got him to Oakland, it was about 3:30 or 4 o'clock, he took King to the courthouse, but Mr. Goodman was arguing a motion, and could not use him then, and told Nimmo to bring him to the office after court. This is substantiated by M. B. Moore, an attorney who had an office in the same suite as Kilpatrick & Goodman and who carried the messages between Goodman and Nimmo and saw King waiting in the car by the courthouse. Nimmo says he then left King at a barber shop on Twelfth street, and, when he came back for him, he was in a speakeasy, drunk. Nimmo then reported to Goodman (who corroborates this part of his story) and told him he was through "chaperoning a drunk," and he considered King too unreliable to use anyhow. He then took King back to Saratoga, arriving at about 8 p. m. He admits impersonating King over the telephone that same evening, but says it was at King's request. Nimmo's story of the visit to Randall O'Neill's office and of Kilpatrick's trip to Saratoga are consistent with O'Neill's and Kilpatrick's. He says he only went to Santa Cruz once and that was at King's insistence; he places the Oakland trip on the same day. He says he never offered King money except for compensation for loss of time; he loaned him small sums out of his own pocket at various times; for instance, King borrowed $5 on the day he came to Oakland in order to go to San Francisco to buy equipment for his shop, but these sums did not amount to $27. He did not tell King to call him, but King did so because he wanted money. On several occasions King told Nimmo the bus company had offered him $100. It is admitted that King tried to get a job with the bus company, interviewing the superintendent who first questioned him about the accident. Nimmo flatly denies all the statements he is said to have made to King's relatives and friends about King's being a star witness for the defendants and paying him well not to appear. He says King would not sign an affidavit for the motion for new trial because he would not pay him to do so. Nimmo said that, after the trial was over, King came to the office and demanded money and threatened to make trouble and that he (Nimmo) threw him out. This story is substantiated by Fenton, an adjuster friend of Nimmo's who overheard the conversation in Goodman's office. Nimmo does not recall telephoning the office from the gas station on the Santa Cruz trip, but he thinks he may have, and thinks also he may have said that he had King with him and that he was drunk. Montell, who ran the service station, identified King, said he was in a car which he described as similar to Kilpatrick's with a man who made a long-distance telephone call to "May," saying: "I have him out here in the car driving around"; that the man who telephoned then told Montell he had a man in the car who was drunk and whom he had to keep away from a trial in Oakland. He talked with King and saw him walk, and he did not think he was drunk. All Kilpatrick's witnesses said that there was no one in the office named May.

The Bohns, Mrs. Graham, and Barnett all substantiate King's story testifying to declarations of Nimmo about the trial, King's value as a witness and promises to reward him for keeping away from the trial and directions not to see any one from the bus company. Mrs. Graham testified that King did not ask Nimmo to answer the telephone for him; she and Barnett both witnessed the drinking party at her house; and Barnett substantiated King's story of the visit to Kilpatrick's office and of Kilpatrick's saying he thought King had received $150, but would give him $50 if he returned that afternoon. Barnett cannot, however, describe Kilpatrick's office at all, and Mrs. Bowles, Kilpatrick's secretary, says King came in about 10 or 11 o'clock in the morning with a woman and asked for Kilpatrick or Nimmo, neither of whom were in; that he returned in the afternoon with a man and went alone into Kilpatrick's office, and that the door was closed; that when he came out Nimmo was just coming in, and King went with him into Goodman's office. All the witnesses who corroborate King are, with the exception of Montell, upon whose testimony the committee placed great weight, either relatives or closely connected with him, and, while their testimony corresponds very closely with regard to many details, the comparative dates of the incidents which they relate are very confused, as they are by King himself. They all place these events in February or March, whereas they almost all occurred in January.

Hay testified that he first went to Saratoga in search of King on January 30, when he saw Barnett, who said King was in San Francisco. He did not see King until February 2, 1932, after the conclusion of the trial, when he went with Mr. Licking to get him to sign an affidavit prepared in accordance with his signed statement which they wished to use in support of a motion for a new trial. Hay and Licking both testified that King was reluctant to sign the affidavit, although he said his statement, a copy of which they gave him to read, was substantially correct. King said he wanted to consult with some one first. Both Hay and Licking suggested attorneys from whom he might get advice, and Hay made an appointment to meet him at noon at his shop about three days later and get his decision. King did not appear at his shop at the appointed time or at all that afternoon, and at 5:30 Hay telephoned him and got the message which Nimmo is said to have given him, although Hay is positive it was King talking. Thereafter they made no further effort to obtain King's affidavit. Aside from this, Hay's only attempts to find King were a trip to Calistoga on January 25 and the trip to Saratoga on January 30.

The main contention of the petitioner is that the evidence is insufficient to support the findings of the committee, and we think this contention must be sustained. The findings against him rest almost entirely upon the testimony of King, aside from which there is little or no evidence tending to show his participation in or knowledge of, the activities of Nimmo.

Were we able to give to the testimony of King the weight which has been accorded to it by the majority of the members of the board of bar governors, not only would we feel that the recommendation made by the board should be approved, but we would be inclined to enter a judgment of disbarment. Conduct by an attorney such as that which is the basis of the charge against the petitioner not only tends to impede the progress of litigation in the courts, but destroys that fairness with which litigation should be conducted. Nothing contained in this opinion is intended as a reflection or criticism of any of the acts or conduct of either of the San Jose attorneys consulted by either Nimmo or King, as apparently both of said attorneys acted in good faith and conducted themselves at all times herein referred to in a proper manner and in keeping with the dignity of the profession. By his own testimony and that of others, the principal witness, King, has been shown to be extremely unreliable. For this reason, the recommendation of the board of bar governors, based upon the findings of the local committee, cannot be approved.

It is therefore ordered that the proceedings against the petitioner be, and they are hereby, dismissed.

220 Cal. 638

DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 14455.

Supreme Court of California.
April 30, 1934.

Master and servant ⚷405(2).

Evidence sustained finding of Industrial Accident Commission that city water department was "special employer" of gasoline shovel operator, and liable for compensation when he met death while working under direction of its foreman in accordance with rental contract whereby his general employer furnished department with shovels and operators who were required to co-operate with forces of department.

◆

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Lillia E. Winkler, widow, for the death of Mark A. Winkler, her husband, opposed by the Department of Water and Power of the City of Los Angeles (a municipal corporation), special employer, and the National Automobile Insurance Company, insurance carrier for L. M. Post and another, a copartnership, doing business as the Mono Construction Company, general employer. To review an order of the Industrial Accident Commission of the state of California awarding compensation, the special employer brings certiorari.

Affirmed.

For prior opinion, see 24 P.(2d) 866.

Ray L. Chesebro, City Atty., J. M. Stevens, Asst. City Atty., Fairfax Cosby, Deputy City Atty., Erwin P. Werner, City Atty., Loren A. Butts, Asst. City Atty., and William E. Balter, Deputy City Atty., all of Los Angeles, for petitioner.

Arthur I. Townsend and Everett A. Corten, both of San Francisco, for respondents.

CURTIS, Justice.

This proceeding was instituted to annul an award of the Industrial Accident Commission in favor of Lillia E. Winkler, the surviving widow of Mark A. Winkler, who met his death while operating a Diesel gasoline power shovel owned by the Mono Construction Company, which at the time of Winkler's injury was rented to the Department of Water and Power of the City of Los Angeles under a written contract between the said construction company with said department. The award was against the Department of Water and Power and the National Automobile Insurance Company, the insurance carrier of the Mono Construction Company. The Department of Water and Power was self-insured with respect to liability imposed by the Workmen's Compensation Act. The Commission found that the deceased while employed as a gasoline shovel operator on November 4, 1932, by L. M. Post and R. D. Cavalery, a copartnership, doing business as Mono Construction Company, his general employer, and Department of Water and Power of the City of Los Angeles, his special employer, sustained injury arising out of and occurring in the course of his employment when he was struck by a fall of earth, the injury proximately causing his death on the same day. It also found that at said time the Mono Construction Company's insurance carrier was the National Automobile Insurance Company and that the Department of Water and Power of the City of Los Angeles was self-insured.

The petitioner herein is the Department of Water and Power of the City of Los Angeles and seeks to annul the award of the Commission based upon said finding against said Department of Water and Power upon the ground that the evidence is insufficient to sustain the finding of the Commission that said Department of Water and Power was the special employer of Winkler at the time of the death of the latter.

The evidence before the Commission showed that Mark A. Winkler was employed by the Mono Construction Company, a copartnership consisting of L. M. Post and R. D. Cavalery. While so employed the Mono Construction Company, hereinafter referred to as the Construction Company, entered into a written agreement with the Department of Water and Power of the City of Los Angeles, hereinafter referred to as the Department, whereby the said Construction Company agreed for a certain fixed sum to furnish a certain number of Diesel shovels, with operators and helpers to the Department to do construction work in the building of a road in Bouquet canyon in the county of Los Angeles, where the Department was about to construct a large dam. In pursuance of said written agreement, the Construction Company furnished and placed at the disposal of the Department a number of Diesel shovels with the said Mark A. Winkler as an operator of one of said shovels. The shovel was operated by Winkler under the direction of a foreman in the employ of the Department. Just prior to the injury Winkler was operating the shovel along the general route marked out by the engineer of the Department. At that time a foreman of the Department was directing the operation of the shovel, and directed Winkler to move the shovel to the other side of the canyon in which the work was being done and near to the side of a hill along said route. This was done, and after the shovel had been operated near this embankment for about three hours, the hill caved in, causing the injuries to Winkler from which he died. The written contract under which the Construction Company furnished the shovels, operators, and helpers to the Department prescribed certain rules to be followed by the employees of the Construction Company in the operation of the shovels and expressly provided that any operator or helper, so employed, who failed or refused to comply with said rules, "or who refused to cooperate with the forces of the City," should be discharged immediately and should not again be employed on the work. Other facts were brought out at the hearing before the Commission which showed that the Department exercised to a substantial extent actual control over the employees operating the shovels after their delivery to the Department, but those already recited above are sufficient in our opinion to justify the Commission in finding that the Department was the special employer of Winkler at the time he suffered the injury which caused his death.

This case we think is controlled by the principles announced in the leading case of Employers' Liability Assurance Corp. v. Industrial Accident Comm., 179 Cal. 432, 177 P. 273. In that case, the Riverside Portland Cement Company planned to install new machinery and to rearrange its plant. It arranged with the Wellman-Lewis Company, a copartnership engaged in the business of installing large machinery, for the Wellman-Lewis Company to furnish to the cement company a number of employees under a foreman also employed by the Wellman-Lewis Company. The Riverside Portland Cement Company was to furnish all materials and was to, and did in fact, give and exercise direction and control of such employees, including said foreman. While performing work under this agreement upon the plant of the Riverside Portland Cement Company, one of the employees furnished by the Wellman-Lewis Company sustained an injury which resulted in his death. The court held that at the time of said injury, Wellman-Lewis Company was the general employer and the Riverside Portland Cement Company was the special employer of the injured employee, and affirmed an award against the insurance carrier of each of these companies in favor of the surviving widow of said injured employee. In its decision the court announced the following principle of law (page 439 of 179 Cal., 177 P. 273, 276): "Where, at the time of the accident, both the general and special employer exerted some measure of control over the injured person through their respective foreman or employees, both should be held liable." In its opinion the court cites as authority and follows the case of De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992. The case of Employers' Liability Assurance Corporation v. Industrial Accident Commission, supra, has in turn been cited with approval in the following decisions of the court: Federal Mutual Liability Ins. Co. v. Industrial Accident Comm., 190 Cal. 97, 103, 210 P. 628; Famous Players Lasky Corp. v. Industrial Accident Comm., 194 Cal. 134, 137, 228 P. 5, 34 A. L. R. 765; Diamond Drill Contracting Co. v. Industrial Accident Comm., 199 Cal. 694, 697, 250 P. 862; Independence Indemnity Co. v. Industrial Accident Comm., 203 Cal. 51, 55, 262 P. 757; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 227, 263 P. 799. In this last-cited case the court stated the law as follows (page 227 of 203 Cal., 263 P. 799, 800): "As such workmen may under the common law of master and servant look to the general employer for wages and to the special employer for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards."

These authorities unequivocally sustain the action of the Commission in awarding compensation against petitioner.

The award is therefore affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; PRESTON, J.

220 Cal. 642

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 14566.

Supreme Court of California.
April 30, 1934.

1. Master and servant 🔑405(2).

Evidence sustained finding of Industrial Accident Commission that construction company was "general employer" of gasoline shovel operator when he met death while working for city water department under rental contract whereby department was furnished with shovels and operators by company, which employed, paid wages to, and could discharge, such operator who was at all times subject to its orders.

2. Insurance 🔑435.

Under workmen's compensation policy insuring truckmen whose operations were performed upon described premises where construction company had its office, liability of insurance carrier was not limited to such specific location.

3. Evidence 🔑19.

Operations and uses of truck and gasoline shovel are matters of common knowledge.

4. Insurance 🔑435.

Gasoline shovel operator, so regularly employed and so engaged when he sustained fatal injury, though he drove truck at times for his employers, *held* not covered by workmen's compensation policy insuring "truckmen" only.

[Ed. Note.—For other definitions of "Truckman," see Words & Phrases.]

5. Insurance 🔑150.

Rider, attached to workmen's compensation policy and limiting liability of insurance carrier to injuries sustained by employees engaged in specific operations, controlled any provision in policy inconsistent therewith.

6. Insurance 🔑435.

Workmen's compensation policies may be limited to specified employees of insured (St. 1929, p. 1169, § 31(a).

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Lillia E. Winkler, widow, for the death of her husband, Mark A. Winkler, opposed by the National Automobile Insurance Company, insurance carrier of the Mono Construction Company, a copartnership, composed of L. N. Post and another, general employer, and the Department of Water and Power of the City of Los Angeles (a municipal corporation), special employer. To review an order of the Industrial Accident Commission of the State of California awarding compensation, the insurance carrier brings certiorari.

Award annulled as to the insurance carrier.

F. Britton McConnell, of Los Angeles, for petitioner.

Arthur I. Townsend and Everett A. Corten, both of San Francisco, for respondents.

CURTIS, Justice.

This is a companion case to that of Department of Water and Power v. Industrial Accident Commission, 32 P.(2d) 354, this day decided. The petitioner herein, the National Automobile Insurance Company, was found by the Industrial Accident Commission to be the insurance carrier of the Mono Construction Company, at the time the employee, Winkler, met his death while operating a gasoline power shovel belonging to said construction company, which shovel with its operator and helper had been rented to the Department of Water and Power of the City of Los Angeles by the Construction Company. An award of compensation was, therefore, made against the National Automobile Insurance Company, as the insurance carrier of the Mono Construction Company, as well as against the Department of Water and Power under the findings of the Commission that the Mono Construction Company was the general employer and the Department of Water and Power was the special employer of the deceased employee at the time of his injury.

The National Automobile Insurance Company seeks to set aside said award on the ground that the evidence before the Commission was insufficient to show that the deceased at the time of his injury was in the employ of Mono Construction Company or that the National Automobile Insurance Company was the insurance carrier of the Construction Company at the time of the injury to said deceased.

[1] In addition to the facts set forth in the opinion in the case of Department of Water and Power v. Industrial Accident Commission, supra, it appears without contradiction that the Mono Construction Company, not

only employed the deceased and paid him his wages, but that at all times he was subject to certain orders of the Construction Company, and that the Company had authority to discharge him at any time it was dissatisfied with his work. It further appears that Mr. Post of the Construction Company paid daily visits to the job, spending there almost the entire time of each day and keeping a general oversight over the operation of the shovels in charge of its employees. These facts were sufficient to support the finding of the Commission that the Mono Construction Company as the general employer of the deceased retained and exercised some measure of control over Winkler at the time of his injury, and justified the conclusion of the Commission that the Construction Company was liable to the decedent's surviving widow for compensation resulting from his death. The supporting authorities cited in the companion case of Department of Water and Power v. Industrial Accident Comm., supra, furnish legal justification for the action of the Commission in awarding compensation to said surviving widow under both the general and special employment of her deceased husband, and it is not necessary to restate them here.

[2] The further question presented on this appeal is embodied in the contention of petitioner that the evidence before the Commission was insufficient to support its finding that petitioner, the National Automobile Insurance Company, was the insurance carrier of the Mono Construction Company with respect to the injury and death of the deceased employee. In the first place, it is contended by petitioner that its liability under the policy of insurance is limited to the specific location named in a rider or indorsement attached to the policy. This rider reads as follows: "The insurance hereunder is limited as follows: It is agreed that, anything in this policy to the contrary notwithstanding, this policy DOES NOT INSURE: As respects injuries (or death resulting therefrom) sustained by any employees engaged in any operations other than those operations specifically rated and described as covered hereunder in the Classification of Operations schedule herein and that this policy shall only cover such operations of this Employer which are performed upon the following described premises or directly in connection with such operations:—1427 North Sycamore, Hollywood, California." It will be noted that the policy of insurance purports to limit the activities of the construction company to a specific location and to certain specified operations. These operations, as set forth in the body of the policy under the heading of "Classification of Operations" were as follows: "Truckmen (N.O.C.). Payroll to include Drivers, Chauffeurs and their Helpers, Stablemen, Blacksmith and Repairmen, excluding only Clerical Office and Storage Warehouse Employees." The evidence shows that the address given in the rider was that of the employer, the Mono Construction Company's office, and from whence it carried on its business. The contention that it is not liable for the death of the deceased because his injury was sustained at a location other than that specified in the rider is without merit as it is apparent that the location given in the rider attached to the policy was only intended to designate the employer's place of business, and did not limit the liability of the insurer to injuries sustained at that particular location. This is made apparent by the "Classification of Operations" wherein the operation insured against is given as that of "Truckmen, etc." If, assuming for the time being, as contended by petitioner, the policy is limited to injuries sustained by the employee while engaged in the trucking business, it is apparent that while its office or principal place of business is designated to be at a particular location, its operations necessarily extend far beyond that locality and into and over other and distant locations. It would be impossible for an employer to carry on a trucking business by housing his trucks upon his premises and keeping them there continually. The very nature of such a business contemplates that the trucks, or other vehicles used therein, shall be sent from place to place as the business requires, and away from and beyond the location where they are kept when not in use. We agree with counsel for respondents that it would be absurd to hold that the policy of insurance limited the activities of the employer to the location given therein, which, as we have seen, the evidence shows is merely the office or principal place of business of the employer.

The further claim of the petitioner that its liability under the policy of insurance is limited to injuries sustained by its employees in the declaration of "Classification of Operations" specified in the policy of insurance, and that the "Classification of Operations" mentions simply, "Truckmen," including drivers, chauffeurs, and their helpers, etc., presents a problem much more difficult of solution. The petitioner claims that its liability under the policy was limited to injuries sustained by employees of the construction company while engaged in an occupation within the terms of the policy and that the policy covers only "Truckmen," including drivers, chauffeurs, and their helpers, etc., and that as the deceased was injured while operating a gasoline power shovel, he was not at that time engaged in any occupation covered by the policy of insurance issued by petitioner.

[3, 4] The evidence before the Commission showed, and that body found, that "Mark A. Winkler, deceased, while employed as a gasoline powered shovel operator," sustained injuries arising out of and occurring in the course of his employment causing his death. While there is some evidence to the effect that the deceased during his employment by the Construction Company drove at times a truck for his employers, it is apparent that that service was only incidental to his regular employment as an operator of a gasoline propelled shovel. The evidence furthermore shows that at the time he received his fatal injuries he was so employed. That there is but slight, if any, similarity between an ordinary truck and a gasoline shovel must be conceded. The operations and uses of the two machines are entirely different. It is not necessary here to describe either the operation or use of either of these instrumentalities, as they are matters of common knowledge. The two machines bear no resemblance to each other, and the term, truck, cannot by any stretch of construction be extended to include or embrace a gasoline shovel. Therefore, when the policy of insurance issued by petitioner limited its liability to injuries sustained by an employee engaged in the operation of a truck, can the insurance carrier be held for the death of an employee injured while operating a gasoline shovel?

In the case of Worswick Street Paving Co. v. Industrial Accident Comm., 181 Cal. 550, 185 P. 953, it was held that an insurance policy issued by an indemnity company to a street paving company did not cover liability for the death of a laborer in the employ of a paving company while engaged in trench excavation work, where the policy contained a proviso expressly excepting the work of constructing sewers. The court held that the "trench excavation" or conduit upon which the employee was working at the time of his injury was a sewer, and as work in the construction of a sewer was expressly excepted from the policy the insurance carrier was not liable for the injury of the employee sustained while working on said trench excavation. While there is no exception in the policy of insurance issued by the petitioner herein, excluding the work of operating a gasoline shovel, said policy of insurance contained no provision which expressly or by implication fixed liability upon the insurance carrier for an injury to an employee sustained while operating a gasoline shovel. The effect of the decision in Worswick Street Paving Co. v. Industrial Accident Comm., supra, is that an insurance carrier cannot be held liable for an injury not covered by the terms of the policy of insurance. As we have seen, the facts in this case are that the policy issued by the petitioner covered truckmen, including drivers, etc., and made no mention directly or indirectly of any other class of employees. It cannot, therefore, be construed as rendering the carrier liable for any injury sustained by an employee while engaged in operating a gasoline shovel or in any other line of employment, other than that set forth in the policy of insurance.

In the case of Pacific Coast Casualty Company v. Industrial Accident Comm., 176 Cal. 24, 25, and 26, 167 P. 539, an award was made against the insurance carrier, the petitioner in said proceeding, for injuries sustained by the superintendent of a mine operated by the insured, which caused the death of said superintendent. In the course of the opinion the court said: "It seems perfectly clear that the occupation of a mine superintendent is not included within any of the employments specifically designated in the stipulation. The respondents do not, indeed, dispute this. But it is argued that the policy itself, a copy of which is attached to the return, was intended to have a broader scope, and to cover the superintendent, as well as the miners performing manual labor in the mine. But * * * we think the policy itself was clearly intended to cover only employees engaged in the specified employments." The court therefore held (page 27 of 176 Cal., 167 P. 539, 540): "It is apparent, therefore, that the premium for which the Casualty Company undertook to insure the Mining Company was based upon the pay received by the specified employees. The fair construction of the policy is that which the parties adopted when they made their stipulation of facts, namely, that the insurance was designed to cover employees of the designated classes, they being the ones whose compensation furnished the measure of the premium, in consideration of which the Casualty Company assumed the risk." The court accordingly annulled the award against the Casualty Company. The stipulation referred to by the court in its opinion was that the Mining Company had a "Workmen's Compensation policy with the Pacific Coast Casualty Company covering the employees operating its mining properties at Coulterville covering miners, hoistmen, surface trainmen, timekeeper and roustabout, millmen, blacksmith and helper, and cook and waiter." In that case the court refused to extend the terms of the policy to cover the superintendent of the mine, although he was one of the employees of the company in its operation of the mine. Here, we are asked to extend the terms of the policy to an employee who was not mentioned in the policy and who was engaged in an entirely different and distinct line of employment from those specified therein. That this cannot be done we think is clear from the authorities above cited, as well as from the following: Western Indemnity Co. v. Industrial Accident Comm., 43 Cal. App. 487, 185 P. 306; Kugler v. Industrial Accident Comm., 63 Cal. App. 308, 218 P. 472; Ocean A. & G. Corp. v. Industrial Accident Comm., 104 Cal. App. 34, 285 P. 707.

The respondent relies upon the case of Ocean, etc., Corp. Ltd., v. Ind. Acc. Comm., 194 Cal. 127, 228 P. 1, in support of the award against the insurance carrier. Respondent contends that this court in that case held that a description contained in the declaration of "classification of operations" is to be taken not as limiting the list of operations in which the insured might engage, but only as fixing a premium rate applicable to the particular operations described therein, and even though the insured was engaged at the time of the injury in work outside the terms and limitations expressed in said declaration of "classification of operations," the effect was not to take the employer or employee outside the protection of the policy, but was only to require the employer to pay a different or additional premium than that provided for the particular employments specified in said declaration. We do not construe the decision in that case as laying down a general rule to that effect, which would be applicable to all policies of compensation insurance. The court in construing the particular policy which was then before it, held that, due to the particular provisions of that policy of insurance, the declaration of "classification of operations" did not fix the list of operations which were insured against by the policy. The court called particular attention to a provision in the policy which by its terms purported to extend the list of operations to other employments not mentioned in the declaration of "classification of operations." This provision reads as follows: "If any operations as above defined are undertaken by this employer but are not described or rated in said Declaration, this employer agrees to pay the premium thereon, at the time of the final adjustment of the premiums in accordance with Condition C hereof, at the rates and in compliance with the rules of the Manual of Rates in use by the Company upon the date of the issue of this policy." Basing its conclusion upon this provision of the policy, as well as others referred to in the opinion, the court held that under that particular policy the list of operations covered by the policy was not limited to the declaration of "Classification of Operations." No provision, like or similar to the one just quoted, is to be found in the policy of insurance issued by the petitioner. On the other hand, there is to be found in the present policy the following stipulation: "The foregoing enumeration and description of employees include all persons employed in the service of this Employer in connection with the business operations above described to whom remuneration of any nature in consideration of service is paid, allowed or due, together with an estimate for the Policy Period of all such remuneration." The effect of this stipulation in the policy is not to extend the list of operations set forth in the "Classification of Operations," but on the other hand, it specifically states that the employees enumerated therein include all persons in the service of the employer in connection with its said business operations to whom remuneration is paid. Respondent places some reliance upon the further stipulation in the policy reading as follows: "The foregoing estimates of remuneration are offered for the purpose of computing the advance premium. The Company shall be permitted to examine the books of this Employer at any time during the Policy Period and any extension thereof and within one year after its final termination so far as they relate to the remuneration earned by any employee of this Employer while the Policy was in force." We fail to see that this stipulation helps the respondent's position. The "estimate of remuneration" mentioned therein refers to remuneration of the employees set forth in the "Classification of Operations" which, as we have seen, were truckmen, etc. The policy was to continue for a year. It would be, of course, impossible at the beginning of this period to do more than estimate the remuneration of said employees during the whole year, and this provision of the policy simply gives to the insurance carrier the right to examine the books of the insured during that period and for a year thereafter to ascertain the true amount of remuneration paid said employees. It does not in any way purport to extend the coverage provisions of the policy to any employees of the insured not included in the declaration of "Classification of Operations."

[5] Even should we concede that in the body of the policy of the insurance issued by petitioner are to be found certain provisions which might form the basis of an argument that would bring this case within the doctrine announced by this court in the case of Ocean, etc., Corp., Ltd., v. Ind. Acc. Comm., 194 Cal. 127, 228 P. 1, supra, although in our opinion it would be most difficult to successfully sustain such argument, yet such provisions if so construed would be inconsistent with the provisions of the endorsement or rider attached to the policy and quoted above, wherein it is expressly provided as follows: "It is agreed that, anything in this policy to the contrary notwithstanding, this policy DOES NOT INSURE: As respects injuries (or death resulting therefrom) sustained by any employees engaged in any operations other than those operations specifically rated and described as covered hereunder in the Classification of Operations schedule herein." As we have seen, the "Classification of Operations" included, only, "Truckmen. Payroll to include Drivers, Chauffeurs, and their Helpers, Stablemen, Blacksmiths and Repairmen." Here is a positive and clear statement that the policy does not cover an employee sustaining an injury while engaged in any operation not rated and described in the "Classification of Operations." This statement, as we have seen, is contained in the endorsement or rider to the main policy. It therefore controls any provision in the policy inconsistent therewith. Cooley's Briefs on Insurance, vol. 8, p. 1009; Royal Ins. Co. v. Caledonian Ins. Co., 182 Cal. 219, 223, 187 P. 748; 14 Cal. Jur., p. 451; Aetna Ins. Co. v. Sacramento Stockton S. S. Co. (C. C. A.) 273 F. 55; Jackson v. British American Assurance Co., 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636.

The policy of insurance issued by the petitioner must be construed as applying only to those employees of the insured named in the declaration of "Classification of Operations" set out in the policy. The wages or remuneration of these employees formed the entire basis upon which the premium paid to the insurance carrier was computed. It had no right to collect premiums based upon the wages paid to any other employees not named in said declaration of "Classification of Operations." It should not, therefore, be held liable for any injury sustained by any such employee.

[6] That compensation insurance policies may be limited to certain specified employees of the insured is now definitely established by statute (Workmen's Compensation Act, § 31 [a], St. 1917, p. 860, as amended by St. 1929, p. 1169), and has received the approval of the courts. Zurich Gen. Acc., etc., Ins. Co. v. Stadelman, 208 Cal. 151, 280 P. 687; Ocean A. & G. Corp. v. Ind. Acc. Comm., 208 Cal. 157, 280 P. 690.

As the deceased at the time of his injury was not within the coverage provisions of the policy of insurance issued by the petitioner, the award against petitioner and in favor of the surviving widow of the deceased cannot be sustained. In so far as said award is made to run against the petitioner, it is hereby annulled.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; PRESTON, J.

UNION OIL ASSOCIATES v. JOHNSON, State Treasurer.*

L. A. 14286.

Supreme Court of California.

April 30, 1934.

Rehearing Granted May 28, 1934.

1. Taxation ⚷165.

Expression "doing business" within Constitution and statutes providing that corporations doing business within state should pay franchise tax *held* to include foreign corporations doing business of intrastate character within state (Const. art. 13, § 16, subd. 2(a) and subd. 5 as adopted in 1928; St. 1929, pp. 19, 20, 23, §§ 4–7, 8(h).

[Ed. Note.—For other definitions of "Doing Business," see Words & Phrases.]

2. Taxation ⚷117.

Expression "business corporation" within Constitution and statutes providing that business corporations doing business within state should pay franchise tax signifies a corporation, purpose of which is that of personal material gain to its members (Const. art. 13, §

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*For subsequent opinion see 43 P.2d 291.

16, subd. 2(a) and subd. 5 as adopted in 1928; St. 1929, pp. 19, 20, 23, §§ 4–7, 8(h).

[Ed. Note.—For other definitions of "Business Corporation," see Words & Phrases.]

3. Taxation ⚷117.

Corporation formed for purpose of acquiring shares of another corporation and of exercising all of rights of ownership of such shares and to receive stockholders' benefits and to vote stock *held* subject to franchise tax as "business corporation," purpose of which was mutual protection and pecuniary gain of its members (Const. art. 13, § 16, subd. 2(a) and subd. 5 as adopted in 1928; St. 1929, pp. 19, 20, 23, §§ 4–7, 8(h).

4. Taxation ⚷37.

Act imposing franchise tax upon corporations doing business within state, upon basis of corporations' net income for next preceding year, *held* not violative of Constitution providing that corporations shall annually pay a tax according to or measured by their net income (St. 1929, pp. 19, 20, 23, §§ 4–7, 8(h); Const. art. 13, § 16, subd. 2(a) and subd. 5 as adopted in 1928).

5. Commerce ⚷69(1).

Act imposing franchise tax upon corporations doing business within state, upon basis of corporations' net income, *held* not invalid as imposing burden upon interstate business because net income was determined from business transacted outside of state, where tax was upon franchise without reference to character of property in which corporations' funds were invested (St. 1929, pp. 19, 20, 23, §§ 4–7, 8(h).

6. Taxation ⚷40(5).

Act imposing franchise tax upon corporations doing business within state *held* not discriminatory, where every corporation of like class was required to pay similar tax upon its franchise (St. 1929, pp. 19, 20, 23, §§ 4–7, 8(h).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Union Oil Associates a corporation, against Charles G. Johnson, State Treasurer. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for appellant.

Andrews & Andrews, L. W. Andrews, and Paul M. Gregg, all of Los Angeles, for respondent.

IRA F. THOMPSON, Justice.

This action was brought by the plaintiff to recover from the defendant the franchise tax paid by the plaintiff in the year 1931, based upon its income for the year 1930. The demurrer of the defendant being overruled, and he declining to answer, his default was entered and judgment followed. This appeal is from the judgment.

By the complaint it is made to appear that the respondent was organized for the purpose of consolidating and maintaining in one holding or pool shares of the capital stock of the Union Oil Company of California. In return for shares of stock of the Union Oil Company, it issued an equal or like number of its own shares. Its stockholders received all of the dividends paid on Union Oil Company shares minus such sums as were necessary to deduct in order to pay the corporate expenses of the respondent. Further, it is alleged that the only assets possessed by respondent, other than capital stock of the Union Oil Company, was its office furniture and equipment and from time to time small amounts of cash for the defraying of current corporate expenses. Its only income is from shares of stock of the Union Oil Company, none of which stock, it is alleged, has ever been sold, mortgaged, or hypothecated.

Further allegations disclose that, by action of the franchise tax commissioner, approved by the state board of equalization, respondent was obliged to pay the sum of $44,552.63, plus interest in the sum of $4,522.09, the amount of which tax was arrived at by estimating that of the sum of $4,872,864 paid to the respondent as dividends by the Union Oil Company 29.643976 per cent. thereof arose out of and was paid from income earned by the Union Oil Company in business transactions outside the state of California.

In 1928, section 16 of article 13 was added to the state Constitution and in its material parts provides as follows:

"2. (a) All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (d) of section 14 of this article * * * shall annually pay to the state for the privilege of exercising their corporate franchises within this state a tax according to or measured by their net income. * * *

"5. The legislature shall define 'corporations' and 'doing business'; shall define 'net income,' and may define it to be the entire

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

net income received from all sources. * * *"

In 1929 there was passed the "Bank and Corporation Franchise Tax Act" (St. 1929, pp. 19, 20), the pertinent provisions of which are as follows:

"Sec. 4. Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2 (a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. * * *

"Sec. 5. The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States.

"The term 'bank,' as hereinafter used, shall include national banking associations.

"The term 'doing business,' as herein used, means any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state.

"Sec. 6. The term 'gross income,' as herein used, includes gains, profits and income derived from the business, of whatever kind and in whatever form paid; gains, profits or income from dealings in real or personal property; gains, profits or income received as compensation for services, as interest, rents, commissions, brokerage or other fees, or otherwise received in carrying on such business; all interest received from federal, state, municipal or other bonds, and, except as hereinafter otherwise provided, all dividends received on stocks.

"Sec. 7. The term 'net income,' as herein used, means the gross income less the deductions allowed."

In providing what deductions from the gross income shall be permissible, section 8 (h) reads:

"Dividends received during the taxable year from income arising out of business done in this state; but if the income out of which the dividends are declared is derived from business done within and without this state, then so much of the dividends shall be allowed as a deduction as the amount of the income from business done within this state bears to the total business done.

"The burden shall be on the taxpayer to show that the amount of dividends claimed as a deduction has been received from income arising out of business done in this state."

That portion of section 5219, Revised Statutes of the United States (as amended by Act March 25, 1926 [12 USCA § 548]), referred to in section 5 of the Bank and Corporation Franchise Act which is material to the present case, permits the states to tax national banking associations "according to or measured by their net income, provided the following conditions are complied with: * * * (c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations."

It is respondent's first contention that it is not doing business in this state within the meaning of the constitutional section, that the Legislature has not the right to create a liability by defining the words "doing business," and that by the adoption of the section of the Constitution we have adopted the construction placed upon the phrase "engaged in business" used in the federal acts referred to later in this opinion.

[1] However, the mere recital of the constitutional provision, the sections of the legislative act, and the material provisions of the federal act provokes two preliminary ob-

servations: First, it is to be noted that the tax here in question is one upon the franchise of domestic corporations and foreign corporations "doing business" in this state, and not one upon the income of such corporations. Second, the enumeration of certain kinds of corporations in section 5219 of the Revised Statutes of the United States is in nowise restrictive of the corporate franchises which may be taxed by the state, but only that those enumerated must be taxed if a franchise tax measured by the net income is to be laid upon national banking associations. In other words, it was the congressional intention to prevent discrimination in favor of the designated corporations to the detriment of national banking associations. These observations suggest that the expression "doing business" was employed in the constitutional provision in order to include foreign corporations "doing business" of an intrastate character in the state. This thought is to a degree confirmed by decisions heretofore rendered to the effect that it is the exercise of the right by a foreign corporation to do intrastate business in the state which was the property to be taxed under article 13, section 14 (d) of the Constitution providing that the franchises of all corporations except those otherwise mentioned in the section should be taxed at their actual cash value. See People v. Alaska S. S. Co., 182 Cal. 202, 187 P. 742, 745; People v. Ford Motor Co., 188 Cal. 8, 204 P. 217, 218. In the first cited case this court said: "The theory that the potential unexercised right of a foreign corporation to do business in this state, which exists by comity only, constitutes taxable property within this state, would lead to results ridiculous and absurd. Every corporation of any foreign state or country is privileged to enter this state and do business therein (herein). While it is doing such business it is exercising corporate powers within this state and the privilege of doing so becomes valuable, but before it exercises that power, or when it ceases to do so, it is no longer possessed in this state of anything of value." And in the second case cited we find the following persuasive language: "The right to be a corporation, or to do business as a corporation, is a franchise which ordinarily has its situs at the place where the home office of the corporation is situated, but, when a corporation engages in business in a state other than the state wherein it was chartered, the actual exercise of the power to engage in business creates valuable intangible property in the foreign state where the business is transacted. In other words, the actual exercise of the power to do business is also a franchise, and such a franchise has a substantial existence in every state where the business is transacted."

The respondent places great weight for its contention that the words "doing business" must be held to mean "the aggressive pursuit of gain" and not merely the receipt of the ordinary fruits incident to the ownership of property, upon decisions of the federal courts construing and applying the Corporation Tax Law (Act of August 5, 1909, 36 U. S. Stat. c. 6, pp. 11, 112–117), and the Capital Stock Tax Law of 1918 (40 Stat. p. 1126, § 1000) and 1921 (42 Stat. p. 294, § 1000), which levied a tax upon corporations "engaged in business," but excluded those not so engaged. Having before it the contention that the tax imposed by the act of 1909 was a direct tax upon property, the United States Supreme Court, in the case of Flint v. Stone-Tracy Co., etc., 220 U. S. 107, at page 145, 31 S. Ct. 342, 346, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, says: "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies, the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any state or territory, as heretofore stated." And in Rose v. Nunnally Inv. Co. (C.

C. A.) 22 F.(2d) 102, 103, in applying the Capital Stock Tax Law the court uses similar language as follows: "Upon the authority of these cases it may safely be stated that the tax is based, not upon the charter powers of the corporation, but upon its activities, and that a corporation which merely receives the income earned by assets which it owns, and distributes that income among stockholders, is not engaged in business." Bearing in mind the restriction against the levy of direct taxes by the federal government except when apportioned according to population (for thorough discussion of the subject of direct taxes see Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759), the consequent necessity of levying an excise tax upon the doing of business under a corporate form, if the corporation is to be taxed, and the difference between a tax so levied and that laid upon the franchises of domestic corporations and foreign corporations "doing business" in this state, it becomes apparent that the federal cases construing the statutes already mentioned cannot be considered as controlling. This conclusion disposes of the contention that we have adopted the construction of the words "engaged in business" placed thereupon by the federal courts, and also demonstrates that the Legislature did not transcend its power of definition when it placed a construction upon the words "doing business" which they would have borne even without legislative expression.

As we have already indicated, the intention sought to be expressed in the constitutional provision, followed by the legislative enactment by the use of the words "doing business," was to subject those corporations to a tax which are doing some substantial part of their ordinary business, or exercising some of the functions for which they were created (Estate of Wellings, 192 Cal. 506, 221 P. 628), because they are then doing business within the state. See Estate of Wellings, supra; Bullfrog Goldfield R. R. Co. v. Jordan, 174 Cal. 342, 163 P. 40; 7 Cal. Jur., p. 222, §§ 704–706.

[2, 3] Respondent also contends that it is not within the act because it is neither a financial, a mercantile, a manufacturing, or a business corporation. We may assent to the proposition that it is neither mercantile nor manufacturing in character. But we cannot agree that it is neither a business nor a financial organization. The expression "business corporation" signifies a corporation the purpose of which is that of personal material gain to its members. National Bank Taxation in California, 17 Calif. Law Review, 456, at 493, and cases cited. The respondent's articles of incorporation, by reference made a part of its complaint, disclose that it was formed for the purpose of buying or otherwise acquiring shares of stock of the Union Oil Company and of exercising all of the rights, powers, and privileges of the ownership of such shares and to avail itself "of all benefits at any time offered to or conferred upon, or made available to, stockholders of said Union Oil Company of California," and to vote the stock at meetings of the stockholders of the Union Oil Company. We cannot say to what degree the respondent controls the management of the Union Oil Company through its stockholdings, but it is apparent that its purpose is the mutual protection and material, pecuniary gain of its members.

[4] Respondent asserts that the act is unconstitutional because article 13, § 16, subd. 2 (a), already quoted, provides that corporations "shall annually pay * * * a tax according to or measured by their net income" wherever the act says that the tax shall be "upon tne basis of its net income for the next preceding year." It is claimed that the act is at variance with the Constitution. We need spend but little time on this statement. The tax is measured by the nearest ascertained income, and we know of no more logical or reasonable way of carrying out the intention of the people. Instead of being at variance, the two provisions are in complete harmony.

[5] It is also claimed that the tax exacted from respondent constitutes a burden upon interstate business. The only argument advanced in support of this statement is that the tax "is based entirely upon income derived from the interstate business of the Union Oil Company—a tax with relation to interstate commerce alone." A complete answer to this suggestion is found in Pacific Co. v. Johnson, 212 Cal. 148, 298 P. 489, wherein it was held that, the tax being upon the franchise of the corporation without reference to the character of the property in which its funds are invested, income from nontaxable securities might be used for the purpose of measuring the tax.

[6] Finally, it is said that the act is discriminatory, in that personal corporate stockholders of the Union Oil Company are not taxed. A complete refutation of this assertion may be framed as follows: Every cor-

poration of like class pays a similar tax upon its franchise; hence there is no discrimination. Individuals are not involved.

From what has been said it is evident that appellant's demurrer should have been sustained without leave to amend and judgment entered for the defendant. Accordingly, the judgment is reversed, with instructions to the trial court to proceed in accordance with the views expressed herein.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.

* * *

220 Cal. 611

SOOY v. CERF et al.

S. F. 14939.

Supreme Court of California.

April 27, 1934.

1. Action 🔑24.

That action on note is action at law and defense by counterclaim asking for accounting is equitable in character does not deprive defendant of his right to interpose such defense (Code Civ. Proc. § 437, and § 438 as amended by St. 1927, p. 1620).

2. Partnership 🔑112.

In action by partner against copartner upon his individual note, copartner may set up by counterclaim cause of action for accounting for money of dissolved partnership collected by partner after dissolution (Code Civ. Proc. § 437, and § 438 as amended by St. 1927, p. 1620).

3. Jury 🔑13(18).
Trial 🔑3.

Where counterclaim is set up as equitable defense to action at law, whole proceeding constitutes two independent causes of action, and upon demand of either party trial court must grant jury trial as to complaint, and determine equitable issues without jury (Code Civ. Proc. § 437, and § 438 as amended by St. 1927, p. 1620).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by C. H. Sooy against E. W. Cerf and others, wherein defendants counterclaimed and filed cross-complaints. Judgment for plaintiff, and defendants appeal.

Reversed.

Henry Robinson, Martin P. Bruton and Herbert A. Leland, all of San Francisco, for appellants.

J. H. Sapiro, A. A. Heer and Maxwell McNutt, all of San Francisco, for respondent.

CURTIS, Justice.

The principal question presented on this appeal may be stated as follows: In a suit by one partner against another, after dissolution of the partnership, upon his individual promissory note, may the defendant partner, in order to diminish or defeat plaintiff's recovery, set up by way of counterclaim a cause of action for an accounting for money of the dissolved partnership collected by the plaintiff partner after the dissolution, in which counterclaim it is alleged that such accounting will show that there is in the hands of plaintiff and belonging to defendant partner a sum in excess of the amount owing on the note?

Plaintiff instituted this action to recover the balance due and unpaid on a joint and several promissory note, executed in plaintiff's favor by the defendants, one of whom was Marcel E. Cerf, who filed a separate answer and alleged therein that the note had been paid. He also pleaded as a separate defense to said action and by way of counterclaim certain facts which, if true, would have entitled him to an accounting for moneys of a dissolved partnership comprised of plaintiff and said defendant Marcel E. Cerf and which had been collected by plaintiff after the dissolution of said partnership, no part of which had been paid to said Marcel E. Cerf. It was further alleged that upon such an accounting it would be found that there was a balance in the hands of plaintiff belonging to defendant Marcel E. Cerf from money collected by said plaintiff on account of the business of the partnership in excess of the amount then owing on said promissory note. Substantially the same matters were set up in a cross-complaint by Marcel E. Cerf. The other defendants set up similar pleadings setting up the same defenses as those interposed by the defendant Marcel E. Cerf. Upon plaintiff's motion the pleadings of these defendants, in so far as they attempted to set up said counterclaims and said cross-complaints, were stricken out by the court. At the trial of the action, judgment was rendered against all of the defendants, jointly and severally, for the amount found due on said promissory note. By section 437 of the Code of Civil Procedure the pleading of a defendant may contain, among other things, "a statement of any new matter constituting a defense or counterclaim." By section 438 of the Code of Civil Procedure (as amended by St. 1927, p. 1620), it is provided that "the counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."

[1] Measured by the requirements of section 438, the counterclaim interposed by the defendant Marcel E. Cerf in his answer possesses all the essential elements of a counterclaim. It tends to diminish or defeat plaintiff's recovery. It exists between the plaintiff and defendant Marcel E. Cerf, and between said two parties a several judgment might be had in said action. The fact that plaintiff's action on the promissory note is an action at law and the defense by counterclaim asking for an accounting is equitable in character does not deprive the defendant of his right to interpose said defense. In Terry Trading Corp. v. Barsky, 210 Cal. 428, 437, 292 P. 474, 478, this court said: "It is well settled that under the system of Code pleading equitable defenses and equitable counterclaims may be set up in actions at law, as well as legal defenses and counterclaims in suits in equity." The reason for permitting such procedure is clearly set forth by Professor Pomeroy as follows: "In an equitable action, a counterclaim consisting of an equitable cause of action, and demanding equitable relief, may be interposed if it possesses all the other elements required by the definition. * * * As the codes in express terms permit equitable defenses in such actions, and as in the self-same provision, and by means of the same language, the statute authorizes the joining of as many defenses and counterclaims, whether legal or equitable, or both, as the defendant may have, to deny the possibility of an equitable counterclaim in a legal action, would make it necessary, if any consistency were preserved, to deny also the possibility of an equitable defense. The courts, as may be seen from the citations made below, have, with a few unimportant exceptions, been unwilling to nullify the language, and defeat the design of the legislature in this manner, and following its plain meaning and import, they have freely admitted and sustained the equitable counterclaim in all actions, whether legal or equitable, where that form of relief was appropriate, and was authorized by the descriptive terms of the statute." Pomeroy, Code Remedies (5th Ed.) p. 1035, § 640.

The case of Terry Trading Corp. v. Barsky, supra, has been followed by this court in a recent opinion wherein it was said: "Under the 1927 amendment to section 438, Code of Civil Procedure, the sole requisites of a counterclaim are that it 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.' Under this amendment it is not necessary that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Terry Trading Corp. v. Barsky, 210 Cal. 428, at page 435, 292 P. 474, 477. The facts of the cited case are particularly germane to the case now before us. In that case plaintiff sued on a note given for services performed by virtue of a written contract. In the instant case the plaintiff sued for the price of goods sold under a written contract. There, as here, the defendants averred an assignment to plaintiff of accounts receivable and prayed for an accounting. Defendants therein also prayed for damages for failure of the services performed by plaintiff to comply with the contract. In the instant case defendants seek damages because, they allege, the product sold to them was not as represented by plaintiff. In disposing of the appeal in Terry Trading Corp. v. Barsky, we held that obviously the claims for accounting and damages were the subject of counterclaim under the section as amended." Luse v. Peters (Cal. Sup.) 28 P.(2d) 357, 359.

[2, 3] Respondent concedes the force and effect of the above authorities, but contends that they do not apply to an action between partners or between persons who were formerly partners, when the equitable defense relates to matters growing out of the partnership business. The position of the respondent is that, in an action at law between partners upon a claim not connected with the partnership business, the defendant may not set up by way of counterclaim a plea that an accounting of the partnership matters would show that plaintiff is indebted to the defendant in an amount which would diminish or defeat the plaintiff's recovery. This claim is based upon the well-established principle of law that one partner, even after dissolution of the partnership, cannot sue the other at law upon any matter arising out

of the partnership business. Respondent seeks to extend this principle of law to an action in which, as in the case before us, the defendant in an action of law, as an equitable defense to plaintiff's recovery, asks for an accounting of the affairs of a partnership existing between the plaintiff and defendant. In support of his contention respondent relies upon the following cases: Case v. Maxey, 6 Cal. 276; Haskell v. Moore, 29 Cal. 437; Wood v. Brush, 72 Cal. 224, 13 P. 627, 628; Lane v. Turner, 114 Cal. 396, 46 P. 290; and Johnstone v. Morris, 210 Cal. 580, 292 P. 970, 972, as well as decisions from other jurisdictions. The first two cited cases were decided under the old Practice Act. A counterclaim under section 47 of this act, except where plaintiff's cause of action and defendant's arose out of contract, was limited to the transaction set forth in the complaint, or connected with the subject of the action. It was accordingly held in the first of said actions that the counterclaim was based upon a division of cattle owned by the parties in partnership, and, as such division had nothing to do with the consideration of the note therein sued on, it could not be set up as a counterclaim or equitable defense to the action. Therefore the appellate court sustained the action of the trial court in striking out the counterclaim, because the subject-matter thereof "had nothing to do with the consideration of the note sued on," and not because it involved a partnership matter. What slight reference is to be found to the question now before us in Haskell v. Moore, supra, must, of course, be construed in the light of the provisions of the Practice Act regarding matters which may be set up in a counterclaim. The only authorities cited in Lane v. Turner, supra, are the two cases first above cited, and which we have shown were decided when the statute permitting a counterclaim was entirely different from the present Code section upon the subject. In Wood v. Brush supra, the partnership account set forth in the counterclaim was against the plaintiff and sundry other persons, and for this reason the court held that it was not a counterclaim "existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action" within the purview of section 438 of the Code of Civil Procedure. In the case of Johnstone v. Morris, supra, plaintiff sued to collect the balance due on a promissory note, executed by the defendant. The parties had formerly been partners, and the note was given in part payment of plaintiff's interest in the partnership property. Defendant filed a counterclaim and also a cross-complaint, in each of which pleadings he claimed that, while the partnership was in existence and before his purchase of plaintiff's interest therein, the plaintiff, without the knowledge of defendant, fraudulently appropriated, by means of false entries in the account books of the partnership, funds belonging to the partnership exceeding in amount the balance due on said promissory note. The action was tried by a jury which returned a verdict that plaintiff take nothing by his action. He appealed from the judgment entered upon the verdict, and, among other things, contended that the cross-complaint "appeals to the equity side of the court, and that on those issues a right to trial by jury does not exist." In discussing the question thus presented, this court stated that: "It is an almost, if not universally. accepted rule, that, in the absence of statutory provision, an action at law as distinguished from an action in equity cannot be maintained between partners with respect to partnership transactions. It is also well settled that the mere fact a dissolution of the partnership has taken place before the action is brought does not change the rule that no action at law can be maintained between partners. (Citing authorities.) But to this rule that no action at law will lie between partners, even after dissolution, there is one well-recognized exception." The court then goes on to show that the peculiar facts of that case bring it within the exception rather than the rule, and concludes its discussion with the following conclusion: "From the above reasoning it follows that, the action being one at law, the defendant was entitled to a jury trial." It will be seen that the question involved in that action and determined by the court was whether the cross-complaint set up an equitable or a legal cause of action, and not whether the defendant could maintain his cross-complaint which set forth matters relating to the former partnership between the parties. In fact, it seems to have been conceded that such a defense, whether by cross-complaint or counterclaim, could be maintained by the defendant, but plaintiff contended that it was an equitable defense, and therefore defendant had no right to have the issues raised thereby tried before a jury. We are satisfied from a careful reading and study of these cases, and any others bearing upon this subject, that they do not decide, nor has it ever been decided in this state since the adoption of the Codes, that under section 438 of the Code of Civil Procedure one partner may not set up as a defense a counterclaim against the plaintiff asking for an accounting of the partnership affairs and offsetting the amount found to be due the defendant by the accounting against the amount found to be due the plaintiff on his cause of action set up in the complaint. Respondent has cited authorities from other jurisdictions in which it may be conceded there is language and rulings which support his contention, but evidently the statutes of those jurisdictions contain no provision as broad as our present statute upon the subject of counterclaims.

Our conclusion, therefore, is that the trial court erred in striking out the counterclaim filed herein by the former partner of the plaintiff. As we view the question, any other conclusion would run directly counter to the plain provisions of section 438 of the Code of Civil Procedure, which since its amendment in 1927 (St. 1927, p. 1620) provides that a counterclaim may be filed when it tends "to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." This conclusion is in line with our recent decision in Luse v. Peters, 28 P.(2d) 357, 359, where we held that: "Under the 1927 amendment to section 438, Code of Civil Procedure, the sole requisites of a counterclaim are that it 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.'" It is true, as respondent says, that this was not an action where the counterclaim involved a partnership accounting. But we see no reason why, if a counterclaim is allowed in every case where it meets the requirements of the Code section, any exception should be made in case of an action between partners. It is true that one partner may not sue, even after dissolution of the partnership, the other partner in an action at law. He may, however, before dissolution, sue for an accounting and ask for a dissolution, and after dissolution he may sue for an accounting. This, it is true, is an equitable proceeding. But it is just as much an equitable proceeding if set up by way of counterclaim by the defendant as it would be in an independent action wherein a plaintiff sues for an accounting. The inclusion of such a demand in a counterclaim does not in any way deprive it of its equitable character, nor does it change the manner in which the issues arising out of said counterclaim are to be tried. Where a counterclaim is set up as an equitable defense to an action at law, the whole proceeding, in practical effect, constitutes two independent causes of action—one by the plaintiff on his complaint, and the other by the defendant on his counterclaim. Pacific Finance Corp. v. Superior Court (Cal. Sup.) 25 P.(2d) 983, 90 A. L. R. 384. The issues therein are tried separately, and upon demand of either party it would be the duty of the trial court to grant a jury trial to determine the issues arising under plaintiff's complaint and to determine the equitable issues arising under the counterclaim without a jury, except as the court might call a jury to act in an advisory capacity. In such a procedure the partners may have their differences determined in a court of equity, and the rule against one partner suing another in an action at law regarding partnership property is not violated.

It is conceded by the plaintiff that, if the defendant Marcel E. Cerf, one of the makers of the note, had the right in this action to set up the counterclaim pleaded, then the right to set up the same defense by way of counterclaim was available to the other defendants, since the note sued on was joint and several.

It follows that the court erred in striking out each of the counterclaims filed herein. For this reason, the judgment should be reversed, and it is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.

220 Cal. 702

SAWYER v. STATE BAR OF CALIFORNIA.

S. F. 15048.

Supreme Court of California.

April 30, 1934.

1. **Attorney and client** ⚿53(2).

Evidence in disciplinary proceeding sustained finding that attorney through research corporation directed solicitation of stockholders in various corporations for purpose of securing professional employment.

2. **Attorney and client** ⚿58.

Attorney found to have directed solicitation of stockholders in various corporations through affiliated research organization with which fees were divided should be suspended for three months.

LANGDON, J., dissenting.

◆

In Bank.

Original application by Frank W. Sawyer to review the findings of the Board of Governors of the State Bar and the recommendation based thereon for petitioner's suspension from the practice of law for six months.

Recommendation modified, and petitioner ordered suspended for period of three months.

Frank W. Sawyer, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

Application for writ to review the findings of the board of governors of the State Bar and the recommendation based thereon that petitioner be suspended from the practice of the law for six months for a violation of rule 3 of the rules of professional conduct of the State Bar of California. Rule 3 provides that a member of the State Bar "shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor shall he directly or indirectly share with an unlicensed person compensation arising out of or incidental to professional employment; nor shall he directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom."

Formal proceedings were instituted against petitioner after a preliminary investigation by local administrative committee No. 3 of the city and county of San Francisco. The petitioner, pursuant to rules 10 and 11 of the rules of procedure of the State Bar was ordered to show cause before local administrative committee No. 4 of the city and county of San Francisco why he should not be disciplined for professional misconduct in violation of said rule 3 and section 287 of the Code of Civil Procedure, because of the charges set out in six separate and distinct complaints, all of the same general import, to the effect that petitioner had at different times and on different occasions solicited of different persons legal employment, either professionally or through an unlicensed layman employed by him, for a cause of action alleged not to be legal or just and so known to be by petitioner; that in such false solicitations false and slanderous statements were made as to different corporations; that money was collected by petitioner ostensibly for legal services in connection with said statements and part of it paid to said unlicensed laymen for services in aiding petitioner, thereby permitting a layman to receive compensation from the practice of the law; and that, after the receipt of said moneys, no legal services were actually rendered. There was also an allegation that petitioner had willfully represented himself as an attorney for a stockholder when not so actually employed.

The petitioner filed an answer to the allegations of the order to show cause as provided for in rules 18, 23, and 24 of said rules of procedure, and denied categorically each and every of said specifications of misconduct set out in each of the six separate and distinct complaints.

In making these denials, the background of the petitioner's position appears substantially in finding No. 4 of local administrative committee No. 4, reading as follows:

"(a) That respondent is now and continuously since the year 1889 has been licensed to practice and is practicing law in the state of California.

"(b) That respondent is sixty-eight years of age.

"(c) That continuously since the year 1904, respondent has been specializing in investigating corporations for the benefit of shareholders and has, during all the time last mentioned, maintained a system to obtain information concerning the management of corporations, and on numerous and various occasions was employed by other members of the bar to represent their clients in investigating and/or prosecuting their claims as shareholders against corporations.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

"(d) That since the year 1904, respondent's experience in his said specialty was that nearly always, dissatisfied shareholders would call at his office and engage him to investigate the management of corporations in which they held shares. On very limited other occasions he was employed by organizations specializing in investigating corporations.

"(e) That National Bureau of Corporation Research was organized for the purpose of investigating corporations. That the respondent accepted employment as counsel for said National Bureau of Corporation Research in connection with the investigation of certain corporations and the arrangement was that the Bureau would engage men to contact the shareholders and such of the shareholders as were willing would advance a sum of money equal to 10% of their investment in the shares and this money was paid to respondent who divided it as follows:

"30% to National Bureau of Corporation Research,

"40% to the solicitors employed by the Bureau,

"30% for respondent."

The petitioner did not object to these findings, but takes the position that he accepted only professional employment; that he himself employed no one to solicit or obtain such employment, but that such persons were employed by National Bureau of Corporation Research to contact shareholders of various corporations dissatisfied with the conduct thereof, and that he acted as counsel under employment by said bureau; that he himself had nothing to do with the organization of the Bureau of National Research beyond preparing its articles of incorporation at the instance of M. J. Anderson, which articles were filed in the proper offices, but no further steps taken toward corporate organization. It appeared that said bureau occupied adjoining offices to petitioner, and a common reception room was used.

At the conclusion of the hearings held during the year 1932, wherein oral evidence was taken and many exhibits introduced, local administrative committee No. 4 found that as to the "second" and "fourth" separate and distinct complaints the facts therein set forth were not true; and that, as to the "first," "third," "fifth," and "sixth" separate and distinct complaints, the committee found that "in every case where respondent acted for shareholders directly or through employment by National Bureau of Corporation Research, he acted in absolute good faith and with the honest belief that the shareholders had a just complaint against their corporations, and that in the case of two of the corporations at least, respondent instituted legal proceedings and did a great deal of work in behalf of shareholders."

In its finding 6 the committee found: "That during the hearing of this matter, respondent stated to the committee that he had been engaged in the specialty aforesaid for the many years aforesaid and had never been criticized in connection therewith nor has it ever been suggested to him that his practice was not ethical and that if, in the opinion of the Board of Governors, respondent's work of investigating corporations under the circumstances heretofore set forth is objectionable in the least, he will abandon the practice upon the suggestion of the Board of Governors."

Finding 9 as to the first cause of complaint was as follows: "The respondent did collect money, viz., $25. from Emma A. Hively for legal services and expenses in connection with an investigation of and legal proceedings instituted against Coast Tire & Rubber Company, a corporation, and in the judgment of this committee, there was probable cause for such investigation. That a part of the money so collected from said Emma A. Hively was paid to the management and solicitors of National Bureau of Corporation Research. That no part of the money so collected was returned to said Emma A. Hively."

Finding 10 was as follows: "That Emma A. Hively was solicited to join the shareholders of Coast Tire & Rubber Company by a lay person and later respondent represented her as her counsel in that matter."

As to the third cause of complaint finding 11 was as follows: "That respondent did receive money, viz., $375, from Daniel Lyons for legal services and expenses in connection with an investigation of and legal proceedings instituted against Doble Steam Motors Corporation, a corporation, and in the judgment of this committee, there was probable cause for such investigation. That a part of the money so received from said Daniel Lyons was paid to the management and solicitors of National Bureau of Corporation Research. That no part of the money so received was returned to said Daniel Lyons."

Finding 12: "That said Daniel Lyons was solicited to join the shareholders of Doble Steam Motors Corporation by a lay person and that said lay person was connected with the said National Bureau of Corporation Research, and by employment, respondent represented such shareholders of Doble Steam

Motors Corporation as were solicited by National Bureau of Corporation Research."

Finding 13: "That with respect to the 'fifth separate and distinct complaint', and the 'sixth separate and distinct complaint', set forth in the Notice to Show Cause, the committee finds that Lizzie Radford, whose correct name is Elizabeth Radford, and John Doe Radford, whose correct name is J. W. Radford, were and are husband and wife and that they were jointly interested in shares of the capital stock of Doble Steam Motors Corporation and that the certificate representing such shares stood in the name of the husband."

Finding 14: "That respondent did receive money, viz., $137.50 from said Elizabeth Radford and J. W. Radford for legal services and expenses in connection with an investigation of and legal proceedings instituted against Doble Steam Motors Corporation, a corporation, and that in the judgment of this committee, there was probable cause for such investigation. That a part of the money so received from said Elizabeth Radford and J. W. Radford was paid to the management and solicitors of National Bureau of Corporation Research. That no part of the money so received was returned to said Elizabeth Radford and/or J. W. Radford. That otherwise the allegations of the sixth count are true."

Finding 15: "That said Elizabeth Radford and J. W. Radford were solicited to join the shareholders of Doble Steam Motors Corporation by a lay person and that said lay person was connected with the National Bureau of Corporation Research, and by employment, respondent represented such shareholders of Doble Steam Motors Corporation as were solicited by National Bureau of Corporation Research."

From the foregoing findings the committee concluded: "That the respondent, Frank W. Sawyer, committed no act in violation of the terms, force, effect, meaning and spirit of the Rules of Professional Conduct adopted by The State Bar of California or Rule 3 thereof, or the terms, force, effect, meaning and spirit of section 287 of the Code of Civil Procedure of the State of California," and recommended as follows:

"(1) That if it is objectionable for a member of the Bar to organize shareholders of corporations for the purpose of representing their interest against the corporation, that respondent be privately reprimanded and instructed to cease the practice.

"(2) That if it is objectionable for a member of the Bar to accept employment from any lay organization or person engaged in the business of organizing shareholders to represent such shareholders in proceedings against the corporations, that respondent be privately reprimanded and instructed to cease accepting employment from any such lay organization or persons.

"(3) That if it is objectionable for a member of The State Bar to organize such shareholders or to represent such lay organizations or persons, that the members of The State Bar be so notified through the State Bar Journal or some other medium, as there are other members of the Bar engaged in that practice."

The proceedings, conclusion, and recommendation of local administrative committee No. 4 of the city and county of San Francisco were duly reported to the board of governors of the State Bar. In its review of the said proceedings, the board of governors decided to take additional evidence at which petitioner with his counsel were personally present. At the conclusion of its review, aided by the additional evidence before it, the board of governors made its own findings expressly disproving the findings, conclusion, and recommendation of local administrative committee No. 4, except as to such matters found to be true in its own findings. As to the "second" and "fourth" separate and distinct counts, no evidence having been introduced in regard thereto, the board of governors found the said charges to be untrue. As to the "first," "third," "fifth," and "sixth" separate and distinct complaints, the board found in accord with the local committee's findings (a), (b), (c), (d), and (e) hereinbefore set out, and additionally as italicized: "(6) That respondent did collect money, viz., $25. from Emma A. Hively for legal services and expenses in connection with an investigation of and legal proceedings instituted against Coast Tire & Rubber Company, a corporation. That a part of the money so collected from said Emma A. Hively was paid to the management and solicitors of National Bureau of Corporation Research. That no part of the money so collected was returned to said Emma A. Hively. *That respondent accepted said employment in said case, knowing that said employment had been solicited by an employee of said Research Corporation, and split the money so received in said employment with unlicensed persons.*" That "there was probable cause for such investigation" was deleted from the local committee's finding.

Finding 7 of the board of governors is the same as finding 11 of the local committee with the phrase "there was probable cause for such investigation" deleted.

Finding 8 is the same as finding 12 of the local committee with the italicized additions thereto: "(8) That said Daniel Lyons was solicited *to pay said money and* to join in an investigation of Doble Steam Motors Corporation *by respondent*, by a lay person and that said lay person was connected with the said National Bureau of Corporation Research; *that* by *said* employment, respondent represented such shareholders of Doble Steam Motors Corporation as were solicited by National Bureau of Corporation Research. *That respondent knew when he accepted such employment that it had been solicited.*"

Finding 9 with respect to the fifth and sixth separate and distinct complaints, is the same as the local committee's finding 13 with respect to the joint interest of Elizabeth Radford and J. W. Radford in shares of the capital stock of Doble Steam Motors Corporation, and that the certificate stood in the name of J. W. Radford.

Finding 10 with respect to the receipt of $137 from the Radfords for legal services and expenses in connection with an investigation of and legal proceedings instituted against Doble Steam Motors Corporation is the same as the local committee's finding 14 with the phrase "and that in the judgment of this committee, there was probable cause for such investigation" deleted.

Finding 11 rewrites finding 15 of the local committee to read as follows: "That said Elizabeth Radford and J. W. Radford were solicited *to pay said money and to join in said investigation of Doble Steam Motors Corporation and to employ respondent by a lay person and that said lay person was connected with the said National Bureau of Corporation Research, and by employment, respondent represented said Elizabeth Radford and J. W. Radford, and other shareholders of Doble Steam Motors Corporation as were solicited by National Bureau of Corporation Research. That in accepting such employment, said respondent knew that such employment had been solicited by employees or agents of said research corporation.*"

Finding 12 is as follows: "That respondent directed the solicitation of the stockholders in the various corporations and knew at all times that in each case herein mentioned that such employment was solicited."

Finding 13 is as follows: "That the organization of said research corporation was not in good faith, but was deliberately planned by respondent and said M. J. Anderson for the purpose of securing professional employment for said respondent, that in accepting said employment so solicited the respondent did not act in good faith."

From the foregoing findings or statement of facts the board of governors reached the conclusion that the petitioner had violated rule 3 of the rules of professional conduct adopted by the State Bar of California, and recommended that he be suspended from the practice of the law in the state of California for a period of six months.

It is apparent from the modification of the findings of the trial committee that the matter in the minds of the board of governors had finally resolved itself down to the question of whether or not a person or persons who are not stockholders of a corporation have the right to organize stockholders into a group in conjunction with an attorney who is actively participating in the solicitation of stockholders to come in and join the litigation, coupled with a further question as to whether it is legitimate practice, assuming that solicitation is proper at all, to take from such aggrieved stockholders a comparatively large sum of money, 70 per cent. of which does not go toward litigation in protection of their rights at all, thus differentiating the question involved in this investigation from the question of the admitted right of stockholders to organize and proceed in a representative capacity, to communicate with other stockholders, and to solicit funds from them for the purpose of protecting their mutual interests in the corporation, the deciding factor in the contemplation of the board of governors being that respondent *knew* that his employment had been solicited and its terms arranged for upon a percentage basis contrary to the spirit of, and inhibition of, rule 3 of the rules of professional conduct.

[1] The petitioner contends there is no evidence to support finding 12 of the board of governors: "(12) That respondent directed the solicitation of the stockholders, in the various corporations, and knew at all times that in each case herein mentioned that such employment was solicited." The petitioner, however, admitted the collection of money and that it was paid to him and came from the members of the various groups of stockholders that were organized; that solicitors were sent out to various stockholders; that one of the purposes of soliciting these stockholders was to bring business to his office for the purpose of instituting legal proceedings, if necessary. The petitioner admitted that his name appeared on the letterheads of said bureau as counsel; that the existence

of a valid research corporation was represented to these people; and that of the collections paid to him as the result of such solicitation petitioner received 30 per cent. and 40 per cent. went to Anderson and 30 per cent. to solicitors as by Anderson directed. Anderson testified that he was employed by petitioner to take charge of the organization work and that petitioner paid the bills. These admissions and testimony amply sustain the finding that petitioner knew that such employment was solicited on a percentage basis, either directly or indirectly.

Petitioner also attacks finding 13 of the board of governors to the effect: "That the organization of the research corporation was not in good faith, but was deliberately planned by respondent and said M. J. Anderson for the purpose of securing professional employment for said respondent; that in accepting said employment so solicited, the respondent did not act in good faith." Lack of good faith may seldom be proved directly, but may be inferred from circumstances appearing in evidence. Here we have the circumstances of adjoining offices and a common reception room as between Anderson, the organizer of the National Bureau of Corporation Research, and the petitioner's law offices, the name of said research corporation appearing on the common reception room door; the admission that Anderson and the solicitors employed by him were in constant consultation with petitioner; that petitioner furnished Anderson with the names of stockholders to be interviewed and solicited; Anderson's statement that he was compensated by petitioner, depending upon the amount of work and the length of time it took; the circumstance that all moneys collected by solicitors were paid first to petitioner and then disbursed to Anderson and to the solicitors as Anderson directed; the admission that Anderson was considerably indebted to petitioner, and that practically every solicitor employed by Anderson owed petitioner money for advances made to them—hardly seems consistent with petitioner's claim that said research corporation was entirely a creation of Anderson's, with which he had no concern except to act as an attorney under its employment, petitioner receiving 30 per cent. of moneys collected, and said research corporation and its employees receiving the balance of 70 per cent., and it would be difficult to hold under the evidence before the board of governors that entire good faith characterized petitioner's connection with said National Bureau of Corporation Research, and that the relation existing between petitioner and said Anderson, its purported organizer and manager, was purely that of client and attorney.

[2] The solicitation of business by members of the legal profession has always, at least historically, been deemed unethical, and is expressly prohibited by rule 2 of the rules of professional conduct of the State Bar of this state. The petitioner admits that there was solicitation and that he had knowledge of it, but asserts "that the solicitation was for the purpose of organizing stockholders likewise interested into a group for mutual protection and benefit."

We feel that in the light of the decided attitude taken by the State Bar and approved by this court as expressed in the recent cases of Townsend v. State Bar, 210 Cal. 362, 291 P. 837; Shaw v. State Bar, 212 Cal. 52, 297 P. 532; Smallberg v. State Bar, 212 Cal. 113, 297 P. 916; Howe v. State Bar, 212 Cal. 222, 298 P. 25; Dahl v. State Bar, 213 Cal. 160, 1 P.(2d) 977; Recht v. State Bar (Cal. Sup.) 23 P.(2d) 273, the disciplinary recommendation of the board of governors is justified and should be upheld by this court.

In fairness to petitioner, it should be stated that, while the board of governors went to some extent into the reasons for the apparent delays in bringing actions and in not having reached a definite conclusion in any of the matters here under investigation, the petitioner points out, plausibly at least, that he believed he had good causes of action in protection of the rights of minority stockholders, but that no adequate results could be obtained in a representative stockholders' suit, and that the only effective means of securing a recovery against wrongdoing directors was by a jury trial; that he believed that minority stockholders had a constitutional right to a trial by jury; that he had attempted to test this right in one case, and had unsuccessfully sought a writ of mandate from this court to compel the superior court to grant a trial by jury; that he had thereupon gone to trial, demanded a jury, been refused a jury trial, and had then offered no evidence, and, the defendants doing likewise, judgment necessarily went for the defendants; that an appeal had been taken from the order denying the demand for a jury trial, and that such appeal is now pending in this court and undecided, and is intended to be a test of the question of whether or not a minority stockholders' suit may be prosecuted by an action at law.

The conclusion of the board of governors that the petitioner has violated rule 3 of the rules of professional conduct of the State Bar is approved. The recommendation that the petitioner be suspended from the practice of the law in the state of California for a period of six months is modified to provide for suspension for a period of three months, which order of suspension is to date from and after thirty days of the entry of this order, and it is so ordered.

LANGDON, Justice.

I dissent as to the punishment. The local administrative committee was uncertain as to whether the acts complained of were improper, as shown by their recommendations, and they found that petitioner did not act in bad faith. They recommended that, if his actions were objectionable, he be privately reprimanded. We hold that they are objectionable, and I am disposed to follow their recommendation. I believe that a mere suggestion to petitioner that he desist from the practices herein found objectionable would be followed promptly. A reprimand is, in my judgment, the extreme penalty justified by the facts.

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220 Cal. 714

SESSIONS et ux. v. TROTT et ux.

L. A. 13262.

Supreme Court of California.
May 3, 1934.

Rehearing Denied May 31, 1934.

1. Appeal and error 🔑1071(6).

Primary purpose of provisions empowering appellate court to make additional fact findings was to abrogate rule that, when trial court failed to find on material issue, decision was against law and judgment or order was reversible (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

2. Appeal and error 🔑1122(1).

Where trial court stated conclusion of law that plaintiffs were entitled to recover certain sum, but made no fact findings as to injury or amount of damages, appellate court could supply defect by finding plaintiffs were injured and adopting, as fact finding, the trial court's conclusion of law (Code Civ. Proc. §§ 633, 956a; Const. art. 6, § 4¾).

3. Fraud 🔑58(1).

In damage action for misrepresentations as to boundaries of lot which defendants conveyed to plaintiffs in exchange for plaintiffs' property, evidence *held* to establish that plaintiffs were injured and to sustain trial court's conclusion that damage was $3,500.

4. New trial 🔑102(3).

Refusal of new trial motion for newly discovered evidence *held* not abuse of discretion, where defendants' showing of diligence was very weak and trial judge was apparently of opinion that the testimony would not change decision.

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In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Horace Sessions and wife against Herman H. Trott and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Prior opinion, 27 P.(2d) 957.

Franklin W. Peck, of Los Angeles, and Arthur L. Erb and Richard C. Waltz, both of Beverly Hills, for appellants.

Otto J. Emme, B. R. Rountree, and Rosecrans & Emme, all of Los Angeles, for respondents.

CURTIS, Justice.

This action was brought by the plaintiffs to recover damages for fraudulent representations made by defendants as to the boundaries of a lot which the defendants conveyed to the plaintiffs in exchange for property owned by the plaintiffs. Plaintiffs and defendants entered into negotiations for the exchange of respective properties owned by each. The property of defendants consisted of lot 49 of tract 9159, upon which an attractive two-story stucco residence worth from $18,500 to $20,000 had been built. Said property was located on Talmadge street near Los Feliz boulevard in the city of Los Angeles. Plaintiffs' property was also residence property in Los Angeles. Lot 49 of tract 9159, as shown on the plat of the district in the office of the Los Feliz Knolls tract office, was an irregular shaped hillside lot with an actual frontage on Talmadge street of 49.89 feet. The west boundary line measured 82.38 feet, the eastern boundary line measured 80.67 feet, and the rear line approximately 82.51 feet. The lot had been landscaped with grass and shrubs, and a sprinkling system had been installed. However, through an error of the gardener—it is not claimed that it was deliberately and purposely done by the defendants—a wide strip of the lot adjoining on the west had been landscaped as part of lot

49, and even part of the sprinkling system had been installed thereon. This strip of land of the adjoining lot so landscaped measured 17 feet on Talmadge street and tapered to 7 feet in the rear. The adjoining lot was vacant and covered with sand and weeds so that it appeared to a casual observer that lot 49 had a frontage of 66.89 feet on Talmadge street. Photographic exhibits of the house taken from the front and from the rear show that the actual property line cuts across in front of the house and even cuts off a portion of the stepping stones laid from the curb to the front door, with the result that the house, which is a large one, is out of proportion to the lot upon which it is built. In fact, the map shows that one corner of the breakfast room is within 3 feet of the property line. The plaintiffs claimed that, at the time they were examining the property for the purpose of deciding whether they wished to make the exchange, the defendant, Mr. Trott, as they stood at the rear of the lot, pointed out the west line of the property as being along the line landscaped, and indicated a string which marked the line as it was landscaped as being the property line. This testimony was corroborated by a disinterested witness who was also present. These representations were made by the defendant Mr. Trott, and his wife, named as the other defendant, was not present. The defendant denied that he had so indicated the property line, and testified that he had pointed out a poplar tree, which was very close to the actual property line, as marking the property line in front. Plaintiffs further testified that they did not at any time prior to the exchange see the tract map in the tract office, for the reason that the defendant had asked them not to contact the tract office, as he wished, as owner, to conduct the negotiations himself. Two experts testified in behalf of the plaintiffs as to the difference in value between the property as represented by defendants and the actual value of the property. One gave his opinion that the difference in value amounted to $5,625, and the other that it amounted to $6,750. The trial court decided in favor of the plaintiffs, and as a conclusion of law held that they were entitled to recover of the defendants the sum of $3,500. Judgment was accordingly entered. Subsequently, a motion for a new trial was made upon the ground of newly discovered evidence, and affidavits were introduced by defendants to the effect that one of the selling agents at the tract office had shown to both the plaintiffs the map of the tract in the office prior to the exchange of properties. It would, of course, follow, if this were true, that the plaintiffs were not entitled to recover, since in making the exchange they were aware of the actual dimensions of the lot, and did not exchange their property in reliance upon the misrepresentations of the defendant. These affidavits were met with counter affidavits of plaintiffs denying that they ever saw such map prior to the exchange and affirming that the only time they saw said map was several months subsequent thereto when they first became aware of the fraud practiced upon them. The motion for a new trial was denied.

Defendants appeal from the judgment so entered upon the following grounds: (1) That the trial court erred in failing to find the plaintiffs were injured by the misrepresentations or the amount of damage suffered by them; (2) that the judgment was excessive; and (3) that the trial court erred in denying their motion for a new trial.

[1-3] It is true that the findings are defective, in that there is not any finding as to injury to plaintiffs, or as to the amount of damages suffered by them, which were material issues. There are findings, however, against defendants as to willful and fraudulent representations made by defendant Trott to the plaintiffs, and the belief of the plaintiffs in such misrepresentations and their reliance upon them. And the conclusion of law, as before noted, is to the effect "that the plaintiffs are entitled to recover of and from the defendants the sum of Three Thousand Five Hundred ($3,500) Dollars, together with their costs of suit." It is apparent that the trial court through inadvertence failed to make a finding to the effect that the plaintiffs were injured by the misrepresentations of the defendant, and to embody in the findings the statement found in the conclusion of law that the damages amounted to $3,500. Under section 4¾ of article 6 of the Constitution and section 956a of the Code of Civil Procedure, this court is empowered to make findings of fact in addition to those made by the trial court. Prior to the enactment of this constitutional provision and the Code section in 1927, it was the rule that, if the trial court failed to find upon a material issue, the appellate court had no option but to reverse the judgment and send the case back to the trial court. Needless to say, the authorities decided prior to these enactments are all to that effect. In an effort to expedite justice, section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure

were enacted with the primary purpose of abrogating the rule that, when the court failed to find upon a material issue, the decision was against the law and the judgment or order was required to be reversed. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. Since their enactment, there are numerous authorities upholding the exercise of this power. Lewin v. Pioneer Hatchery, 99 Cal. App. 473, 278 P. 902; Allee v. Shay, 92 Cal. App. 749, 268 P. 962; Kirk v. Culley, 202 Cal. 501, 261 P. 994; Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 11, 75 A. L. R. 555. We are satisfied that this is a proper case for the exercise of such power. In the case of Linberg v. Stanto, supra, the trial court failed to expressly find as to the damages suffered by virtue of plaintiff's injuries in an automobile accident, but, as a conclusion of law, ordered judgment to to rendered against defendant in the sum of $1,509. This court refused to reverse the judgment, saying: "It is well settled, in spite of the fact that section 633 of the Code of Civil Procedure provides that facts and conclusions must be separately stated, that a finding may be regarded as one of fact, although mistakenly placed among the conclusions of law." In pursuance, therefore, of the power conferred by said Code section, we hereby find that the plaintiffs herein were damaged in the amount of $3,500. And from the record before us there can be no other conclusion but that plaintiffs were injured by the false and fraudulent representations of the defendant, and we hereby find: "It is true that plaintiffs suffered injury by reason of the false and fraudulent representations of the defendant Trott as to the property line of said lot." It may be argued in reference to a hypothetical case that, as damages for deceit in the sale of property are the difference between the actual value of the property and its value as it has been represented, it is conceivable that, notwithstanding the deceit practiced by a vendor and the reliance by the vendee upon the false representations made, the actual value may turn out to be as much or more than it would have been had the representations been true. It will suffice to say that such a hypothesis is conclusively contradicted by the record before us. The photographic exhibits in the case demonstrate beyond cavil that plaintiffs were injured in failing to receive as large a lot as that which they had a right to expect they would receive.

These photographic exhibits also demonstrate that the damages suffered by plaintiffs were considerably greater than the mere area of the strip would indicate. As before noted, the exclusion of the 17 feet frontage from the lot has the result of making the house seem too large for the lot, and the lot, instead of being practically rectangular in shape, is in fact a queer irregular shape. As before indicated, one expert, a court appraiser, testified that the difference in value amounted to $5,625, and the other expert, a real estate broker, testified that the difference amounted to $6,750. The defendant Trott had testified that the difference would not amount to more than $200. The property was viewed by the trial judge, evidently with the consent of the parties, and, as indicated by the conclusion of law, it is apparent that in his opinion the difference in value lay somewhere between the estimate of the experts and the opinion of Trott, or $3,500. We are satisfied that $3,500 is a fair estimate of the damages suffered by plaintiff.

It should perhaps be pointed out that the damages in this case are made up of only one item, whereas in the case of James v. Haley, 212 Cal. 142, 297 P. 920, relied upon by appellant, several items of special damages were pleaded. The decision of the latter case that the appellate court would not adopt a conclusion of law to the effect that the plaintiff was damaged in a certain sum as a finding of fact, therefore, is not decisive of this case. The court there had no way of segregating the various items of special damages, and, moreover, as pointed out in the opinion, it developed that three of the items of damages were not suffered by plaintiff, suing in his individual capacity, as an individual, but were losses suffered by a partnership of which plaintiff was a member. As the plaintiff as an individual was not entitled to recover for damages suffered by the partnership, a segregation of the items would have been imperative, and the court properly refused to take over the duties of the trial court.

[4] The motion for a new trial was heard and determined by the same judge who had presided during the trial of the case. The showing of defendants that due diligence had been used in an attempt to procure the testimony of the salesman at the tract office is very weak. Despite the fact that defendant Trott must have been aware that salesmen were employed at the tract office, the only person he interrogated prior to the trial of the case was the man in charge of the office, and apparently he did not request the manager to ascertain whether any of the salesmen had any knowledge of the affair. Evidently the trial judge was of the opinion that, even if the testimony set out in the affidavits presented

by defendants were produced upon a new trial, his decision would be the same. We find no abuse of discretion.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

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220 Cal. 660

THIRD AND BROADWAY BLDG. CO. et al. v. LOS ANGELES COUNTY.

L. A. 13744.

Supreme Court of California.

April 30, 1934.

Rehearing Denied May 29, 1934.

1. Taxation 🔑200.

Property used by public utility in its business, though as lessee and not as owner, is exempt from local taxation (Pol. Code, § 3665b; Const. art. 13, § 14, as amended in 1910).

2. Taxation 🔑200.

Portion of building used exclusively by lessee, a public utility, in its business, *held* exempt from local taxation, though balance of building was subject to local taxation (Pol. Code, § 3665b; Const. art. 13, § 14, as amended in 1910).

3. Taxation 🔑537.

Failure of lessee, a public utility, to report leased space as operative property to board of equalization *held* not to preclude lessor owner from recovering local taxes illegally exacted on portion used exclusively by lessee in its utility business (Pol. Code, § 3665b; Const. art. 13, § 14, as amended in 1910).

4. Taxation 🔑249.

Action of lessor owner in returning property used exclusively by lessee in its public utility business to local assessor *held* not to estop lessor from claiming that property was not subject to local taxation (Pol. Code, § 3665b; Const. art. 13, § 14, as amended in 1910).

SHENK, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lester Wm. Roth, Judge.

Action by the Third and Broadway Building Company and others against Los Angeles County. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Rehearing denied; SHENK and SPENCE, JJ., not voting for rehearing.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Frank James, Everett H. Mills, and Henry Herzbrun, all of Los Angeles, for respondents.

C. Stanley Wood, City Atty., John W. Collier, Deputy City Atty., both of Oakland, Daniel E. Farr and W. Torrence Stockman, both of Los Angeles, and Albert M. Monaco, Heller, Ehrman, White & McAuliffe, Bianchi & Heyman, and C. G. Morse, all of San Francisco, amici curiæ.

LANGDON, Justice.

This is an action by plaintiffs to recover taxes paid to defendant county on the ground that a part of the property taxed was operative property of a public utility and thus exempt from local taxation.

The facts are simple and undisputed. The property consists of land improved by the Edison building, an eleven-story structure located at Third and Broadway streets in Los Angeles. Plaintiff Third and Broadway Building Company has the beneficial interest under a 99-year lease. Plaintiff Citizens' National Trust & Savings Bank holds the legal title under a deed of trust from Third and Broadway Building Company, as security for a bond issue. During the tax years 1927–28, 1928–29, 1929–30, and 1930–31, a certain portion of the building (the upper eleven floors and substantially all of the basement) was used by Southern California Edison Company, a public utility, as general offices, under a lease. The building also contains a theater, stores, and some space not leased to the utility.

In its report of operative property to the state board of equalization in 1927, the Edison Company did not include the leased part of the building, nor did it report the property as such to the tax assessor of the county. In 1928, 1929, and 1930, it did report it as operative property, described as "general offices," to the state board, with the required duplicate to the county assessor. During these years, however, the plaintiff bank, as holder of the legal title, made its statement of the property to the assessor, and the building was assessed and taxes levied thereon and paid throughout the period, in the total sum of $135,795.51, by plaintiff Third and

Broadway Building Company. Subsequently the company filed its claims with the board of supervisors of the defendant county for a refund of $95,057.56, or 70 per cent. of the amount of taxes paid, based upon a 70 per cent. use of the building by the utility in its business. Upon rejection of the claims, this action was commenced. Defendant county answered, and plaintiffs moved for judgment on the pleadings. A stipulation of facts was entered into by the parties, and the court gave judgment for plaintiffs in the sum of $71,980.50 and costs. Defendant county brings this appeal.

The basic question raised is whether the building, by reason of its exclusive use in part by a public utility in its business, is as to such part exempt from local taxation. The principles which govern the answer to this question have in the main been clearly laid down in prior decisions. The system of state taxation of the gross receipts of public utilities was established by constitutional amendment in 1910 (Cal. Const. art. 13, § 14), and was elaborated upon in the Political Code (§ 3664 et seq.). The scheme was abandoned by constitutional amendment in 1933, effective January 1, 1935 (Cal. Const. art. 13, §§ 14, 14½), but the old law governs this action. Under the plan thus created in 1910, the utilities pay to the state a tax upon their gross receipts, in lieu of all other taxes, on "property, or any part thereof, used exclusively in the operation of their business in this state." Cal. Const. art. 13, § 14 (a). This is described in the statute as "operative property." Pol. Code, § 3665b. Property not so used, that is, nonoperative property, is taxable locally. The theory of the system is that the percentage of the gross receipts is a fair equivalent of a tax on the property itself, and that the property of the utility is not exempted from taxation, but is subjected to this substituted tax. Operative property contributes to the earning of income, and is therefore considered as taxed by the gross receipts tax. Nonoperative property does not contribute to the income and is not reached by the substituted tax; hence, it is taxable locally in order that all property be taxed in proportion to its value by either the state or local government. See Southern California Tel. Co. v. County of Los Angeles, 212 Cal. 121, 298 P. 9.

[1, 2] The problem created by the operative use of leased property has also been definitely settled. Property used by a utility in its business, though as lessee and not as owner, is nevertheless exempt from local taxation. If this were not the rule, then double taxation would certainly fall upon that property, for the utility lessee would pay through the tax on its gross earnings, and the owner lessor would pay a property tax locally assessed. This court, following the United States Supreme Court, has condemned such a tax. Morgan Adams, Inc., v. County of Los Angeles, 209 Cal. 696, 289 P. 811; Hopkins v. Southern Cal. Tel. Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329; Central Mfg. District v. State Board of Equalization, 214 Cal. 288, 5 P.(2d) 424.

The question is thus narrowed down to the effect of use, not of an entire unit of property as in the Morgan Adams Case, but of a portion thereof, under such a lease. The Edison Company has used certain clearly identifiable portions of the building, during the taxable years, exclusively in the operation of its business. Under the theory of the gross receipts tax, this part of the property has been taxed by the state. Must the owner of the building pay another tax on such part of the property?

The defendant county holds that it must, on the theory that the building and land constitute a unit, not severable, and that an apportionment of tax between that part operatively used by the utility, and the balance of the structure, is neither practically nor constitutionally possible. Reliance is chiefly upon the leading case of Lake Tahoe Ry. & Transp. Co. v. Roberts, 168 Cal. 551, 143 P. 786, Ann. Cas. 1916E, 1196. There the plaintiff corporation owned a railroad, and steamers operated in Lake Tahoe. The boats were used both in connection with the railroad business of plaintiff, a public utility, and for traffic on the lake, unconnected with the railroad business. The court held that a steamboat was manifestly "a single, indivisible fabric," and that it was not "used exclusively" in the operation of its railroad business. Hence it was subject to local and not to state taxation.

The Lake Tahoe Case unquestionably reaches a sound conclusion, for the steamboat as a whole was used in both businesses, and hence was not "used exclusively" in the utility business. There is no warrant in the Constitution for distinguishing between complete and partial use of an indivisible unit of property. But the property involved herein is of a different character. Here a clearly defined part of the property is wholly and exclusively used in the business of the utility. It is perhaps difficult, but it is not impossible or unusual, to assess and tax separately the remaining portion of the building.

[3] The other points are two: Whether the plaintiff is precluded by an alleged failure of the Edison Company to report the leased space as operative property to the board of equalization as required by section 3665c of the Political Code, and whether the plaintiff is estopped by the return of the property to the local assessor.

In the year 1927, the Edison Company failed to report the property as operative; in the other years, it reported it generally, but defendant county claims that the report was inadequate. We are not impressed with this argument, for the description, while brief, seems sufficient to place the assessor upon notice of the claim. However, there was a failure to report it in 1927, and for the purposes of this appeal, we may assume that it was not properly reported in 1928, 1929, and 1930. Defendant then concludes that the utility is estopped to question the classification as nonoperative property, on the theory that the state board of equalization is given exclusive original jurisdiction to determine its character.

Whether this position is sound, as regards the utility, is a question not involved in this case. The utility does not own the property taxed herein. The owner, on the other hand, is neither authorized nor permitted by the statute to make a report of the property to the state board of equalization. Thus the position of defendant county on this issue is that the owner may be taxed on property which has already, through the medium of the gross receipts tax, paid its tax, and this because the owner's right of exemption has not been pressed before a body to which he has no access, and before which he has no standing. Defendant says that the lessee utility is the "agent" or "representative" of the lessor for the purpose of making this claim of exemption for operative property. But there is nothing in the statute which suggests that the Legislature contemplated such representation. In fact, the language of the Constitution and statute, and the course of litigation construing them, would indicate that the problem of owner lessor and utility lessee was not anticipated by the Legislature. Certainly no procedure to protect the right of the owner, save a suit for taxes improperly levied, is to be found.

We think that the right of the owner lessor to test the validity of the assessment in a court of competent jurisdiction is not denied, and is, in fact, specifically recognized in article 13, § 14 (g), of our Constitution: "After payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law."

[4] We are likewise unimpressed with the argument that the statement of the property to the assessor estopped the taxpayer from subsequently claiming that it was not taxable. The chief element of estoppel, reliance by the defendant upon a representation to its detriment, is lacking. No loss has been suffered by the county; it has collected a tax not legally authorized, and it must refund it. If, by reason of the return, the assessor was in some way induced to forego a right of the county, there might be some justification for the contention. But holding as we do that the property is operative, the taxpayer has an undoubted right to recover the illegal tax. See Slade v. County of Butte, 14 Cal. App. 453, 461, 112 P. 485.

We may add that this conclusion was forecast by our denial of a hearing in the case of Third & Broadway Building Co. v. Southern California Edison Co., 132 Cal. App. 186, 22 P. (2d) 574, where the District Court of Appeal held that the local taxes levied upon the portion of this building leased to the utility (70 per cent.) were illegally assessed and void.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

SHENK, Justice (dissenting).

I dissent. It is admittedly true that the plaintiff, a private corporation, is the beneficial owner of the entire Edison building; that the portion of the building leased to the Edison Company on a 15-year lease from 1918 to 1933, constitutes but 43.27 per cent. of the whole building; that for three tax years (1927, 1928, and 1929) the holder of the legal title returned the entire building to the assessor for assessment to itself as the owner; that for the year 1930 no such return was made, and the assessor assessed the building to the private owner as theretofore; that for the year 1927 the utility company made no mention of the property in its return of operative property to the state board of equalization; that for the years 1928, 1929, and 1930 the only mention of the property in the return to the state board was included in an item designated "General Offices (leased property)," following a list of other property classed as operative and particularly described by lot and block number; and that the reason the assessor did not notify the state board of equalization that he regarded the Edison building as nonoperative or as partially operative and practically nonoperative was because he understood and believed that the Edison Company had not claimed and did not intend to claim that said leased property was operative property.

That the property occupied as leased premises was subject to assessment cannot be questioned. It was assessable to the private owner unless removed from the local tax roll as operative property in the manner provided by law. Whether it should be so removed depended upon a question of fact. That fact is ascertained in two ways: First, by the report of the utility company to the state board of equalization without objection by the local assessor; and, secondly, by the state board of equalization upon objections by the assessor. If the property is not claimed by the utility company as operative in its report to the board, it goes on the local roll as a matter of course and is taxed accordingly. In the case of a dispute, and there is none unless the utility company claims it as operative, the controversy is settled in the first instance by the state board, subject thereafter to review by the courts. Great Western Power Co. v. City of Oakland, 189 Cal. 649, 655, 209 P. 553.

The procedure for the determination of whether property is operative or nonoperative is laid down in sections 3665c and 3666 of the Political Code, and the proceeding is in the nature of a proceeding in rem. As stated, if the property is not included as operative by the utility company, it is not taxed by the substituted method. This was unquestionably the case as to the 1927 tax. But it is contended that the lessor owner is not subject to the laws providing how public utility property shall be classified for the purposes of taxation. But the property was leased to the utility company subject to those laws and the lessor owner is subject to the local tax unless the property is classed as operative in accordance therewith, just as in such a case the utility company would be locally taxed therefor. It cannot be said that the owner lessor is without means of protection. In the first instance it is incumbent on him to see that his property is classed by the lessee as operative, if it be such. In the event of a refusal by the lessee to do so, the law would undoubtedly afford a remedy either by compelling its inclusion or in damages for an unwarranted refusal. With respect to the tax years 1928, 1929, and 1930, the report of the utlity company to the state board was plainly insufficient to classify these particular leased premises as operative property. As to all other property, real and personal, claimed in those years to be operative, a description thereof, by lot and block or location, with the assessed valuation, was specifically set forth. Included therein was a claim of operative property for office furniture and equipment, of a specific valuation, and located in the Fay building, the Laughlin building, the Edison building, and Second and Boylston. Notwithstanding these facts, the trial court determined as a matter of law that the item, "General Offices (leased property)," was a claim of exclusion from local taxation of the property held under lease in the plaintiff's building. I am satisfied that there was every reason for the conclusion on the part of the assessor, as admitted by the pleadings, that there was no intention on the part of the Edison Company in its report to the state board to claim the space occupied by it as operative property. Also there would seem to be a plain case of estoppel on the part of the owner lessor because of its return of this building to the assessor for the years 1927, 1928, and 1929 as property for which it should be taxed. The amount of the refund is large, and, if the leased property be declared improperly on the local tax roll, the county will have been seriously crippled in its fiscal arrangements. This is not the case of an erroneous assessment as matter of law. It may or may not be erroneous depending on the facts as they exist or in this case as represented by the owner to be while the assessor still had power to act. The owner has led the assessor, as to said three years, to believe that certain facts were true, and should not in this litigation be permitted to contend otherwise. Section 1962, subd. 3, Code Civ. Proc.

220 Cal. 629

RICE v. TAYLOR et al.

S. F. 14580.

Supreme Court of California.

April 28, 1934.

1. Mortgages ⚷171(1).
Vendor and purchaser ⚷231(1).

Conveyance, to impart constructive notice to subsequent purchasers or mortgagees, must be acknowledged, certified, and recorded as prescribed by law (Civ. Code, § 1213).

2. Mortgages ⚷171(6).

Indexing of instrument as "Note and pledge as security" *held* not to impart to subsequent incumbrancers constructive notice of real estate incumbrance (Civ. Code, § 1213; Pol. Code, § 4131, and § 4132, subd. 26).

While the word "pledge" may in certain connections be loosely used to denote a real estate incumbrance as well as one of chattels, still, where standing alone as a subject without qualifying surroundings, it cannot be said that real estate is even hinted at.

[Ed. Note.—For other definitions of "Pledge," see Words & Phrases.]

3. Mortgages ⚷169.

Title company, in tendering policy of title insurance to mortgage company, did not act as agent of mortgage company in matter of title to property so as to render title company's knowledge regarding alleged prior incumbrance imputable to mortgage company (Civ. Code, § 453v).

4. Mortgages ⚷169.

Even if title company was agent of mortgage company to which policy of title insurance was issued, agency extended only to searching for matters properly of record, and anything learned by title company about matters not affecting record title would not be imputed to mortgage company.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by W. C. Rice against Frank P. Taylor and others. Judgment for plaintiff, and defendants appeal.

Judgment reversed, and cause remanded with directions.

McKee, Tasheira & Wahrhaftig, of Oakland, for appellants.

Charles L. James, of San Francisco, for respondent.

PRESTON, Justice.

This appeal presents the single question as to whether plaintiff Rice or defendant Pacific Bond & Mortgage Company has the prior lien upon a residence lot, and improvements thereon, at 101 Cambridge avenue, San Leandro, Cal. Admittedly defendant Taylor was indebted to both these parties and was the record owner of said lot.

On October 15, 1925, an incumbrance of some $4,000 existed on said property in favor of the Mercantile Trust Company, a banking corporation. On said date Taylor, who was a real estate broker and presumably versed, by both experience and observation, in the art of conveyancing and incumbrancing real and personal property, executed, with his wife, to the plaintiff, W. C. Rice, a document, on the letterhead of "Taylor Sales Co., Importers and Jobbers, Hardware Specialties, 354 Tenth street, Oakland, California," in the words and figures following: "For value received we promise to pay to W. C. Rice, two years from date hereof, the sum of * * * $6,250 with interest at 7% per annum. As security for the above, we pledge our equity in property at 101 Cambridge Ave., San Leandro, Cal., and the Taylor Sales Co., 350 10th St., Oakland, Cal. In the event of the decease of either party we pledge our estate for the amount. (signed) Frank P. Taylor (signed) Antionette H. Taylor." This document was acknowledged by a subscribing witness, certified by a notary public, and recorded, at request of plaintiff, on December 4, 1925, in Liber 1209, p. 76, of official records of Alameda county.

On March 12, 1926, said Taylor and wife executed another deed of trust on said property to secure the sum of $550, owing to one M. A. Camp, and while still in this precarious financial condition, and on September 13, 1926, they applied to the Pacific Bond & Mortgage Company for a loan to refund the indebtedness shown by the two incumbrances above described, apparently without reference to the claim of plaintiff Rice. Taylor, on said date, of his own account, also applied to the Alameda County Title Insurance Company for a policy of title insurance on said property in favor of a contemplated mortgagee in the sum of $4,500. He later received from the title company a preliminary report, which contained the following: "Note: There appears of record in Liber 1209 of Official Records, page 76, Alameda County Records, the copy of a promissory note, dated October 15, 1925, executed by the above named vestees and payable to W. C. Rice in the sum of $6,250. Said note contains this statement, 'as security for the above we pledge our equity in the property located at No. 101 Cambridge Ave.' No opinion expressed as to the effect thereof."

Taylor failed to exhibit this report to the mortgage company and said company was not informed, but was without actual knowledge at all times herein, of the existence of said document referring to the $6,250 loan. Naturally it was in the interest of Taylor to conceal it from the loan company, for to reveal the contents of said report would have been to impair or destroy his chance of refinancing his indebtedness. The mortgage company later agreed to make the loan and prepared two promissory notes and two deeds of trust naming itself as payee and beneficiary, the first for $4,000 and the second for $550. On September 16, 1926, it delivered these deeds of trust in escrow to said title company, along with a check, with instructions that the trust deeds, when recorded, should be and become first and second record liens respectively on said property. Said instructions also provided for the issuance of a policy of title insurance, payable to it, in the sum of $4,500, and it agreed with the title company as follows: "It is understood that your liability under the evidence of title herein referred to shall be based upon the *record title only* and that you shall not be liable for secret defects of title not appearing of record, nor for forgery, nor for false personation, either as to instruments already of record or those involved in this escrow."

In January, 1930, plaintiff instituted this action to reform the above set out instrument executed to him and to have it construed as a real estate mortgage on said lot and foreclosed. Defendant mortgage company answered pleading itself to be a bona fide incumbrancer for value without notice. The court made all findings in favor of plaintiff, reforming the instrument and decreeing its priority and foreclosure as a real estate mortgage. This judgment provoked the present appeal. The other defendants named in the caption are without pecuniary interest in the result thereof.

For a correct understanding of some of the legal questions involved, it is necessary to further state that the recorder of Alameda county keeps but one set of numbered official books, that allowed by section 4131 of the Political Code. He also follows the "general index system" provided by the same Code, section 4132, subd. 26. The documents here in question were noted in said general grantors and grantees indices under the column marked "Title," "Note and pledge as security." If they constituted a real estate mortgage, the proper indexing would have been to note them under a column marked, "Title," "Mortgage of real property"; if considered a chattel mortgage, they should have been noted under a column marked, "Title," "Mortgage of personal property."

Appellant makes three basic contentions: (1) That it had no actual notice of said instruments; (2) that it had no constructive notice thereof because of the improper indexing; and (3) that it had no imputed knowledge thereof because the title company, that discovered the documents, was not its agent respecting the condition of title to the property.

We have been led to the conclusion that appellant is correct in all of its said contentions. The first one may be disposed of without further comment as no satisfactory evidence is found in the record to show that appellant at any time prior to taking said incumbrance had actual notice of the existence of said instruments.

[1, 2] Secondly, a conveyance, to impart constructive notice to subsequent purchasers or mortgagees, must be acknowledged, certified, and recorded as prescribed by law. Civ. Code, § 1213. In Cady v. Purser, 131 Cal. 552, 555, 556, 63 P. 844, 845, 82 Am. St. Rep. 391, it was held that a compliance with section 1170 of the Civil Code would not alone be effective against subsequent purchasers or mortgagees, but in addition section 1213 of the Civil Code must be complied with. It was further held, with respect to constructive notice: "The principle upon which the rule rests is that as, under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or incumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book." In that case a sheriff's deed was erroneously recorded in a book entitled "A" of "Bills of Sale and Agreements," and it was held that such a recordation failed to impart constructive notice of subsequent incumbrancers or mortgagees. This ruling was modified by statute to hold that notice was imputed if the instrument was properly indexed as required

by statute. Pol. Code, § 4135a. See, also, Central Pac. R. Co. v. Droge, 171 Cal. 32, 151 P. 663. California may, therefore, be classed as one of those states which has an "index system of recording." See Ludy v. Zumwalt, 85 Cal. App. 119, 259 P. 52.

In James v. Newman, 147 Iowa, 574, 126 N. W. 781, 783, it was said: "In order to impart constructive notice to third persons of any instrument of transfer by one person to another, the statute contemplates and requires that it be properly acknowledged by the parties, and that it be filed for record and spread upon the records by the county recorder, and that it be properly indexed. * * * We know of no rule of law that would justify us in dispensing with these prerequisites to constructive notice." Other states, in addition to Iowa, holding similarly are Wisconsin, Washington, Pennsylvania, and North Carolina. See note to the case of Parry v. Reinertson, 208 Iowa, 739, 224 N. W. 489, found in 63 A. L. R. 1051, note pages 1057–1066.

The indexing of the instrument here involved as a "note and pledge as security" did not impart to subsequent incumbrancers constructive notice of a real estate incumbrance.

In Koch v. West, 118 Iowa, 468, 92 N. W. 663, 664, 96 Am. St. Rep. 394, it was said: "The purchaser is not bound to look beyond the proper index for information as to conveyances, and, if the index shows none, there is no constructive notice of any."

Here a reading of the index alone would not even suggest a real estate incumbrance but, on the contrary, a transaction respecting chattels would come to the mind. While the word "pledge" may in certain connections be loosely used to denote a real estate incumbrance as well as one of chattels, still, where standing alone as a subject without qualifying surroundings, we cannot see how it can be said that real estate is even hinted at. If the index is to be held material at all, it must give some direct reference to the true nature of the instrument referred to. Respondent admits if "a title so shows that its character is such that it would be unreasonable to suppose it might affect the property under search," the indexing is insufficient. We believe this to be just such a case.

We have deemed it unnecessary to discuss the legal effect of the instrument itself to charge one with actual notice of its contents, with knowledge that it affected real property. This, we believe, is a serious question; but we shall not pause to decide it.

[3] Lastly, assuming the instrument to be one incumbrancing real property at the street address given, was knowledge of the contents thereof by the title company, imputed to the mortgage company, when it agreed to accept the policy of insurance and complete the loan? It is to be here noted that Taylor, the record owner of the property, secured the search applied for and presumably paid the insurance premium. The extent of the special authority conferred upon the title company by the mortgage company was to complete the exchange of documents necessary to consummate the transaction, all conditioned upon its writing the policy insuring the title with the new deeds of trust as first and second liens respectively. Was the title company, in tendering the policy of insurance, acting as the agent of the mortgage company in the matter of the title to this property?

Admittedly, were the title company a mere searcher of titles, with accompanying duty to report its findings to its employer, the relation of agent and principal would be established; the same would be true were the relation that of attorney and client. Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045; Rauer v. Hertweck, 175 Cal. 278, 165 P. 946; Mabb v. Stewart, 147 Cal. 413, 81 P. 1073; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. The liability of the searcher or of an attorney would be for negligence and not as an insurer or guarantor. Title insurance is quite a different contract to that of the abstractor of titles. Our Civil Code, § 453v, defines a policy of title insurance as follows: "Any written contract or instrument purporting to show the title to real property, or furnish information relative thereto, which shall in express terms purport to insure or guarantee such title or the correctness of such information, shall be deemed a policy of title insurance." Such contract contains no elements of agency but is the indemnity agreement of an independent contractor.

To write title insurance the company must conform to the specifications required by law and in general submit to the same supervision as other insurance companies. The nature of the title insurance contract is discussed in the case of Title Ins. & Tr. Co. v. Los Angeles, 61 Cal. App. 232, 235, 214 P. 667, 668, as follows: "Title insurance had become a recognized form of insurance in California and elsewhere prior to the year 1910, although it is more modern in its origin than are many other branches of insurance business. It has been defined as an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specific amount against loss through defects of title to real estate, wherein the latter has an interest, either as purchaser or otherwise. 38 Cyc. 344. Generally, in other kinds of insurance, the policy protects the assured against matters that may arise during, and only during, a stated period after the issuance of the policy; but the risks of title insurance, although they may be referable to the contingency of future loss, are only designed to save the assured harmless from loss through defects, liens, and incumbrances that may affect or burden the title at the time when the certificate or policy is issued. There is no implied agreement to go beyond the conditions existing at the time the policy is issued and to assume a general liability to indemnify against future incumbrances. 38 Cyc. 349, 350. But the distinction thus existing does not deprive title insurance of any of the essential elements which characterize the contract of insurance." See Cooley's Briefs on Insurance, vol. 1, pp. 21, 324.

The insured and the insurer deal at arm's length. There is no room for the operation of a fiduciary relationship. The title company is in business for profit. It may be willing to assume risks that the insured might think imprudent. The duty to report its findings as to the nature of the title of the property involved to him is nowhere enjoined. The fact that the company often reports its findings preliminarily to him is not evidence that it is compelled to do so. The wisdom of doing this, except in cases where the insurer demands the correction of defects of title before issuing its policy, is not apparent. Under such a hypothesis, it could be said that in every insurance transaction of whatsoever type, the insurer is the agent of the insured. Much more reasonable would be a holding the reverse of this contention. Although the question did not receive extended consideration, nevertheless, in the case of Mayhew v. Melby, 206 Cal. 396, 400, 274 P. 517, 518, we used the following language: "Defendants also contend that the judgment should be reversed for the refusal of the court below to admit in evidence a policy of title insurance * * * issued to plaintiff, which stated that her title was subject to the Melby contract. But said policy could not have been received by her until after her deed had been recorded. Said title insurance company was not the agent of plaintiff, and any knowledge it may have possessed as to the condition of the title was not imputable to plaintiff."

[4] Moreover, if an agency was here conferred upon the title company, it was to search only for matters properly of record, as noted in the above quotation from the escrow agreement. Bothin v. Cal. T. Ins. & Trust Co., 153 Cal. 718, 722, 96 P. 500, Ann. Cas. 1914D, 634. Anything learned about matters not affecting the record title would not in any event be imputed to the principal. If the instruments in question were not properly of record, the title company on its own account, or as agent, had no duty to perform respecting them. As said in the case of Bogart v. George K. Porter Co., 193 Cal. 197, 210, 223 P. 959, 964, 31 A. L. R. 1045: "The rule invoked by counsel is subject to the qualification that 'knowledge *possessed* by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, *although such knowledge may have been acquired before the agency was created*, if it appears that such knowledge was present in his mind at the time he acted for the principal.'" See, also, Cooke v. Mesmer, 164 Cal. 332, 128 P. 917; Christie v. Sherwood, 113 Cal. 526, 45 P. 820.

The findings to the effect that the document was properly recorded and that defendant mortgage company had knowledge of its contents are therefore unsupported by the evidence.

The judgment is reversed, and the cause is remanded for further proceedings within the limits here imposed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.

138 Cal.App. 245

McDUFFIE v. CALIFORNIA TEHAMA LAND CORPORATION.

Civ. 8317.

District Court of Appeal, Second District, Division 2, California.

April 24, 1934.

1. Corporations ⚷503(1).

Provision that corporation "may be sued" in certain county means not merely that action may be commenced, but that it may be prosecuted to final judgment there unless defendant shows sufficient grounds for change (Const. art. 12, § 16).

[Ed. Note.—For other definitions of "Sue," see Words & Phrases.]

2. Corporations ⚷503(1).

Plaintiff may choose as forum of action against corporation any county in state fitting any of various descriptions in constitutional provision (Const. art. 12, § 16).

Const. art. 12, § 16, permits plaintiff at his option to sue corporation in county where contract is made or to be performed, where obligation arises or breach occurs, or in which defendant's principal place of business is situated.

3. Corporations ⚷503(3).

Mere fact of nonresidence is not sufficient ground for changing place of trial of action against corporation (Const. art. 12, § 16).

4. Appeal and error ⚷241.

On appeal from order granting motion of corporation for change of venue, corporation cannot rely on ground for change not specified in notice of motion to support such order.

5. Corporations ⚷503(3).

Evidence *held* not to support order changing venue of action against corporation to county of corporation's principal place of business (Civil Code, §§ 1478, 1488; Code Civ. Proc. §§ 395–397; Const. art. 12, § 16).

Affidavit filed by the opposing party in consideration with the allegations of the complaint concerning the indebtedness contained evidence from which legal conclusion followed that debt was payable and breach of agreement to pay occurred in county where action was brought, and there was no evidence conflicting therewith, while other evidence supporting such legal conclusion was the prima facie case made by the venue raised in the complaint.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by William C. McDuffie, as receiver of Richfield Oil Company of California, against the California Tehama Land Corporation. From an order changing the place of trial, plaintiff appeals.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (A. E. Pennekamp, of Los Angeles, of counsel), for appellant.

Aaron N. Cohen and John L. McNab, both of San Francisco, for respondent.

ARCHBALD, Justice pro tem.

Appeal by plaintiff from an order changing the place of trial from Los Angeles county to the city and county of San Francisco.

Plaintiff, as receiver of the Richfield Oil Company of California, filed his complaint in the superior court of Los Angeles county against defendant corporation for the recovery of the unpaid balance of a certain sum which it is alleged defendant agreed to pay in monthly installments of $1,000 each. The complaint alleges the corporate existence of both parties, but does not allege where the principal place of business of either is located.

Defendant interposed a demurrer to the complaint and filed therewith its notice of motion for an order transferring the place of trial from Los Angeles county to the city and county of San Francisco, upon the sole ground that its principal place of business was in the latter named place. An affidavit of the president of defendant corporation was also filed therewith, stating that the principal place of business of the corporation at the time of the commencement of the action was in said city and county of San Francisco. On the hearing of such motion, plaintiff, by leave of court, filed its affidavit in opposition to the motion, which stated substantially that at all times mentioned in the complaint the principal place of business of said Richfield Oil Company was in Los Angeles, that the indebtedness referred to in the complaint was payable in said county, and that the breach of defendant's obligation to pay occurred there. The matter was continued, over plaintiff's objection, to give defendant an opportunity to file additional affidavits in support of its motion, and on the day set an affidavit was filed by it which denied that the indebtedness was payable in Los Angeles county or that the alleged breach of obligation to pay occurred there, and alleged, "but that in truth and in fact the said obligation arose, was contract-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ed for and was to be performed at and in the city and county of San Francisco."

[1-4] Article 12, § 16, of the Constitution, permits a plaintiff "at his option" to sue a corporation in the county (1) where the contract is made, (2) where it is to be performed, or (3) where the obligation arises, or (4) the breach occurs, or (5) in which defendant's principal place of business is situated. It is well settled that the language "may be sued" means not merely that the action may be commenced, but that it may be prosecuted to final judgment, unless the defendant can allege and show some sufficient ground for a change of the place of trial other than the mere fact that the residence of the corporation is in another county. Cook v. W. S. Ray Manufacturing Co., 159 Cal. 694, 115 P. 318.

Appellant urges that the nonresidence of a defendant corporation in itself is not a sufficient ground to support such a motion, and that, the motion having been made upon that sole ground, defendant could not thereafter show as a ground therefor that the contract was not to be performed or that the liability did not arise, nor the breach occur, in Los Angeles county.

The simple reading of the section of the Constitution above cited shows that it permits such a plaintiff to choose as the forum of his action any county in the state fitting any of the various descriptions in the section; and so the cases all hold, as well as that the mere fact of nonresidence alone is not a sufficient ground for changing the place of trial. Cook v. Ray Manufacturing Co., supra; Lakeside Ditch Co. v. Packwood C. Co., 50 Cal. App. 296, 195 P. 284; Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal. App. 339, 21 P.(2d) 443, and many others. It is equally true that on appeal from an order granting a motion the respondent cannot rely upon a ground not specified in his notice of motion to support such order. McDonald v. California Timber Co., 151 Cal. 159, 161, 90 P. 548.

[5] In order to apply the rules stated, it is necessary to keep in mind the distinction between the several grounds upon which a motion for change of venue may be made under section 397, Code of Civil Procedure, and the various grounds or provisions of said article 12, § 16, of the Constitution, under which a plaintiff may determine in what county he may bring his action against a corporation defendant.

Under section 395, Code of Civil Procedure, a personal action must be tried in the county in which the defendants, or some of them, reside at the commencement thereof. Section 396 of the same Code in effect provides that an action may be tried in any county of the state unless the defendant at the time he answers or demurs files an affidavit of merits and in writing demands a trial in the proper county; and section 397 authorizes the court, on motion, to change the place of trial when the county designated in the complaint is not the proper county, as well as specifying other grounds for such a motion. In view of the section of the Constitution above mentioned, it will be seen that section 395, Code of Civil Procedure, does not refer to corporations, and in consequence, as the cases cited hold, the mere fact that the action is not brought in the county of a defendant corporation's residence does not establish a ground, or "case," for changing the place of trial under section 397 of that Code. Defendant's notice of motion and the supporting affidavit in the instant case do not urge nor support a sufficient ground to bring the case within subdivision (1) of section 397, supra. Undoubtedly if the motion had been submitted on the complaint and supporting affidavit, the court would have erred in granting it. Chase v. Railroad Co., 83 Cal. 468, 23 P. 532. If, however, the complaint itself showed that the facts establishing venue, other than residence, could not exist, a defendant corporation would be entitled as a matter of right to the transfer of the case to the county of its residence, inasmuch as the record before the court on the motion would then show that it was not brought in the proper county. Krogh v. Pacific Gateway, etc., Co., 11 Cal. App. 237, 104 P. 698. Such, however, is not the case here.

Appellant's affidavit in opposition to the motion, which showed that the principal place of business of the Richfield Oil Company of California was at all times mentioned in Los Angeles county, further alleged the legal conclusions which necessarily arose under the facts alleged in the complaint, in view of the residence of the creditor corporation, viz. that the indebtedness referred to in the complaint was payable to said Richfield Oil Company in Los Angeles county and that the breach of such obligation to pay occurred there. Burr v. Western States Life Ins. Co., 211 Cal. 568, 575, 296 P. 273. Respondent's additional affidavit denies "that the indebtedness referred to in plaintiff's complaint was payable to the said Richfield Oil Company at or in the city of Los Angeles, and denies that the said defendant's alleged breach of obligation to pay the same * * * occurred in the city of Los Angeles," and alleges that the "obligation arose, was contracted for and was to be performed at and in the city and county of

San Francisco, the principal place of business of said defendant corporation." It is such affidavit that appellant urges attempts to show a different ground for change of venue than the one set up in the notice of motion.

Strictly speaking, as we have said, the notice of motion does not set up, nor does the supporting affidavit prove, any ground for changing the place of trial fixed by section 397 of the Code of Civil Procedure, but such notice and affidavit do attempt to show that the complaint is not filed in the proper county, under subdivision 1 thereof; and, although in our opinion defectively stated and not proved, yet we think the notice conveyed to plaintiff the information that such was its intention. The last supporting affidavit was an attempt to prove that the complaint was not filed in the proper county because no ground existed permitting such filing in any county other than that of the residence of the defendant corporation, viz. San Francisco county. Taking that view of the affidavit and notice of motion, does the affidavit create a conflict in the evidence on the question raised as to whether or not the debt was payable in Los Angeles county and the breach occurred there?

Certainly it cannot be said that the simple affirmation by one party in an affidavit that the contract was payable in Los Angeles county and the breach occurred there, and the denial of such affirmation in an affidavit by the other, followed by the statement by such denying party that the contract was payable in San Francisco county and that the breach occurred there, were such evidence of ultimate facts that the court by reading both affidavits could reach any fair inference as to which was the truth. Such statements might serve as allegations of ultimate facts in a pleading. Ellis v. Central California, etc., Co., 37 Cal. App. 390, 394, 174 P. 407. When we refer to "ultimate facts" in that connection, however, we mean the facts which it is expected the evidence will support; and in our opinion it is the conflict of evidentiary facts which binds an appellate court. An affidavit, as used here, serves the purpose of evidence, and, if it contains but conclusions drawn from evidentiary facts, it would seem that it takes from the trial judge his function of drawing such conclusions from the evidentiary facts, and but gives him the choice of differing conclusions. In our opinion, in the two affidavits filed last, the only real evidence is the statement of the location of the principal place of business of the Richfield Oil Company, the alleged creditor. This in consideration with the allegations of the complaint concerning the indebtedness is evidence from which the legal conclusions follow that the debt was payable and that the breach of the agreement to pay occurred in Los Angeles county (Burr v. Western States Life Ins. Co., supra); and we fail to find any evidence conflicting therewith. Other evidence supporting such legal conclusion is the prima facie case made by the venue laid in the complaint. Chase v. Railroad Company, supra. In fact, it would seem that to prove the contrary would require evidence showing an express agreement to perform the contract in some county other than Los Angeles. Civ. Code, §§ 1478 and 1488; Burr v. Western States Life Ins. Co., supra. This is not attempted.

Order reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

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138 Cal.App. 319

CRANE CO. v. BORWICK TRENCHING CORPORATION, Limited, et al.

Civ. 8241.

Hearing Denied by Supreme Court June 25, 1934.

District Court of Appeal, Second District, Division 2, California.

April 26, 1934.

1. Principal and surety 🔑136.

Test for determining whether contractor's bond is made for benefit of person other than obligee is that if contract or bond, which are to be construed together, shows that parties intended to and did agree to pay such third person, suit can be brought on bond by third person to recover on the promise so made for his benefit.

2. Principal and surety 🔑136.

Surety on common-law contractor's bond undertaking that contractor should faithfully perform work contracted to be performed which was to furnish and install pipes for proposed water line *held* not liable to seller of pipes used in construction of water line, where bond was solely for protection of water company, and guaranteed nothing to contractor.

3. Trial 🔑388(4).

Findings of fact by trial court were unnecessary, where all of material facts affecting appellant were admitted by pleadings or stipulated.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Crane Company against Borwick Trenching Corporation, Limited, and another. From a judgment for plaintiff, the Fidelity & Casualty Company of New York appeals.

Reversed, with directions.

Jennings & Belcher, of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal by the Fidelity & Casualty Company of New York from a judgment in favor of plaintiff and against appellant and its codefendant.

The Borwick Trenching Corporation, Limited, entered into a contract with Rubio Canyon Land & Water Association of Altadena, consisting of a proposal by said trenching company, dated March 27, 1931, and addressed to said water association, which so far as material here reads as follows: "We will furnish and install the pipe for the proposed water lines on Mendocino, Lake, Calaveras and Morado streets as follows: 10-inch O. D. pipe dipped installed complete, $1.10½ per foot." This was followed by the description of three other sizes of pipe of different diameters and different prices for complete installation. The proposal then continues: "The above prices include the digging, welding, back-filling pipe, boring and tie-ins on new lines. The water company is to furnish all valves and fittings and water to backfill the ditches. * * * All permits are to be furnished by the water company. * * * If bond and additional insurance is to be carried the cost of same will be paid by the water company. * * * All resurfacing of streets are [sic] to be made by the water company." Such proposal was accepted by the water company in the following, dated April 6: "Your bid of March 27, 1931, covering installation of pipe lines as shown on plans submitted to us is hereby accepted under these conditions. You are to furnish bond in the amount of your bid guaranteeing satisfactory completion of the work. You are to furnish insurance to cover us in the same insurance company as your own policy, this policy is to be $50,000 public liability and only for this job. You are to guarantee all work for a period of one year. All work to be done under our supervision. We are to get the benefit of Crane Company's billing of 2% May 10th on the amount of pipe used. We will furnish state permit, county inspector, all fittings not made by welding and resurface streets." The conditions mentioned were "accepted" by the trenching company.

The bond furnished and upon which this action is based reads in part as follows: "We, Borwick Trenching Corp., Ltd., of Downey, California, * * * as principal, and the Fidelity and Casualty Company of New York, * * * as surety, are held and firmly bound unto Rubio Canyon Land and Water Association of Altadena, California * * * in the sum of * * * ($3,200), for the payment whereof said principal and surety bind themselves firmly by these presents. Whereas, the principal has entered into a written contract * * * with the obligee for furnishing and installing 2650 feet eight-inch pipe, 650 ten-inch pipe, 250 six-inch pipe and 150 four-inch pipe * * *; now, therefore, the condition of this obligation is such that if the principal shall *faithfully perform the work contracted to be performed under said contract*, then this obligation shall be void, otherwise to remain in full force and effect. Subject, however, to the following conditions: * * * Third: * * * This bond does not cover any provision of the contract, or specifications, respecting guaranties of efficiency, or wearing qualities; or for maintenance or repairs; nor does it obligate the surety to furnish any bond, policy or obligation other than this instrument. Fourth: That no suit, action, or proceeding by the owner to recover on this bond shall be sustained unless the same be commenced within six months from the completion of said * * * work of improvement * * *."

It was admitted by plaintiff that the work to be done under the contract was completed June 1, 1931, and it was stipulated that plaintiff, between April 1 and April 18, 1931, furnished and sold to the trenching company materials actually used by it in such work, of the reasonable and agreed value of $2,249.90, no part of which was paid. Judgment was given for said amount.

The sole question involved in this appeal is: Was such bond a contract expressly made for the benefit of respondent? If so, it could be enforced by it.

The language of the contract as well as the bond, in our opinion, shows clearly that no attempt was made to furnish a statutory undertaking under section 1183, Code of Civil Procedure. The one in question is a common-law bond, and on its face seems to be solely for the protection of the water company, with reasonable requirements for the protection of the surety. There is nothing in the contract referred to in the bond requiring the contractor to pay for materials furnished in doing the work. Neither does the bond upon its face purport to secure such payment, nor is it conditioned upon the faithful performance of *all of the covenants and agreements of the contract.* Furthermore, respondent's name is not mentioned therein except for the purpose of securing to the water company the discount of 2 per cent., which of itself implies that the water company as well as appellant expected the contractor would pay cash for the pipe to get such discount. The contract requires the contractor to furnish public liability insurance and to guarantee the work for a period of one year; yet the bond excludes liability on account of either, so far as appellant surety company is concerned. The limitation of action on the bond runs against the obligee only.

[1] Under such circumstances can it be said that the bond was made for the express benefit of any one except the obligee therein named? Appellant says no. Respondent says yes, and points to the case of Pacific States Electric Company v. United States F. & G. Co., 109 Cal. App. 691, 293 P. 812, and cases cited. The test for determining whether or not a contract may be said to be expressly made for the benefit of another is laid down in the case of Ryan v. Shannahan, 209 Cal. 98, 104, 285 P. 1045, 1047, where the court says, quoting from the case of French v. Farmer, 178 Cal. 218, 172 P. 1102: "If it can be fairly said from either the contract or the bond, which are to be construed together, that the parties intended to and did agree to pay such third person, a suit could be brought on such bond by such third person to recover upon the promise so made for his benefit."

[2] The contracts in the cases relied on by respondent bound the contractors to furnish the necessary labor and materials for the respective jobs. The courts substantially held that there was necessarily implied therefrom the promise to pay for such labor and materials, and the bonds, guaranteeing as they did the faithful performance of *all the covenants and agreements of* such contracts, became a part thereof and covered such implied promise, and inured to the benefit of the person furnishing labor, etc. In the instant case the proposal of the contractor is to "furnish and install the pipe for the proposed water lines." Undoubtedly under such proposal it would be implied that it would pay for the pipe, although there is no express promise so to do. Turning to the bond involved here, however, we do not find a guarantee on the part of the surety that *all the covenants and agreements of the contracts will be performed*, but only the undertaking that the contractor "shall faithfully *perform the work contracted to be performed.*" We find nothing in the bond indicating that it was the intention or agreement of the surety to guarantee anything to the contractor, nor can we read any such agreement into the plain language used in the bond. The securing of the pipe was a duty placed wholly upon the contractor; and when the pipe was furnished and the work completed, every requirement secured by the bond had been performed. Paying for the pipe and the labor for installation was a matter of no concern to the water association, and was not within the purpose of the bond. "It is elementary that: 'Sureties are never bound beyond the strict letter of their contract; that they have the right to stand upon the precise terms of their agreement, and that there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves.' Callan v. Empire State Surety Co., 20 Cal. App. 483, 485, 129 P. 978, 981." W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 612, 153 P. 743, 745.

[3] The court in the instant case made findings of fact and a conclusion of law. Both are contrary to the conclusions reached by us here. Because all of the material facts affecting appellant were either admitted by the pleadings or stipulated, no findings were necessary.

Under the authority of section 956a of the Code of Civil Procedure, it is ordered that the findings of fact and conclusions of law herein, so far as they affect appellant, be and they are vacated and set aside. The judgment against appellant is reversed and the trial court is instructed to enter a judgment in its favor.

We concur: STEPHENS, P. J.; CRAIG, J.

138 Cal.App. 410

BAIRD v. JAMES A. HILL CONST. CO. et al.

Civ. 8196.

District Court of Appeal, Second District, Division 2, California.
May 1, 1934.

Automobiles 🔑246(58).

Testimony that plaintiff was struck from behind by truck of which he was unaware, while walking along gutter near curb, entitled plaintiff to instruction on last clear chance doctrine.

◆

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by David C. Baird against the James A. Hill Construction Company and others. Action was dismissed as against all except named defendant, judgment was rendered for such defendant, and plaintiff appeals.

Reversed.

W. H. Douglass, of Los Angeles, for appellant.

G. F. McCulloch and J. R. McGuire, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

When plaintiff was about 7 years of age, the right rear wheel of a truck belonging to defendant ran over and so injured his right foot and ankle that amputation was necessary. Within a year after reaching his majority he filed his complaint against various defendants, alleging that his injuries were caused by the negligent operation of the truck. At the trial, the action was dismissed as against all defendants excepting James A. Hill, who owned and operated the truck through his employee at the time of the accident. From a judgment entered on the verdict of a jury in favor of such defendant, plaintiff has appealed.

Plaintiff requested an instruction on the doctrine of last clear chance, which was refused. He testified that he was walking in the gutter within a foot or a foot and a half of the curb, with his back toward the approaching truck, and that he had so walked for forty or fifty feet when he was struck. He argues that the driver would have seen him if he had looked, and that, having had a chance to avoid striking him when plaintiff was not aware of his own danger, the instruction should have been given. Plaintiff's testimony is corroborated for the most part by that of two young men, who at the time of the accident were also small boys and had been playing with plaintiff. One of such witnesses testified that the truck "brushed" plaintiff, causing him to lose his balance and advance his right foot, which was caught under the right rear wheel. If the jury accepted that view of the evidence, it might have concluded that plaintiff was walking along the gutter close to the curb, and that, while unaware of his danger, the truck came up from behind, driving close enough to the curb to brush him, throwing him off balance and causing the injuries; that the driver "must have seen the boy in the road" (Hoy v. Tornich, 199 Cal. 545, 552, 250 P. 565, 568), unconscious of his danger, and could have stopped the truck or swerved it to the left in time to have avoided the accident. In our opinion, under plaintiff's theory of the case and the evidence produced by him in support thereof, he was entitled to an instruction on such doctrine; and its importance to the case is obvious.

As the judgment must be reversed on this ground, we shall not notice other assignments of error.

Judgment reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

CLOGSTON v. SCHIFF-LANG CO., Inc.*

Civ. 7766.

District Court of Appeal, Second District, Division 1, California.
April 24, 1934.

Hearing Granted by Supreme Court June 22, 1934.

Contracts 🔑292½.

Each party to contract, providing for settlement of their differences by arbitration, may insist on execution of such provision (Code Civ. Proc. §§ 1280, 1284).

◆

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by H. D. Clogston against the Schiff-Lang Company, Inc. Judgment for plaintiff, and defendant appeals.

Reversed.

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*For subsequent opinion see 41 P.2d 555.

Rohe, Dottenheim & Weikert and G. V. Weikert, all of Los Angeles (Robert P. Dockeray, of Los Angeles, of counsel), for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

HOUSER, Justice.

Among the provisions of a contract that was entered into between plaintiff and defendant was the following: "Any differences arising between the parties of this contract shall be settled by arbitration, and buyer shall accept goods with such allowance or award as shall be determined by such arbitration, each shipment to be considered separately."

Thereafter, "differences" having arisen between the parties to the contract, without first having arbitrated such "differences," and in the absence of any attempt so to do on the part of plaintiff, he commenced an action in the superior court against defendant for damages, which plaintiff claimed he had sustained by reason of the alleged breach of the contract on the part or defendant.

As far as the same is applicable to the facts herein, section 1280 of the Code of Civil Procedure provides that: "A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract * * * shall be valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for the revocation of any contract. * * *"

By section 1284 of the Code of Civil Procedure it is provided that: "If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

Defendant demurred to the complaint in the action, and, in accordance with the rules of the superior court, attached to said demurrer its memorandum of "points and authorities" in which was contained the statement that: "The complaint shows upon its face that there was an agreement in writing to arbitrate any differences arising under the contract sued upon, and there is no allegation that an arbitration has been had or that plaintiff has offered to submit to arbitration." (Citing authorities.)

The demurrer was overruled. In its sixth affirmative defense, defendant again pleaded the defense that the contract contained the provision hereinbefore set forth, and "that in accordance with said provision in said contract in writing, said defendant has offered in writing, to submit to arbitration the differences between plaintiff and defendant, arising out of said contract in writing, which differences are the subject matter of this action, but plaintiff has failed, neglected and refused, and still fails, neglects and refuses to submit the said differences or any of them to arbitration."

On the trial of the action, with reference to the issue of the right of arbitration, the trial court found "that it is not true that said contract provided for the settlement of any and/or all differences between the plaintiff and defendant arising out of said contract by arbitration to the exclusion of the settlement of said differences by the courts of the state of California."

From a judgment rendered in favor of plaintiff, defendant has appealed to this court.

Although prior to the year 1927, at which time the statutes of this state with reference to the subject of "arbitrations" were amended and new statutes added, it was generally held by our courts that an agreement such as was made by the parties to the instant action was not specifically enforceable, since the time when such amendments to the statutes became effective, the trend of the rulings of this state uniformly has been to the effect that such a provision in a contract entitles each of its parties to insist upon its execution. Pacific Orient Co. v. Superior Court, 203 Cal. 797, 262 P. 1117; Jardine, Matheson & Co. v. Pacific Orient Co., 100 Cal. App. 572, 280 P. 697; Landreth v. South Coast Rock Co. (Cal. App.) 29 P.(2d) 225. And in those jurisdictions (especially in the state of New York) in which arbitration laws identical in character, if not in language, with those of this state have been the subject of consideration, the rulings thereon with reference to the point here at issue have been in accord with those announced by our appellate tribunals. Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N. E. 288; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582; Pacific Indemnity Co. v. Insurance Co. of North America (C. C. A.) 25 F.(2d) 930; S. A. Wenger & Co. v. Propper Silk Hosiery Mills, 239 N. Y. 199, 146 N. E. 203; American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N. Y. 398, 148 N. E. 562.

Even before the 1927 amendments to the

arbitration statutes became effective, in the case of Davisson v. East Whittier L., etc., Co., 153 Cal. 81, 82, 83, 96 P. 88, it was held that a provision in a contract such as that in the instant case was enforceable, that (syllabus) "such arbitration, or an unsuccessful attempt to secure the same, is a condition precedent" to the right to maintain an action for breach of the contract, and that, in the absence of arbitration of, or any attempt on the part of, the plaintiff to arbitrate, any contractual differences which had arisen between him and the defendant therein, in connection with an asserted cause of action, a judgment rendered in favor of the plaintiff in the action for a breach of the contract should be reversed.

It follows that, without reference to other points suggested by appellant herein, the judgment should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

* * *

138 Cal.App. 430

In re MADDUX' ESTATE.

WALLING et al. v. MADDUX et al.

Civ. 9581.

District Court of Appeal, Second District, Division 2, California.

May 3, 1934.

1. **Wills 🔑194.**

Property settlement between testatrix and husband severing marital property rights to determine rights of inheritance and to absolve each from future acts of other affecting property rights *held* not to show intent of testatrix to renounce previous appointment of husband as executor of her will, in view of testatrix' failure to change executor in codicil executed after such settlement (Probate Code, § 401 et seq.).

2. **Executors and administrators 🔑14.**

Where no objections in writing were filed to appointment of executor named in testatrix' will, appointment of such executor *held* not error (Probate Code, § 407).

Appeal from Superior Court, Los Angeles County; May D. Lahey, Judge.

Proceedings in the matter of the estate of Helene D. Maddux, deceased, by Helene V. Bowler Walling and others against J. L. Maddux and another, to contest the appointment of the executor nominated by testatrix. From an adverse order and judgment, contestants appeal.

Affirmed.

L. A. Lewis, D. K. Gault, Thornton, Menzies & Penney and G. Harold Janeway, all of Los Angeles, for appellants.

J. Glenn Moore and Ralph H. Moore, both of Los Angeles, for respondents.

CRAIG, Justice.

Appeal by contestants from an order appointing an executor nominated by testatrix in her last will and testament and from a judgment entered pursuant to trial.

[1, 2] Due execution of the will and codicil here in question was not disputed, the same were admitted to probate, and the executor named in the will was appointed so to act. It appearing that said executor and the testatrix, formerly husband and wife, had, after the execution of her said will, entered into a property settlement agreement, persons who had appeared to contest the probate of the will waived their contest, but contended that said executor had thereby renounced his right to appointment, and that the court was without authority to invoke the nominating provision. By said agreement it was the expressed intention of the parties thereto to forever settle and adjust all mutual and respective rights and obligations arising out of the marriage relation, to determine the respective rights of inheritance, divide all community property between the parties, in full and final settlement of any claim, one upon the other, and to absolve each from future acts of the other affecting property or property rights. The will previously executed was not mentioned therein, nor did the testatrix by her codicil dated thereafter make any change of executor. It is argued, in effect, that the severance of marital property rights and obligations constituted a renunciation of such nomination, but the executed documents do not evidence such intention, nor can it be said that any reason stated for such severance is capable of interpretation as a disqualification. Probate Code, § 401 et seq. And, further, it does not appear that objections in writing to the appointment of executor as required by section 407 of the Probate Code were filed. Hence it must be held that said nominee was appointed fully in accordance with the direction of the testatrix, and that said appointment was not error.

In re Bauquier's Estate, 88 Cal. 302, 26 P. 178, 532.

The order and judgment are affirmed in each appeal.

We concur: STEPHENS, P. J.; DESMOND, J.

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138 Cal.App. 296

JOHNSON v. SUN REALTY CO. et al.

Civ. 8957.

District Court of Appeal, First District, Division 1, California.

April 26, 1934.

Rehearing Denied May 26, 1934.

1. Appeal and error 🔑102, 870(5).
Orders sustaining demurrers to complaint without leave to amend are not appealable, but are reviewable on appeal from judgment.

2. Appeal and error 🔑113(1).
Generally, an order refusing to vacate a judgment is not appealable, but, where the record on appeal from the judgment fails to disclose the grounds of the motion, such order is appealable.

3. Pleading 🔑218(1).
Noncompliance with court rules relating to transfer of demurrer and requiring certificate of good faith did not prevent hearing and disposition of demurrer to complaint.

4. Appeal and error 🔑900.
On appeal, presumption is that trial court's disregard of its own rules was for sufficient cause.

5. Pleading 🔑205(1).
General demurrer to complaint for insufficient facts to state any cause of action should not be sustained if complaint states facts from which any liability results, irrespective of relief sought.

6. Appeal and error 🔑837(4).
Propriety of ruling sustaining demurrer to complaint for insufficient facts to state any cause of action must be determined from a consideration of the scope and effect of the allegations of the complaint.

7. Reformation of Instruments 🔑36(2).
Complaint for reformation of a written contract must allege real agreement, agreement as reduced to writing, wherein writing fails to embody real agreement, facts showing how mistake was made, and that it was mutual.

8. Reformation of Instruments 🔑36(2).
General statement of facts showing real agreement and the agreement as reduced to writing is, if complete, sufficient in suit to reform written contract, though proof may involve details.

9. Reformation of Instruments 🔑36(2).
In suit to reform written contract, complaint need not allege in direct terms that contract was made; it being sufficient if from facts stated it reasonably appears that the making of a contract is alleged.

10. Reformation of Instruments 🔑36(2, 3).
In suit to reform written contract, complaint alleging that subtenant signed written instrument in reliance upon original landlord's representation that it evidenced landlord's consent to assignment to plaintiff of interest of another subtenant, and that landlord later claimed it was assignment of original lease and assumption of its obligations by plaintiff, *held* sufficient as to real and executed agreements and fraud to warrant reformation, though defective as to facts causing mistake.

11. Reformation of Instruments 🔑36(3).
Complaint for reformation of written contract is sufficient if it shows by direct averment that by reason of defendant's fraud executed agreement is not the real agreement.

12. Reformation of Instruments 🔑25.
Reformation will be denied where failure to read contract differing from real contract was wholly due to a party's negligence, but not where such failure was induced by false representations of other party, even though no fiduciary relation existed.

13. Injunction 🔑26(6).
Injunction will not lie to enjoin a judicial proceeding in which party asking for injunction may obtain all the relief to which he is entitled.

14. Injunction 🔑26(6).
In action for rent for $880 in Los Angeles municipal court, defendant who did not ask to have alleged agreement relied on by plaintiff reformed for fraud was not entitled to injunction restraining prosecution of such action, since municipal court could have granted reformation, but defendant was entitled to maintain suit in superior court for reformation of such instrument (Gen. Laws 1931, Act 5238, § 29, subds. 1(a), 4; Civ. Code, § 3423; Code Civ. Proc. § 526).

Appeal from Superior Court, Los Angeles County; J. C. Needham and Isaac Pacht, Judges.

Action by George C. Johnson against the Sun Realty Company and another. From a minute order and a subsequent written order sustaining without leave to amend the general demurrer of the Sun Realty Company to plaintiff's complaint, from a judgment pursuant to such orders and a minute order and a subsequent order denying plaintiff's motion to vacate such judgment, plaintiff appeals.

Reversed, with instructions.

See, also, 215 Cal. 382, 10 P.(2d) 460.

George C. Johnson, of Los Angeles, in pro. per.

Loeb, Walker & Loeb and Louis M. Lissner, all of Los Angeles, for respondent H. F. Metcalf.

GRAY, Justice pro tem.

[1-4] Appellant appeals from (1) a minute order and a subsequent written order, each sustaining, without leave to amend, the general demurrer of the Sun Realty Company, hereinafter called the respondent, to appellant's complaint; (2) a judgment, pursuant to such orders, in favor of respondent for its costs; and (3) a minute order and a subsequent written order, each denying appellant's motion to vacate such judgment. The orders sustaining the demurrer are not appealable, but are reviewable on appeal from the judgment. Harmon v. De Turk, 176 Cal. 758, 169 P. 680. Generally, an order refusing to vacate a judgment is not appealable, but where, as here, the record on appeal from the judgment fails to disclose the grounds of the motion, it is appealable. Hall v. Imperial Water Co., 200 Cal. 77, 251 P. 912. The grounds of the motion are that the demurrer should not have been considered because, (1) when heard, it lacked the certificate of good faith, and (2) it had not been regularly transferred, both as required by court rules. Noncompliance with such rules, to which no penalty was attached, did not prevent the court from hearing and disposing of the demurrer. Wigman v. Superior Court, 74 Cal. App. 132, 239 P. 427. See, also, Five States Timber Co. v. Dwinnell, 54 Cal. App. 113, 203 P. 410. In absence of any showing to the contrary, it will be presumed that the court disregarded its rules for sufficient cause and to subserve the ends of justice, as it had the power to do. Connell v. Higgins, 170 Cal. 541, 150 P. 769.

[5, 6] Since the general demurrer challenges the sufficiency of the complaint to state any cause of action, it should not have been sustained if the complaint states facts from which any liability results, although not for some or all of the relief sought to be obtained. California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297. The propriety of the ruling on the demurrer must be determined by the consideration of the scope and effect of the allegations of the complaint. Biggart v. Lewis, 183 Cal. 660, 192 P. 437. The complaint alleges that on October 17, 1927, the respondent, in writing, leased three rooms in an office building for a term of five years to Edwin T. Kennedy, hereinafter called the defendant; that on May 2, 1930, appellant and another, with respondent's written consent, verbally subleased a portion of such rooms for the remainder of the term; that on November 7, 1930, such other person assigned his interest in the sublease to appellant, defendant and respondent each verbally consented thereto, and respondent presented to appellant a written instrument, which it stated evidenced its consent to the assignment of the sublease and which it asked him to sign; that appellant, believing such statement to be true and relying thereon, signed in the belief that it was a consent to the assignment of the sublease; that, by mutual mistake of the parties, the instrument was so drawn as to now cause respondent to claim it is an assignment of the original lease and an assumption of its obligations; that no consideration has been paid to appellant for assuming such additional obligations; that it was the intention of the parties to sign a consent to the assignment of the sublease, and that the substitution of other wording was due to mutual mistake and oversight of respondent's employees and the parties; that defendant has always retained possession of the rooms not subleased; that respondent has refused appellant's request for permission to examine its lease with defendant on the ground that there was no privity of contract between it and appellant; and that defendant is indebted to appellant for legal services in a specified amount, which he is entitled to offset against rent found due. The complaint further alleges that on July 25, 1931, respondent and defendant filed, in the Los Angeles municipal court, a complaint against appellant, claiming that under an assignment of the original lease, dated November 13, 1930, which they held, appellant had accepted and assumed all of the obligations of the original lease, including payment of rents total-

ing $3.300, for the lessor's benefit, and had entered into and retained possession of the leased premises; and praying for judgment in the sum of $880 for rent, attorney's fees, and costs; that demand for a reformation of the instrument so as to make it a consent to an assignment of the sublease has been made and refused; that on August 7, 1931, respondent served notice that it would move the municipal court to strike out appellant's answer and render judgment against him; that appellant is without an adequate remedy at law, the municipal court is without equitable jurisdiction to reform the written instrument, and, unless the prosecution of such action is restrained until the instrument is reformed, appellant will suffer irreparable loss by not being permitted to offset his claims against defendant against respondent's claims, and a multiplicity of actions will result. The prayer, which gives the gist of the action, asks a reformation of the instrument, and, meanwhile, the restraint of the prosecution of the municipal court action.

[7-12] A complaint for the reformation of a contract should allege what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement. It is also necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that mutuality may appear. Auerbach v. Healy, 174 Cal. 60, 161 P. 1157. While it is necessary to state both the actual and the executed agreements, a general statement, if comprehensive and complete, is sufficient, although the proof may involve details. Gardner v. Cal. Guarantee, etc., Co., 137 Cal. 71, 69 P. 844. The complaint need not allege in direct terms that an agreement was made, but the requirement of pleading is met if it appears reasonably and fairly from the facts stated that, in effect, such an agreement is alleged. Horton v. Winbigler, 175 Cal. 149, 165 P. 423. It would appear, therefore, that the actual and the executed agreements are sufficiently alleged. However, the facts causing the mistake are not alleged, and therefore the complaint in that respect is deficient. Auerbach v. Healy, supra; Horton v. Winbigler, supra. The complaint is sufficient if it shows, by direct averment, that by reason of fraud practiced by one of the parties the executed agreement is not the actual agreement. Pascoe v. Morrison (Cal. Sup.) 25 P.(2d) 9. This it does, for it is alleged that respondent falsely represented that the executed agreement was the one agreed upon, that appellant relied upon such misrepresentation, and was induced thereby to sign. Cross v. Bouck, 175 Cal. 253, 165 P. 702. If the failure to read a contract is solely due to a party's carelessness or negligence, reformation will be denied; but, if such failure or negligence is induced, as here alleged and admitted by the demurrer, by the false representations of the other party that its provisions are different from those set out, the courts, even in absence of a fiduciary or confidential relationship between the parties, will reform the instrument so as to cause it to speak the true agreement of the parties. California Trust Co. v. Cohn, supra. Tested by the above rules, the complaint states sufficient facts for a reformation of the assignment.

[13, 14] The sufficiency of the facts stated to warrant the second part of the relief prayed, to wit, the granting of an injunction, will next be considered. "An injunction cannot be granted: First—To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings." Civ. Code, § 3423; Code Civ. Proc. § 526. The writ will not lie to enjoin a judicial proceeding where the complainant may obtain all the relief to which he is entitled by way of answer, defense, cross-complaint, or intervention in such proceeding. Waymire v. San Francisco, etc., Ry. Co., 112 Cal. 646, 44 P. 1086; Wolfe v. Titus, 124 Cal. 264, 56 P. 1042. Subdivision 4 of section 29 of the Municipal Court Act (Deering's General Laws, Act 5238) provides that: "Each municipal court shall have jurisdiction of all cases in equity, when pleaded as defensive matter or by way of cross-complaint in any case properly pending in such municipal court." Under subdivision 1 (a) of the act, the municipal court had jurisdiction of the action to recover $880 as and for rent. "The reformation of contracts is a branch of the equity jurisdiction." Bradbury v. Higginson, 167 Cal. 553, 557, 140 P. 254, 255. Therefore, since appellant could have pleaded in the municipal court action the same facts as are set forth in the present complaint, he was not entitled to an injunction, for the present action increases, rather than prevents, a multiplicity of proceedings. Although he could have pleaded his equitable defense in the municipal court action, he was not required to do so, and, not having done so, he is entitled to proceed with the present action. Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30

Cal. 309; Golson v. Dunlap, 73 Cal. 157, 14 P. 576.

The judgment is reversed, with instructions to overrule the demurrer.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

138 Cal.App. 328

YEAGER v. BRAY et al.

Civ. 5001.

District Court of Appeal, Third District, California.

April 26, 1934.

Hearing Denied by Supreme Court June 25, 1934.

1. Appeal and error 🔑979(1).

Ruling on motion for new trial for insufficiency of evidence will not be disturbed, in absence of abuse of discretion.

2. Appeal and error 🔑979(2).

If there is any testimony which, if believed, would support a verdict for adversary of party who obtained verdict, order granting new trial for insufficiency of evidence to support verdict will not be disturbed.

3. New trial 🔑72.

Under evidence, defendant truck driver, attempting to pass another truck when visibility because of fog was limited to between 250 and 300 feet, and colliding with plaintiff's automobile approaching from opposite direction, *held* negligent as respects new trial after verdict for defendants.

4. Automobiles 🔑245(79).

Whether plaintiff motorist was contributorily negligent in concluding that defendant's approaching truck attempting to pass another truck would turn back in rear thereof so as to clear plaintiff's path, and whether plaintiff was contributorily negligent in driving between the trucks when defendant suddenly turned across plaintiff's path, *held* fact questions.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by William P. Yeager against J. O. Bray and another, in which there was a verdict and judgment for defendants. From an order granting plaintiff's motion for a new trial, defendants appeal.

Affirmed.

Redman, Alexander & Bacon, of San Francisco, Neumiller & Ditz, of Stockton, and Herbert Chamberlin, of San Francisco, for appellants.

O'Connor, Fitzgerald & Moran, of San Francisco, and Foltz, Rendon & Wallace, of Stockton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to recover damages for and on account of injuries received in an automobile collision, on the 23d day of February, 1932. The defendants had judgment. After the entry of judgment, the court, on the plaintiff's motion made upon all the grounds set forth in the Codes, granted the plaintiff a new trial, specifying, among other grounds, the insufficiency of the evidence to support or justify the verdict of the jury. From this order the defendants are prosecuting this appeal.

The record shows that at about the hour of 7:45, on the morning of February 23, 1932, the plaintiff was driving easterly on the state highway in the county of San Joaquin, a short distance west of the San Joaquin river; that at the same time two trucks, one called the "Fageol" truck, driven by a man by the name of Kerry; the second truck, called the "Reo" in the transcript, driven by the defendant John Melvin Hicks, were being driven in a westerly direction. It appears that these trucks were being driven in a westerly direction. The Fageol truck, driven by Kerry, was in advance of the Reo truck, and was traveling at the rate of about 18 miles per hour. The Reo truck, driven by the defendant Hicks, followed the Fageol truck for a considerable distance, and, just before reaching the point where the collision occurred, attempted to pass the Fageol truck. The paved portion of the highway, along which the trucks were traveling, is shown by the record to be 20 feet in width. On the north side of the paved portion of the highway is a macadam strip 3.7 feet to 4 feet in width, and is abutted by a graveled shoulder 4 feet to 6.3 feet in width. To the south of the pavement is an oiled strip 3.3 feet to 3.5 feet in width, with an abutting graveled shoulder 3.6 feet to 4.5 feet. These figures show a possible width of the highway upon which trucks and automobiles, under stress of circumstances, may travel, of approximately 35 feet.

The morning in question was foggy so that vision was limited to a distance of between

250 and 300 feet. According to the testimony of the defendant Hicks, the highway was dry. According to the testimony of the plaintiff, the highway was wet. From the testimony that the morning was foggy, and that the highway was wet, the court had a right to accept the testimony of the plaintiff as being a correct statement, as it would be more probable that the highway would be wet and, to some extent, slippery, on a foggy morning, not far from the course of the San Joaquin river. After having crossed the San Joaquin river and followed the Fageol truck for a few hundred feet, the defendant Hicks turned the Reo truck to the left, with the expressed purpose of passing the Fageol truck. The defendant Hicks testified that the Fageol truck was traveling at a speed of 18 miles per hour, and that in turning to the left for the purpose of passing the Fageol truck he speeded the Reo up to 20 miles per hour, and at no time exceeded 21 miles per hour. The Fageol truck was loaded with hay and the Reo truck with canned goods. Both trucks were pulling trailers; the Fageol truck and trailer loaded with baled hay occupied a space of 8 feet in width and a length of 52 feet; the Reo truck was of approximately the same width, and with the trailer covered a distance of 48 feet. The driver of the Reo truck, after pulling to the left for the purpose of passing the Fageol truck, sighted the approaching "Plymouth" car (being the car driven by the plaintiff), and, according to his testimony, attempted to pull back to the right-hand side of the road in the rear of the Fageol truck, but, for some reason or other, did not succeed in doing so, and, perceiving that a collision was about to occur between his truck and the on-coming Plymouth, turned sharply to the left and crossed over to the south side of the highway, leaving some space between the Fageol truck and trailer driven by Kerry.

The plaintiff's testimony is to the effect that he sighted the approaching trucks at about 250 or 300 feet distant, through the fog; that at the time he caught sight of the Reo truck he was possibly 200 feet distant, and at that moment the truck was only partly over the center line of the paved portion of the highway in its attempt to pass the Fageol truck; that at that time he was driving the Plymouth at approximately 30 miles per hour, and applied the brakes gently to lessen the speed of the car; that the highway was wet, and he could not apply his brakes with great force on account of the danger of skidding; and that, until an instant or two before the collision, he thought that the Reo truck would pull back behind the Fageol truck and allow him to pass by on the proper side; but, as the Reo truck was driven at an angle across the highway, it left an opening between the two trucks, and at that instant he applied his brakes with full force, in order, if possible, to stop his car, and steered to the open space between the two trucks. This space, however, was not of sufficient width, and the plaintiff's car came in contact with one of the wheels of the Fageol truck, causing the Fageol truck to turn to the left, and a collision also occurred between the two trucks. In the collision the plaintiff suffered severe personal injuries as well as the destruction of his car.

Upon this appeal it is contended that the injuries suffered by the plaintiff were due wholly to his own negligence, or contributory negligence in not immediately stopping his car when he perceived that the Reo truck had turned to the left of the Fageol truck.

[1, 2] The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict is so largely in the discretion of the trial court that its ruling will be upheld unless it appears that there has been an abuse of discretion. If there is any testimony sufficient to support a verdict for the opposing party, if believed by the trial court, the order granting a new trial will not be disturbed. The law relating to the granting of new trials and the limitation upon the powers of an appellate court in reviewing the order of a trial court are so fully set forth in the case of Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951, in an opinion written by Preston, Justice pro tem., that reference thereto only is necessary and need not be elaborated upon herein.

Section 126 of the California Vehicle Act (St. 1923, p. 558, § 126, as amended by St. 1931, p. 2126), specifies that "the driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken, and in every event the overtaking vehicle shall return to the righthand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction."

On the part of the respondent, it is argued that the driver of the Reo truck, in order to comply with this section, should not have attempted to pass the Fageol truck unless there was a visible distance ahead of him of approximately a quarter of a mile. On the part of the appellant it is argued that 300 feet were sufficient.

The language of the driver of the Fageol truck in asking the defendant Hicks as to why he was endeavoring to pass in a fog, heard by the trial court, expresses very forcibly the lack of judgment on the part of the defendant in attempting to pass under the circumstances. Hicks' testimony is to the effect that he speeded his truck up to 20 miles an hour, and at no time exceeded 21 miles. His testimony also is that the Fageol truck was running at a speed of 18 miles an hour. Under such circumstances the Reo truck would just gain 2 miles on the Fageol truck in one hour, or a distance of 176 feet per minute, while the Fageol truck, traveling at 18 miles per hour, would move forward at the rate of 1,585, and a fraction, feet per minute. The testimony shows one of the trucks with trailer covered a distance of 48 feet. The other truck with trailer covered a distance of 52 feet. The testimony is to the effect that the driver of the Reo truck was in the rear of the Fageol truck some 15 feet when he turned to the left in his attempt to pass the forward truck, and, in order to turn in in front of the Fageol truck, a like clearance would be necessary to avoid a collision, and section 126 of the California Vehicle Act specifies that there must be an additional distance of 100 feet in front of the truck. These distances, when computed, total 230 feet. As we have stated, the Reo truck, traveling at 20 miles per hour, would gain on the Fageol truck only 176 feet per minute, during which time the Fageol truck, traveling at 18 miles an hour, would have covered a distance of 1,585 feet. This calculation, carried to its conclusion, would show that in attempting to pass under such circumstances, the driver of the Reo truck should have had a clear vision ahead of at least a half a mile.

On the other hand, if the appellants' contention be accepted that the Reo truck was traveling at a rate of 30 miles an hour, it would have gained on the Fageol truck 17 feet per second, during which period of time the Fageol truck would have moved forward 26 feet, which, added to the distances required by the California Vehicle Act to afford safety in passing, would have necessitated a clear vision of something near 600 feet.

[3] The testimony of all of the parties is to the effect that visibility was limited to between 250 and 300 feet. This résumé of the testimony, if accepted by the trial court, establishes absolutely the negligence of the defendant Hicks, the driver of the Reo truck owned by the defendant Bray.

[4] It cannot be said, as a matter of law, that the plaintiff, as the driver of the Plymouth car, was guilty of contributory negligence at the instant of the collision. The testimony is to the effect that the driver of the Plymouth car was proceeding easterly at the rate of about 30 miles per hour, guiding his car approximately in the center of the paved portion of the highway. Upon perceiving the approach of the trucks, he turned the car to his right-hand half of the pavement, to wit, to the south half thereof, and slackened his speed gently. An instant after perceiving the approach of the forward truck, he observed the Reo truck turning to the left, about one-half of the cab of the Reo truck being visible as it so turned in the rear of the Fageol truck. Under such circumstances, it is a question of fact as to whether the plaintiff, in the exercise of sound judgment as a reasonable man, was entitled to conclude that the Reo would drop back in the rear of the Fageol and not move forward in the perilous attempt to pass the Fageol truck. It must be remembered that, as the Plymouth was moving easterly at the rate of 30 miles an hour, and the Reo truck was moving westerly at the rate of 20 miles per hour, the intervening space was being closed at the rate of 50 miles per hour. In other words, in every second of time, 73 feet of the distance between the Plymouth and the trucks was being eliminated. From the time that the driver of the Plymouth perceived the approach of the trucks, approximately 3 seconds of time elapsed before the instant of the collision.

Again, when the driver of the Reo truck, instead of falling in behind the Fageol truck, made the false move of driving across the highway diagonally to the south side, the testimony is to the effect that the Plymouth car was only 75 feet away, which would give only a trifle over a second of time in which to determine a course of action. At this instant the testimony is that the Plymouth driver applied the brakes forcibly in an attempt to stop his car, and, as there appeared a distance between the two trucks, sought to escape the collision by driving through such opening. Not being of sufficient width, the collision occurred.

Under the circumstances which we have summarized herein, we think the following language contained in the opinion of this court written by Mr. Justice Hart, in the case of Lawrence v. Goodwill, 44 Cal. App. 440, 186 P. 781, 784, not only applicable, but controlling here, to wit: "Common experience tells us that instances often occur in which appalling circumstances of imminent danger or peril so suddenly and unexpectedly confront persons of ordinarily cool and calm temperament and judgment that they for the time lose their presence of mind, or so find themselves in a position in which they are required to make up their minds as to the best or safest course to adopt to avoid the disaster which such circumstances threaten commensurately with the suddenness with which they arise. This appears to be one of such cases; and the courts have uniformly held that in such cases, in which damage or injury has directly resulted from the exercise of an erroneous judgment in attempting to meet or overcome the peril of such circumstances, the party whose act has thus caused the injury will not be held actionably responsible or liable for any injury or damage so caused. Or, as this proposition is stated as follows, in Tousley v. Pacific Elect. Ry. Co., 166 Cal. 457, 137 P. 31, quoting the syllabus: 'A person in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances.' See, also, Shearman & Redfield on Negligence, § 89; Schneider v. Market St. Ry. Co., 134 Cal. 490, 66 P. 734; Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 166 P. 823; Ellis v. Central Traction Co. [37 Cal. App. 390], 174 P. 407, 411." That case also sets forth the rule, supported by abundant authorities, that whether the plaintiff did or did not, in this case, do all that he could reasonably have been expected to do, presents a question of fact for the jury, and, upon a motion for new trial, of course, presents a question of fact for the court, and the trial court's conclusion thereon is binding upon appeal.

Other cases might be cited, but what we have set forth appears sufficient to show that the ruling of the trial court should be sustained, and, while there is testimony in the record other than what we have set forth, upon this proceeding all that is necessary is to take from the record sufficient to show that the trial court did not abuse its discretion in entering the order appealed from.

The order is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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138 Cal.App. 447

SMITH v. BIMINI INCOME PROPERTIES, Inc., et al.

Civ. 9241.

District Court of Appeal, Second District, Division 2, California.
May 7, 1934.

1. Appeal and error 🔑799.

Appellate court must assume truth of uncontroverted statement in motion to dismiss appeal and supporting affidavit, served on appellant's attorney, that appellant is dead.

2. Abatement and revival 🔑58(1).

Action for damages for personal injuries does not survive after plaintiff's death.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Mitchell Smith against the Bimini Income Properties, Inc., and another. Judgment for defendants, and plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Motion to dismiss an appeal from a judgment in favor of defendants in an action for damages for personal injuries suffered by plaintiff, allegedly due to defendants' negligence. The ground of the motion is the death of appellant.

[1] The motion and supporting affidavit were served on appellant's attorney, who has not appeared nor controverted such statement. We therefore must assume that it is true.

[2] No citation of authority is necessary to show that such an action does not survive.

"Actio personalis moritur cum persona" is a legal maxim that has come down to us from the earliest days of the common law (Kramer v. San Francisco, etc., Ry. Co., 25 Cal. 435), and it has not been changed by statute (Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 P. 178).

Appeal dismissed.

We concur: STEPHENS, P. J.; CRAIG, J.

PEOPLE v. MELDRUM. *

Cr. 2479.

District Court of Appeal, Second District, Division 2, California.
April 28, 1934.

Hearing Granted by Supreme Court May 28, 1934.

1. Forgery 🔑44(½).

Evidence sustained forgery conviction of alleged president of corporation who altered check after it was signed by himself and another officer, as required by board of directors, with intent to defraud bank who was liable to corporation for its funds paid out other than on check signed as authorized (Pen. Code, § 470).

2. Forgery 🔑43.

In forgery prosecution against alleged president of corporation who altered check after it was signed by himself and another officer, as required by board of directors, bylaws allegedly providing that president had control over corporation funds *held* properly rejected as immaterial (Pen. Code, § 470).

3. Criminal law 🔑1129(3).

Assignment that court erred in refusing four instructions offered by defendant *held* insufficient to authorize review.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

T. Ben Meldrum was convicted of forgery, and he appeals.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Appeal from an order denying defendant's motion for a new trial, after a verdict of guilty was returned after trial upon a charge of forgery.

As grounds for reversal of the order appellant urges: First, that the verdict is against the law and the evidence; second, that the court erred in certain rulings made during the trial, and in refusing to give four of defendant's requested instructions.

It appears that appellant and one Frances M. Boon promoted a corporation known as the Hollywood Vogue, Inc. They with three employees, who apparently had no financial interest in the concern, were named as directors in the articles of incorporation. It seems to have been agreed between appellant and Boon that neither would draw a fixed salary but that each would be entitled to draw the same amount from time to time as the business permitted. A bank account was opened with the Bank of America in the name of Hollywood Vogue, Inc. In due course a signature card or declaration was filed with the bank, which in part reads as follows:

"To Bank of America Resolved: That this corporation establish in its name a Commercial account with the Bank of America National Trust & Savings Association upon such terms and conditions as may be agreed upon with said bank and that the President and Vice Prest. or Secy. of the corporation be and they are hereby authorized to establish such an account. Resolved: That T. Ben Meldrum Prest. and Frances M. Boon Vice Prest. or B. S. Duper Secy. of this corporation be, and they are hereby authorized to withdraw funds of this corporation from the said account upon checks of this corporation, signed as provided herein with signatures duly certified to said bank by the Secretary of this corporation and said bank is hereby authorized to honor and pay any and all checks so signed, including those drawn to the individual order of any officer or other person authorized to sign the same."

"I hereby certify that the foregoing is a full, true and correct copy of the resolution adopted by the Board of Directors of the Hollywood Vogue, Inc., at a meeting of said Board regularly held on the 14th day of Feb. 1933, and that the signatures appearing on the reverse side of this card are the signatures of the persons duly authorized to withdraw funds of said corporation from said bank in accordance with the above resolution until such authority is revoked by giving written

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 39 P.2d 202.

notice thereof to said bank signed by the officers duly authorized to sign checks as provided herein.

"Witness my hand and seal of the corporation

"[Seal] B. S. Duper, Secretary."

On the other side of the card appeared the signatures of appellant as president, Frances M. Boon as vice president, and B. S. Duper as secretary, two of whose signatures were required on all checks.

On August 23, 1933, Mrs. Boon asked appellant if he would sign with her a check for $10 for her personal account. He replied that he would if she in turn would sign a check for a like amount payable to him. Two checks were then drawn, each for $10, one payable to appellant and the other to Frances M. Boon. Before presenting his check for payment appellant altered it so as to read $50 and cashed it at the bank. This admitted act of altering and cashing the check as altered, forms the basis for the charge of forgery of which appellant was found guilty.

As grounds for reversal of the order denying his motion for a new trial appellant urges: First, that he was president of the corporation and as such had authority to draw on the funds of the corporation on deposit in the bank; second, that the court erred in refusing his offer in evidence of a document which he characterized as the by-laws of the corporation; and, third, that the court erred in refusing to give to the jury four instructions requested by defendant.

[1] The record does not necessarily support the assertion that appellant was elected president of the corporation. Without detailing the evidence on this point, it will suffice to say that there is sufficient evidence in the record to have justified the jury in concluding he never was elected president.

But conceding that appellant was at least de facto president, he with two other directors constituting a majority of the board executed a solemn declaration, which was filed with the bank, declaring that the funds of the corporation on deposit with the bank were to be drawn on only by checks signed by appellant and another officer. This written declaration in effect constituted a contract, binding on the bank and the corporation as well.

Section 470 of the Penal Code, so far as it affects the instant case, reads as follows: "Every person who, with intent to defraud, * * * alters * * * any * * * check * * * or * * * passes, * * * as true and genuine, any of the above-named * * * altered * * * matters, as above specified and described, knowing the same to be * * * altered * * * with intent to * * * defraud any person, * * * is guilty of forgery." There can be no doubt but what appellant, when he raised the check, did so with the intent of making the bank believe it was originally signed and issued for $50, and with the purpose of inducing the bank to pay him $50 on the check. In doing this, he intentionally perpetrated a fraud on the bank, for the bank was liable to the corporation for any of its funds paid out other than on checks signed as authorized. The evidence clearly supports the charge of forgery.

[2] As to the second point, the refusal to allow in evidence the so-called by-laws, it may first be observed that no proper foundation was laid for their introduction as the by-laws adopted at a legally called and held meeting of the directors and stockholders. Again, even if the purported by-laws did provide, as claimed by appellant, that the president had control over the funds of the corporation and therefore had the right to check on the bank deposit, the charge here involved his alteration of a check after it was signed and issued in accordance with the written authority agreed to by him and authorized by a majority of the board of directors. Under the circumstances here involved, the by-laws would be immaterial.

[3] The third error charged is the general assertion that four instructions offered by defendant were refused, and that in doing so the court committed error. This general statement is wholly insufficient to justify the court in giving consideration to this assignment of error. We have, nevertheless, examined the instructions refused, as well as those given, and are satisfied there is no merit in this contention.

The order denying defendant's motion for a new trial is affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

138 Cal.App. 412

QUAIL v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 5132.

District Court of Appeal, Third District, California.
May 1, 1934.

Hearing Denied by Supreme Court June 29, 1934.

1. **Master and servant 🔑405(4).**

Evidence in proceeding to recover compensation for employee's death *held* not to justify finding that he died from effect on his heart of traveling in high altitude.

2. **Master and servant 🔑376(2).**

Fact that employee, dying from heart failure precipitated by physical effort in course of his employment or effect of high altitude, previously had chronic diseased or defective heart, does not warrant denial of compensation for his death.

3. **Master and servant 🔑417(7).**

Industrial Accident Commission's finding, supported by substantial evidence, will not be disturbed on certiorari.

4. **Master and servant 🔑405(4).**

Opinion of deceased employee's physician, based on treatment of patient and post mortem examination, that automobile accident in course of deceased's employment had little or nothing to do with his death from coronary occlusion, *held* sufficient to support Industrial Accident Commission's denial of compensation.

5. **Master and servant 🔑405(4).**

Testimony of chiropractor, treating injured employee merely for dislocated vertebra, that his death was due to exacerbation of heart affliction, *held* insufficient to require award of compensation to his widow as merely creating conflict of evidence and result of speculation (Code Civ. Proc. § 1870, subd. 9).

Term "chiropractic" is defined as system of curing disease by means of adjusting joints of spine by hand, and there was no evidence that chiropractor knew that employee had symptoms of heart ailment or complained thereof, made heart examination by stethoscope or otherwise, or knew that he suffered severe epigastric pains for several days before his death.

[Ed. Note.—For other definitions of "Chiropractic; Chiropractor," see Words & Phrases.]

◆

Certiorari to Industrial Accident Commission.

Proceeding by Sylvia Jane Quail to recover compensation under the Workmen's Compensation Act for the death of Frank E. Quail, employee, opposed by the Department of Public Works of the State of California, employer. Compensation was denied by the Industrial Accident Commission, and claimant brings certiorari.

Commission's findings and decision affirmed.

Chester E. Watson, of Stockton, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

By means of certiorari the petitioner seeks to review the findings of the Industrial Accident Commission to the effect that her husband, Frank E. Quail, who died while he was employed in the state highway division, did not die as a result of injuries sustained from an accident occurring in the course of his employment. Compensation was denied.

The deceased was sixty-five years of age. He was 5 feet 11 inches tall and weighed 190 pounds. For five years he had been employed by the state of California as assistant highway maintenance engineer. March 9, 1933, he drove an automobile in the course of his employment from Sacramento to Donner lake over the Sierra Nevadas. On this journey he reached an elevation of 7,500 feet. Upon his return that day, after passing the summit, an accident occurred. The car left the highway and turned over. It rested upon its left side at a point about 8 feet from the highway. Mr. Quail, apparently uninjured, climbed out over the door, and, securing the aid of a passing truck, they hauled the car back onto the highway. It was slightly damaged, but he was able to drive the machine on its own power. He returned to Auburn that night, where he remained in the hotel. He claimed to have been unable to sleep that night on account of the pounding of his heart. The following day he returned to Sacramento and reported the accident. Feeling unwell, upon the advice of his superior officer, Dennis, he drove home to Stockton. He reclined upon a bed during the forenoon, complaining of difficulty in breathing.

Dr. H. S. Chapman, the family physician, was called about 5 o'clock that day. He reported finding the patient restless, with ashen-colored face. He was breathing hard and fast. He complained of pain in the right chest. He had a sense of impending death. It appears from the record that on March

1st, which was eight days before the accident occurred, Mr. Quail suffered an acute attack of epigastric pain. He then visited a doctor for medical aid. From that date to the time of his death he suffered a recurrence of such pains, together with nausea, vomiting, and constipation. He also had acute precordial pains and pains in the back and beneath the scapulæ. These are symptoms of the heart trouble which resulted in his subsequent death. After examining the patient the doctor found no external bruises, contusions, or apparent injuries as a result of the automobile accident, but discovered that he had dilated pupils of the eyes, a pulse beat of 170, fibrillation and dilation, together with murmuring of the heart. He sent the patient to bed and prescribed medicine for his condition. At 7 o'clock that night Mr. Quail died as a result of what the doctor diagnosed as coronary occlusion. The doctor performed an autopsy and reported that he discovered an enlarged heart with a very sclerotic condition of the coronary arteries. His testimony contains the following expert medical opinion regarding the cause of death: "I believe that death in this case was due to coronary occlusion. Had he been put to bed at absolute rest on March 1st, his life might have been prolonged. The (automobile) accident was only a coincident and I believe had little or nothing to do with his demise."

The record contains no substantial evidence in conflict with the doctor's expert conclusions regarding the cause of death.

It does, however, appear from a statement made by C. E. Bramwell, a chiropractor, that Mr. Quail visited his office at 2:30 o'clock on the afternoon of March 10th and was treated for a dislocation of the spine. Mr. Quail stated to the chiropractor that he had had an automobile accident the preceding day, due to a defect in the free-wheeling system of his machine, and that he left the highway and turned over because he was unable to control his brakes. He was perspiring profusely. He said that he had hurt his neck and that he thought he had a severe cold. There appears to have been no complaint of pain in the region of the heart and no examination in that regard. After the adjusting of the vertebra, the patient seemed to be feeling better. He was instructed to go home and remain quiet, and report his condition the following day. That night he died. In the report of the chiropractor he said: "It is my opinion that the heart had been greatly strained and overtaxed as a result of the accident and that his death was due to that, together with the injury or displacement of the axis vertebra which in my opinion exacerbated the heart condition."

It is contended there is no substantial evidence to refute the theory that Mr. Quail died as a result of the automobile accident, and that the shock therefrom aggravated the chronic defect of his heart, and that since that accident occurred in the course of his employment, the widow is therefore entitled to compensation. It is also urged that the effect upon his heart of traveling in a high elevation was necessarily detrimental to the weakened condition of that organ.

[1, 2] There is no evidence in the record, expert or otherwise, upon which a finding would be justified that the deceased died from the effect upon his heart of traveling in a high altitude. It has been definitely determined that when heart failure is precipitated by the physical efforts of a deceased person in the course of his employment, or by the effect upon his heart of a high altitude, even though he may have previously had a chronic diseased or defective heart, that condition will not warrant the denial of compensation. Knock v. Industrial Acc. Comm., 200 Cal. 456, 253 P. 712. In the present case the evidence fails to show that the heart failure was precipitated by the effect of a high altitude.

[3] It is settled law that the findings of the commission will not be disturbed on certiorari when they are supported by substantial evidence. Walter v. Industrial Acc. Comm., 209 Cal. 635, 289 P. 627; Murray v. Industrial Acc. Comm., 216 Cal. 340, 14 P.(2d) 301; Brandon v. Industrial Acc. Comm., 211 Cal. 341, 294 P. 1064.

[4] In the present case the findings of the commission that "said employee died on March 10, 1933, from coronary occlusion, and death was not caused in whole or in part by an injury arising out of and in the course of the employee's employment," is largely dependent for support upon the opinion testimony of a medical expert. In support of the foregoing findings regarding the cause of death, we are bound by the evidence of Dr. Chapman, who was the family physician of the deceased, who treated him for his heart ailment, and who subsequently made an autopsy on the body of the deceased. He found an aggravated, chronic sclerotic condition of the heart and adjacent arteries. A serious ailment which evidently affected the heart had afflicted him several days before the accident occurred. He died of coronary oc-

clusion. From these conditions the doctor might naturally conclude that the patient, under no circumstances, could long survive. He does say that if the patient had been put to bed on March 1st, when the first attack occurred, and remained there with absolute rest, his life might have been prolonged. There is no intimation that the accident contributed towards, or aggravated the heart ailment which caused his death. Upon the contrary, the doctor says the accident was only a coincident, and that he believed it had little or nothing to do with his demise. This opinion was based upon the doctor's treatment of the patient and his post mortem examination of the heart and adjacent arteries. This furnishes adequate expert medical evidence to support the findings of the commission denying compensation. Bethlehem Shipbuilding Corp. v. Industrial Acc. Comm., 181 Cal. 500, 185 P. 179, 7 A. L. R. 1180; McNamara v. Industrial Acc. Comm., 130 Cal. App. 284, 20 P.(2d) 53. There appears to be nothing in conflict with the foregoing conclusion in the cases of Knock v. Industrial Acc. Comm., supra; Fogarty v. Dept. of Industrial Relations, 206 Cal. 102, 273 P. 791, or Nielsen v. Industrial Acc. Comm. (Cal. Sup.) 29 P.(2d) 852, 853, upon which the petitioner relies. In the case last cited the court says: "The questions of the weight of the evidence and the credibility of the witnesses are for the commission, and, if there is any evidence or reasonable inference which will support the commission's finding, the reviewing court has no power to disturb it."

[5] The petitioner relies upon the statement of the chiropractor, C. E. Bramwell, in support of her application to annul the commission's denial of compensation. The chiropractor did say that the heart had been greatly strained and overtaxed as a result of the accident and expressed his opinion that death was due to exacerbation of the heart condition. There is no evidence he had examined the patient for a heart affliction, or that he had any means of securing information upon which he could base that opinion. We specifically refrain from deciding whether a chiropractor may qualify himself as an expert witness to render a competent opinion regarding the cause of death resulting from heart ailments, although section 1870, subdivision 9, of the Code of Civil Procedure authorizes the admission of the opinion of one who is skilled in any science, art, or trade, regarding his specialty, and it may be true that a chiropractor may be qualified to give expert evidence with relation to heart ailments. The term "Chiropractic" is defined as a system of curing disease by means of adjusting the joints of the spine by hand. Webster's New International Dict., p. 386; Cummings v. State, 214 Ala. 209, 106 So. 852, 854. A chiropractor is not ordinarily a specialist regarding the diseases of the internal organs. He is precluded by statute from practicing medicine in the usual acceptation of that term. Stats. 1923 p. LXXXVIII, Act 4811, § 7, vol. 2, Deering's Gen. Laws of 1931, p. 2375. Even though a chiropractor may qualify as a witness so as to render competent an opinion regarding the cause of death resulting from an ailment of the heart, in the present case the statement of the chiropractor merely creates a conflict of evidence. It does not appear that he knew the patient had any symptoms of a heart ailment, or that he had even complained of any pain or ailment in connection with the heart. He made no examination by means of a stethoscope or otherwise to ascertain the condition of his heart. It does not appear that he even knew the patient had suffered severe epigastric pains for several days before his death occurred. He did not participate in the autopsy. He merely treated the patient for a dislocated vertebra. The record is devoid of evidence of knowledge on the part of Dr. Bramwell which will furnish any basis for his conclusion regarding the cause of death. His conclusion in that regard appears to have been the result of speculation, and therefore of slight value.

The findings and decision of the commission are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

138 Cal.App. 389

RICHARDSON, State Building and Loan Commissioner, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9401.

District Court of Appeal, Second District, Division 1, California.

April 30, 1934.

Hearing Denied by Supreme Court June 28. 1934.

1. Corporations 🔑555.

Superior court has general jurisdiction in equity, and may appoint receiver of corporation's property (Const. art. 6, § 5).

2. Building and loan associations 🔑2.

Building and loan associations' business is subject to the police power (St. 1931, p. 539, § 13.11 et seq.).

3. Injunction 🔑85(1).

Respecting injunctions against building and loan commissioner, principal characteristics of commissioner's position in liquidating building and loan associations are those of public officer charged with statutory duty (Civ. Code, § 3423, subds. fourth and sixth; St. 1931, p. 539, § 13.11 et seq.).

4. Building and loan associations 🔑45(3).

Statute authorizing state commissioner to take over building and loan associations' property *held* not to limit superior court's equity jurisdiction, but deprives shareholders of right to have receiver substituted for commissioner (Civ. Code, § 3423, subds. fourth and sixth; St. 1931, p. 539, § 13.11 et seq.).

◆

Petition by Friend W. Richardson, as State Building and Loan Commissioner, for a writ of prohibition against the Superior Court in and for Los Angeles County, to prohibit the respondent court from exercising jurisdiction in an action brought against the commissioner and the Pacific Building & Loan Association and from appointing a receiver of the association's property then in the possession of the commissioner.

Peremptory writ granted.

Hearing denied by Supreme Court; Preston, J., dissenting.

Clock, McWhinney & Clock, of Long Beach, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles (Bernard Potter, Edward A. Adams, Lobdell & Watt, Malcolm Davis, and R. Lee Collins, all of Los Angeles, of counsel), for respondent.

CONREY, Presiding Justice.

In this proceeding an alternative writ of prohibition was issued, to which return has been made by demurrer, as well as by answer. Petitioner seeks to obtain a peremptory writ prohibiting respondent court from exercising jurisdiction in an action now pending in respondent court, in so far as said proposed exercise of jurisdiction relates to certain described measures of relief demanded by the plaintiff in that action. The action is entitled Morsey et al. v. Richardson, as Building and Loan Commissioner of the State of California et al., and is case No. 360483 in said superior court.

The questions presented herein are all tributary to a problem relating to the jurisdiction of the superior court; and, more particularly, to the limitations which may be found to exist, staying the exercise of judicial power, where such exercise of judicial power would interfere with administrative authority created by statute.

[1] The superior court is a court having jurisdiction in "all civil cases and proceedings," with stated exceptions which have no importance in the present case. Constitution of California, art. 6, § 5. By virtue of this provision of the Constitution, the superior court is a court of general jurisdiction in equity. "The superior courts have complete and full jurisdiction of all cases in equity—the same jurisdiction as that possessed and administered by the High Court of Chancery in England." San Joaquin, etc., Co. v. Stevinson, 175 Cal. 607, 611, 166 P. 338, 340. And it will not be denied that this includes, under some conditions, authority to appoint a receiver of the property of a corporation.

The petitioner herein asks for the writ of prohibition, to prevent the respondent court from appointing a receiver of the property of a building and loan association, viz., Pacific Building & Loan Association, a corporation, in said action No. 360483, and from compelling petitioner to surrender to the receiver the said property, as respondent court threatens to do, notwithstanding the fact that, as shown by the complaint and by the complaints in intervention in said action, the petitioner Richardson is the duly qualified building and loan commissioner of the state of California, and as such commissioner is in possession of the property, business and assets of said corporation by virtue of proceedings taken in accordance with the provisions of section 9 of the "Building and Loan Commission Act" of 1911. St. 1911, pp. 607, 611; amended 1911, Ex. Session, p. 7. Such possession was first taken by H. L. Carnahan, building and loan commissioner, in June, 1931, and his action therein was duly confirmed by the superior court of Los Angeles county, by order made pursuant to the procedure authorized by said section 9. In January, 1932, petitioner, Richardson, became building and loan commissioner by appointment as successor to said Carnahan, and as such successor entered into possession of the property and business of said Pacific Building & Loan Association, all as provided and authorized by law, and until now has continued to hold such possession.

In the year 1931 the Legislature enacted a new "Building and Loan Association Act." St. 1931, p. 483; Deering's Gen. Laws [1931 Ed.] Act 986. This act repealed the "Building and Loan Commission Act" of 1911. But it was provided by the new act (section 14.03) that this act shall be construed as a continuation of, and as amendatory to, the said act of 1911; and that the office of building and loan commissioner created by said former statute "is continued by this act." See, also, section 13.01. From the foregoing statement it plainly appears that, although petitioner, Richardson, acquired his office under the Building and Loan Commission Act of 1911 (as variously amended), his duties and powers are now subject to the provisions of the present law.

It is conceded by respondents, as it must be, that the building and loan commissioner does have the right to take possession of the assets and business of a building and loan corporation, where the conditions call for that procedure, as authorized by the statute. Their claim is that, assuming that in the first instance the commissioner is lawfully in possession for the appropriate purposes of liquidation of the business, yet "this would not at all affect the power of a court to exercise its equity powers and jurisdiction in case of fraud, abuse of discretion, unfairness, etc., during the course of liquidation."

[2] The business of a building and loan corporation, like the business of banking, has inherent qualities and characteristics which affect its relation to the public, and bring it within the scope of the police power of the state. The controlling reasons which justify legislative exercise of the police power in relation to such institutions were very clearly stated in State Savings, etc., Bank v. Anderson, 165 Cal. 437, 132 P. 755, L. R. A. 1918E, 675.

When the building and loan commissioner has taken possession of the property and assets of a building and loan association as provided by section 9 of the Building and Loan Commission Act, and when he retains such possession under the corresponding provisions of section 13.11 et seq. of the Building and Loan Association Act, the position of the commissioner is very similar to that of the state superintendent of banks when, in accordance with the provisions of section 136 of the Bank Act (St. 1909, pp. 87, 115, and amendments thereto; Deering's Gen. Laws [1931 Ed.] Act 652), the superintendent of banks has taken possession of a bank. The situation thus created when the state superintendent of banks, in performing the duties of his office required of him by the statute, takes possession of a banking corporation, was the subject of discussion in an opinion of the Supreme Court in Mercantile Trust Co. v. Miller, 166 Cal. 563, 137 P. 913, 916. The court said that under these circumstances the superintendent of banks is acting as a state officer in his official capacity, within the meaning of section 1058 of the Code of Civil Procedure, which provides that in every civil action, when any state officer in his official capacity is a party, no bond, written undertaking, or security can be required of him, and that therefore, in taking an appeal from a judgment, the officer was exempt from the obligation of giving any undertaking on appeal for stay of execution. It was pointed out by the court that, when the superintendent of banks takes possession, he supersedes the bank officials in the management and control of the business, and acts upon his own initiative, and independent of them. "Thus, apparently, the title to the property passes to him for the purpose of the trust, and through him to the stockholders. While engaged in the process of liquidation and settlement, he holds the property as trustee, to dispose of it as the statute directs. It is an express trust created and imposed upon him by the statute."

The Building and Loan Association Act is a law enacted for the general purpose of providing for the organization of such associations and regulating the manner in which their business shall be conducted; and for the more particular purpose of establishing a procedure under which any building and loan association which has fallen into an unsafe condition "or is conducting its business in an unsafe or unauthorized manner," etc., may be required to surrender its property, business, and assets to a public officer, viz., the building and loan commissioner, for the purposes of liquidation and settlement. The law provides a measure of control of the actions of the commissioner, by proceedings in the superior court of the county in which the principal office of the building and loan association is located, both with reference to the seizure of the association by the commissioner and with reference to his actions in the course of administration of the business of the association by him. Although he has power to sell, convey, and transfer both real and personal property of the corporation, yet this may not be done except on order of the court given and made after a hearing on such notice as the court shall prescribe. And ultimately, when liquidation of the business has been completed, the law requires the commissioner to prepare and file with the court a full and final statement thereof. It is only after due hearing and approval of his account that the liquidation is deemed to be closed.

[3] While it thus appears that the authority of the commissioner over the property and business affairs of the association when in his custody is subject to certain prescribed judicial review and control, the principal characteristics of his position as administrator are those of a public officer charged with a statutory duty which, for reasons of public policy, has been made to include a trust in private property. The statute constitutes a declaration of policy by the state to the effect that the protection of investments in building and loan associations is a special subject of care by the state, and that the measures prescribed in the statute are necessary measures in relation to the welfare of the public. By section 3423 of the Civil Code it is provided that an injunction cannot be granted, "Fourth—To prevent the execution of a public statute, by officers of the law, for the public benefit. * * * Sixth—To prevent the exercise of a public or private office, in a lawful manner, by the person in possession."

[4] The particular question before us relates to the asserted power of the superior court as a court of equity to inquire into the acts of the commissioner and appoint a receiver to take from him the assets in his possession, and thereby in effect remove him from his position as statutory liquidator of the Pacific Building & Loan Association. It is the contention of petitioner that the equity powers of the superior court are not narrowed or diminished by the Building and Loan Association Act. To this respondents reply that they agree, but with the proviso that, should the statute be construed as a law attempting in any way to take from the superior court its jurisdiction as a court of equity, then the statute, pro tanto, is void. We find no reason for disagreement with the principle thus suggested. But we are of the opinion that the statute may be given full effect without impairment of the jurisdiction of the court. In Reclamation District v. Superior Court, 171 Cal. 672, 681, 154 P. 845, 849, the Supreme Court said: "Section 3423 of the Civil Code does not in all of its provisions establish new rules for the granting or denying of preventive relief in equity. Some of the subdivisions are merely declaratory of principles which, in the absence of statute, were and are generally held to govern courts of chancery in determining what causes are proper subjects of equitable cognizance. Subdivision 1 is more than declaratory. It establishes a rule; it limits the right to issue injunctions as that right was understood in the English and American court before the adoption of our Codes. The Constitution of this state gives to the superior courts original jurisdiction 'in all cases in equity.' To the argument that this jurisdiction could not be limited by statute this court said in Spreckels v. Hawaiian, etc., Co., 117 Cal. 377, 49 P. 353, and in Wright v. Superior Court, 139 Cal. 469, 73 P. 145, that subdivision 1 of section 3423 was an exercise of the legislative power to define the rights of persons. It did not limit the power of courts of equity to issue an injunction wherever the complainant was entitled thereto, but so operated on the complainant as to take away his right in certain cases to this form of relief." Further along this line, see Estate of Barnett, 97 Cal. App. 138, 141, 275 P. 453.

So, here, the statutes to which we have referred do not limit the equity jurisdiction of the court, but they do operate on the parties plaintiff (and interveners), in the court below, so as to deprive them of the right to have a receiver substituted for the commissioner. It may be assumed that a case in equity might be stated wherein a party owning or beneficially interested in property held by the commissioner as property of the building and loan association would be entitled to an injunction to prevent some wrongful disposition of such property. Circumstances might be shown to exist, in relation to specific property, where the plaintiff's claim to such property, and the condition of that property in the hands of the commissioner, would authorize, not only an injunction, but the appointment of a receiver of the property and the surrender thereof by the commissioner to the receiver. But this would be an exceptional case, wholly apart and distinct from an action brought by holders of "investment certificates," or "instalment membership shares," or "guarantee capital stock" (as in said action Morsey et al. v. Richardson), wherein the plaintiffs attack the entire administration of the affairs of the corporation by the commissioner, and seek to remove him from his office so far as the described corporation is concerned, and to compel him to surrender the entire business to the court, to be administered by the court through a receiver appointed for that purpose. The assertion of such authority by the court is an assumption of jurisdiction which, under the existing laws, the superior court, with all its equity powers, does not possess.

In accordance with the foregoing opinion, let the peremptory writ issue.

I concur: YORK, J.

Mr. Justice HOUSER, deeming himself disqualified, takes no part in this decision.

138 Cal.App. 432

REDWING v. MONCRAVIE.

Civ. 5096.

District Court of Appeal, Third District, California.

May 4, 1934.

1. Evidence 🔑581.

Proof that witness at former trial was absent from state, counsel's assumption of filing and trial of former action, and stipulation that plaintiff was wife of plaintiff in former action when commenced, *held* insufficient foundation for admission of such witness' former testimony (Code Civ. Proc. § 1870, subd. 8).

2. Evidence 🔑582(3).

Only competent evidence of matter involved in former action, witness' testimony in trial of which is offered at trial of subsequent action because of his absence from state, is record of former action (Code Civ. Proc. § 1870, subd. 8).

3. Evidence 🔑582(3).

Absent witness' testimony at former trial *held* properly excluded, in absence of showing that transcript of evidence taken thereat was made by official reporter, duly appointed and sworn, or that testimony was transcribed or certified as correct (Code Civ. Proc. § 273; § 1870, subd. 8).

4. Appeal and error 🔑843(2).

Instructions specified as erroneous need not be discussed on appeal, in absence of evidence sufficient to sustain judgment for appellant; latter not being prejudiced thereby.

5. Appeal and error 🔑981.
New trial 🔑99.

Granting or denial of motion for new trial for newly discovered evidence is within court's discretion and will not be reversed unless abuse thereof appears.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Rose Marie Redwing against Charles A. Moncravie. Judgment for defendant, and plaintiff appeals.

Affirmed.

Goldman & Lieberman, of Los Angeles, for appellant.

Kidd, Schell & Delamer and Sam E. Edwards, all of Los Angeles, for respondent.

RANKIN, Justice pro tem., delivered the opinion of the court.

This action was brought to recover damages for personal injuries suffered by plaintiff in an automobile accident which occurred while plaintiff was riding as a guest in defendant's automobile. The jury found a verdict for defendant, and plaintiff appeals from the judgment entered upon said verdict.

[1] The first point urged by appellant is that the evidence of the witness Davis, given at a former trial of an action entitled Robert Redwing v. Charles R. Moncravie, should have been admitted in the instant case, and that, if such testimony had been admitted, there would have been ample evidence to sustain a finding of gross negligence by the jury.

At the trial plaintiff offered the testimony of one Ernest Davis given at the trial of said former action, and offered to prove such testimony by reading from an alleged reporter's transcript. Defendant objected thereto on the ground that such testimony was incompetent and that no sufficient foundation was laid. We find no error in the ruling of the court sustaining the objection. The preliminary proof or foundation for the introduction of the former testimony of the witness Davis consisted of proof that Davis was absent from the state, the assumption by counsel on both sides of the filing of the former action and the trial thereof, and a stipulation to the effect that the plaintiff, Rose

Marie Redwing, at the time the former action was commenced, and at the time it was tried, was the wife of Robert Redwing, the plaintiff in the former action. It is apparent that this proof does not establish a sufficient foundation for admission of the former testimony of the absent witness.

Subdivision 8 of section 1870 of the Code of Civil Procedure, upon which appellant relies, provides, in substance, that the testimony of a witness out of the jurisdiction, given in a former action between the same parties relating to the same subject-matter, may be given at a trial. The facts established not only failed to show the former action was between the same parties, but, on the contrary, establishes the fact that the instant case was not an action between the same parties. Appellant argues that the term "same parties" is construed to include "all persons who are represented by the parties and claim under them or in privity with them." Privity is not shown, but only assumed, as there is nothing in the record to disclose what matters were in issue in the former action.

[2, 3] This brings us to the question as to whether the same matter is involved in this action as in the former action. The only competent evidence to prove the matter involved in the former action is the record thereof. Tritch v. Perry et al., 48 Colo. 339, 108 P. 981. The record in the former action was not offered. The ruling of the court was proper for the further reason that there was no showing that a transcript of the evidence taken at the former trial was made by an official reporter duly appointed and sworn, or that the testimony given at the former trial was transcribed or certified as being correct. Section 273, Code Civ. Proc.; Reid v. Reid, 73 Cal. 206, 14 P. 781; In re Estate of Benton, 131 Cal. 472–480, 63 P. 775.

Plaintiff's offer of proof being properly rejected by the court, it is immaterial as to what its effect might be if admitted.

[4] Appellant concedes that there is no positive evidence in the case tending to prove Moncravie's gross negligence. It follows that, there being no evidence sufficient to sustain a judgment for plaintiff, she could not be prejudiced by the giving of instructions numbered 18 and 33, specified as erroneous, and it is unnecessary to discuss the same.

[5] Appellant claims error in the denial of her motion for a new trial. The only ground for new trial urged is that of newly discovered evidence. The granting or denial of the motion on this ground is within the discretion of the court, and will not be reversed unless it appears that the trial court abused its discretion. No such abuse of discretion is shown.

For the reasons herein stated, the judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

138 Cal.App. 435

EARL v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Civ. 7888.

District Court of Appeal, Second District, Division 1, California.
May 7, 1934.

Hearing Denied by Supreme Court July 5, 1934.

1. Evidence ⚷518.

In action by broker on blanket bond indemnifying against losses from fraud or dishonesty of employees excepting losses caused by trading, where evidence did not show that term "trading" was used in other than its common meaning, admitting expert testimony that loss was not sustained through trading *held* error.

2. Insurance ⚷430.

In action by broker on blanket bond indemnifying against losses caused by fraud or dishonesty of employees except losses caused by trading, loss caused by buying on margin for customer *held* loss from "trading," precluding recovery on bond, notwithstanding that buy order on which losses occurred was executed on employee's fraudulent representation that order had been approved without margin from customer.

[Ed. Note.—For other definitions of "Trading," see Words & Phrases.]

3. Insurance ⚷665(4).

In action by broker on blanket bond indemnifying against losses caused by fraud or dishonesty of employees, evidence established that losses from purchase of 1,000 shares on margin were not caused by fraud of employee, precluding recovery on bond.

Evidence showed that buy order of 1,000 shares which employee fraudulently represented as approved without margin from customer was not executed, and that later buy orders of 200 and 800 shares were executed without misrepresentations by employee and that broker condoned misconduct of employee by going through with buy orders without margin by customer.

◆

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by William Jarvis Earl, doing business as the Wm. Jarvis Earl & Co., against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals.

Reversed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

William M. Rains, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Defendant appeals from a judgment rendered against it for the sum of $10,085 upon a "broker's blanket bond" issued by defendant to plaintiff, to indemnify him against any losses suffered by him through certain prescribed acts of his employees in the brokerage business in which he was engaged in the city of Los Angeles.

The provisions of the surety bond in question which are material to the points raised on this appeal read as follows:

"In consideration of the premium of Eleven Hundred and 00/100 ($1,100.00) Dollars, paid by Wm. Jarvis Earl & Company, hereinafter referred to as the Insured, to the Fidelity and Deposit Company of Maryland, hereinafter referred to as the Underwriter, * * * the Underwriter hereby undertakes and agrees to indemnify the Insured, and hold it harmless from and against any loss, to an amount not exceeding Twenty-five Thousand and 00/100 ($25,000.00) Dollars, of money, currency, bullion, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, warehouse receipts, bills of lading, or similar securities, in which the Insured has a pecuniary interest, or held by the Insured as collateral, or as bailee, trustee or agent, * * * sustained by the Insured. * * *

"(a) Through any dishonest act of any of the Employees wherever committed, and whether committed directly or by collusion with others.

"(b) Through larceny, whether common law or statutory, robbery, burglary, hold-up, theft, or other fraudulent means. * * *

"This bond does not cover— (f) Any loss directly, or indirectly from trading, actual or fictitious, whether in the name of the Insured or otherwise, and whether or not within the knowledge of the Insured, and notwithstanding any act or omission on the part of any Employee in connection therewith, or with any account recording the same."

In plaintiff's employ was one R. V. Kessler, who, as "head customers' man," had authority to confirm and put through customers' orders, when such orders were executed on the New York Stock Exchange. Another employee was Fred T. Lane, who as cashier had general oversight of customers' accounts and also had authority to confirm and direct the execution of customers' orders. A third employee was one W. C. Gatlin, who, as a "customers' man," was engaged in securing customers' orders. Such orders required the confirmation of either plaintiff, Kessler, or Lane before they were accepted and executed.

About October 15th, Gatlin brought one Louis Stein into plaintiff's place of business and introduced him as a prospective customer. Stein signed a margin card which was placed in the customers' files for use in connection with any orders Stein might place with the house. He was represented by Gatlin as a heavy trader whose business would be a valuable acquisition for the house, if secured. On the morning of October 17th, Gatlin came to plaintiff with an order from Stein for the purchase of 1,000 shares of International Telephone & Telegraph stock at $124 per share. As this purchase was to be made on the New York Stock Exchange, it would have had to be executed through some broker who had New York Stock Exchange connections. When plaintiff was advised by Gatlin that no money had been put up on the order by Stein, plaintiff refused to o. k. the order and told Gatlin, "You go get the check and then if it is good, I will be glad to o. k. the order." Later the same morning, Gatlin went to Kessler with the request that he put through the Stein order. Concerning this episode, Kessler testified: "Mr. Gatlin came to me with a buy order for 1,000 shares of International 'Phone for Mr. Stein's account. I told Mr. Gatlin I couldn't put it in because there was no money up. I knew that there had been no money put up, and that he would have to get Mr. Earl to o. k. it, and he left my desk. * * * Mr. Earl was standing possibly ten feet behind me at the telephone desk, and Mr. Gatlin went to Mr. Earl, and I didn't hear what they said, and then Mr. Gatlin came back to me and threw the order on my desk and said, 'O. k.' and I said, 'Did Mr. Earl say it was o. k.?' and by that time Mr. Gatlin had walked over to a chair by Mr. Stein, and he turned around and hollered back, 'Yes, o. k.,' so I put the order in. * * *"

Stein and Gatlin remained in plaintiff's board room awaiting word as to the execution of the order. When about 12 o'clock noon, the closing time of the New York Stock Exchange, no word had been received that the stock had been purchased, Stein canceled the order. As Stein and Gatlin were about to leave plaintiff's office shortly after 12 o'clock, Gatlin went to Kessler, and said, "We are going to buy 200 shares at the opening in the morning." Whereupon Kessler wrote out a new buy order for 200 shares of International Telephone & Telegraph stock at 124, which he advised Gatlin and Stein he would put through early on the following morning. The next morning Kessler put through the 200 share buy order and in due course Stein and Gatlin, who were in plaintiff's office waiting for word as to the execution of the order, were advised that the 200 shares had been secured at 123⅜. After a few minutes of conference between Stein and Gatlin, Gatlin went to Kessler's desk, wrote out an order to buy 800 shares of International Telephone & Telegraph stock, and after signing the name of "Lou Stein" to the order in the presence of Kessler, handed the order to Kessler for execution. This order for 800 shares was immediately put through and Stein advised of the purchase.

Fred T. Lane, plaintiff's cashier, testified that about 11 o'clock on the morning of October 18th, after both purchase orders had been put through, he went to Gatlin and told him to get a check from Stein for $38,000, which was the margin the house required on the two orders. Gatlin replied that he would secure the required check. Shortly after this conversation with Gatlin, plaintiff learned for the first time from his cashier Lane that the stock had been purchased for Stein. Plaintiff at once went to Gatlin, and, according to plaintiff's testimony, the following conversation took place: "I told Mr. Gatlin to get a check on this account right away, and he said he would, and he asked me if it would be all right if he got one that evening and brought it down in the morning and I said, 'No, we want the check immediately,' and he said he would go out then and there and get one. * * * I told him what we wanted him to do and what we expected him to do, and he left shortly after that." Plaintiff, testifying to a conversation with Gatlin later in the afternoon, said, "I met Mr. Gatlin on the street as I was going from the office and he was coming down with the check and in passing he said, 'I have the check, Mr. Earl,' and started to show it to me and I said, 'That is fine Mr. Gatlin; take it right up to the cashier.'"

Gatlin delivered the check, which was postdated October 19th, to Lane, the cashier, and stated that Stein had told him that money to take care of the check would be in the bank on which the check was drawn at 11 o'clock on the following morning, October 19th. When presented for payment at the bank on the following morning, payment was refused. Thereupon plaintiff sold the stock purchased for Stein, and, by reason of the falling market, the stock sold for $10,085 less than was paid for it when purchased. To recover this loss, plaintiff brought this action against defendant on the "blanket brokers' bond" hereinbefore referred to.

During the trial, plaintiff called to the stand two witnesses who were engaged in the brokerage business who were characterized by plaintiff's counsel as "expert witnesses." To each was propounded what was termed a hypothetical question, which consisted of a recital of the testimony of plaintiff's witnesses as to the conversations and events relating to the Stein orders and their execution. At the close of this recital the witness was asked, "Assuming all of the foregoing facts to be true, have you an opinion as to whether or not the loss of the sum of $10,085 resulted directly or indirectly from trading actual or fictitious; if so, what is that opinion?" Over defendant's objections, both witnesses were allowed to express an opinion, which in each instance was in the negative.

In urging a reversal of the judgment, appellant places its main reliance on the contention that the loss suffered by plaintiff was clearly shown to have resulted "from trading," and that defendant had specifically excepted such losses from its liability under the policy in the following paragraph: "This bond does not cover—(f) Any loss directly or indirectly from trading, actual or fictitious, whether in the name of the Insured or otherwise, and whether or not within the knowledge of the Insured, and notwithstanding any act or omission on the part of any Employee in connection therewith, or with any account recording the same."

[1-3] That the loss was one suffered in a trading transaction cannot successfully be disputed. It is true two of plaintiff's witnesses, in response to hypothetical questions, over defendant's objections, testified in their opinion that the loss was not suffered directly or indirectly from trading, but these opinions were erroneously admitted by the court. The question propounded to these witnesses was

one for determination by the court and not a proper question for a witness' conclusion. If the issue involved was that the word "trading" as used in the bond had a limited or peculiar meaning when used by brokers and bonding houses in the writing of such indemnity policies, it would have been proper to have offered the testimony of some qualified witness to show such meaning. The hypothetical question called for a widely different answer than that which would have been proper in showing the accepted meaning of the term when used under the circumstances here involved.

In the absence of any evidence showing the term "trading" was used in other than its common meaning, there would seem no escape from the conclusion that the transactions here involved came within the ordinary meaning of the term.

Respondent places his main stress upon the contention that the loss was caused by the "fraud and dishonest act" of Gatlin in that he represented to Kessler that plaintiff had o. k.'d the first 1,000 share buy order, when in truth plaintiff had refused to o. k. the order without a margin check from Stein. This contention of respondent in no wise answers the argument that the loss was one incurred in trading.

In the case of Harris v. National Surety Co., 258 Mass. 353, 155 N. E. 10, a situation similar to that here involved was before the court. Plaintiff, who was in the brokerage business, had secured from defendant a "broker's blanket bond" to cover all his employees. The bond contained a paragraph identical in every respect with that here involved, which excepts trading losses from the liability of the bond. One Jacobs, an employee of plaintiff, opened a trading account with plaintiff in the name of Susan M. Collins. All orders for buying and selling on the account were given by Jacobs, as the ostensible agent of Susan M. Collins. He secured surreptitiously the monthly account statements issued by the house to Susan M. Collins.

After carrying the account for some months, the margin became insufficient and the securities then in the account were sold at a loss to the account of $6,975. It was then discovered that Susan M. Collins was a fictitious name under which Jacobs had been operating for his own account. Plaintiff filed action against the bonding company for the amount of the loss on the theory that the loss was caused by the dishonest acts of Jacobs in using the fictitious name under which to operate for his own account.

The court, admitting that the conduct of Jacobs was dishonest and fraudulent, so far as his employer was concerned, held that the loss was one suffered in trading, and, under the exception clause, the bonding company was not liable.

The reasoning as also the conclusion of the court in the recently decided case of Security Trust & Savings Bank of San Diego v. New York Indemnity Co. (Cal. Sup.) 31 P.(2d) 365, 367, gives support to our conclusions on this point. There the indemnity bond excepted from the liability assumed "loss effected directly or indirectly by means of forgery," and "any loss resulting from any loan made by the Insured." A loan was made to one Howard, who, in making representations which induced the loan, committed forgery, and, as stated by the court, acts which clearly constituted theft as defined by our Penal Code (section 484). Losses by theft were specifically covered by the bond. Notwithstanding the declared criminality of Howard's acts in obtaining the money, the court held the bonding company was not liable under its bond because of the exceptions provided for in the bond.

The evidence in the instant case would seem the more readily to bring it within the exception clause than the case just referred to, for there is not sufficient evidence in this case to justify a finding that Gatlin was guilty of any of the crimes specified in the bond.

Still other considerations would seem to militate against respondent's position. First, it clearly appears that the 1,000 share order in connection with which Gatlin made the misrepresentation was canceled and was never in fact executed. There is no evidence that Gatlin made any misrepresentation in connection with the 200 and 800 share buy orders. Kessler had full authority to put through these orders without any o. k. from plaintiff. That Kessler may have assumed that, if plaintiff approved the 1,000-share buy order without a margin check, he would have approved the 200-share buy order, does not justify the implied finding that the misrepresentation was made in connection with the orders actually executed, or that the loss resulting from the two purchase orders was caused by Gatlin's misrepresentation in connection with an order never executed.

Another factor which weakens respondent's contentions arises from the fact that, after plaintiff learned that the two orders had been executed on the following day, he seems to have sanctioned the purchase without first securing a margin check, by directing Gatlin to go and get a check from Stein. This Gatlin at once proceeded to do as ordered, and, upon returning with a check, plaintiff commended Gatlin's accomplishment and directed that he take it to Lane, the cashier. When it was handed to Lane, he observed that it was postdated and only for $25,000. Gatlin explained that Stein said he would have the money in the bank on which the check was drawn at 11 o'clock the next morning, and that Stein would send a check for the remaining $13,000 to make up the margin requirement the following morning. The check and the explanation was accepted by Lane, who as cashier had full authority in such matters. This conduct on the part of Earl and Lane fairly justifies the inference that plaintiff had decided to waive or condone Gatlin's conduct in misrepresenting Earl's attitude regarding the 1000 share purchase order and go through with the two purchase orders as they had been made.

From the foregoing it follows, and we so decide, that the findings that plaintiff was not engaged in trading; that the acts of Gatlin in connection with the purchase orders were perpetrated with the intent to defraud plaintiff; that the loss suffered by plaintiff was caused by the fraudulent acts of Gatlin; that Louis Stein did not place any orders for the stock purchased; but that the same were fraudulently placed by Gatlin—do not find support in the evidence.

For the reasons indicated, that the evidence fails to support the findings and judgment, and the errors of the court in overruling defendant's objections to the hypothetical questions, the judgment must be reversed. It is so ordered.

We concur: HOUSER, Acting P. J.; YORK, J.

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138 Cal.App. 424

GAMBERG v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9180.

District Court of Appeal, First District, Division 1, California.
May 3, 1934.

1. Appeal and error 🔑1011(1).

Reviewing courts may not invade field of fact finding body, and where substantial conflict of evidence exists, findings are conclusive.

2. Appeal and error 🔑1011(1).

In determining whether there is conflict in evidence which will prevent reviewing court from disturbing findings, mere conclusions will not serve to meet definition of substantial or any evidence as against positive direct evidence of fact.

3. Appeal and error 🔑1011(1).

In determining whether there is substantial conflict in evidence which will prevent reviewing court from overturning findings, conclusions of expert based on incorrect or faulty hypothetical case are of no practical value.

4. Master and servant 🔑405(4).

Evidence *held* insufficient to support finding in compensation case that bookkeeper's hernia was not caused or exacerbated by injury arising out of and in course of employment.

Testimony of bookkeeper showed that hernia was caused when he attempted to prevent 40-pound ledger, which had slipped from his grip, from falling to floor, and written reports of insurance carrier's doctors did not raise substantial conflict with such testimony.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Irving Gamberg, opposed by Redlick-Newman Company, employer, and State Compensation Insurance Fund, insurer. To review an order of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Annulled and proceeding remanded.

William Berger, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

KNIGHT, Justice.

This is a proceeding to review a decision of the respondent commission denying petitioner's application for compensation for an injury which he claims to have sustained in the course of his employment.

It is conceded by respondents that at the time the application was filed, heard, and determined, petitioner was suffering from a left inguinal hernia; but the refusal to compensate him therefor was based upon a finding of the referee that the same was not "caused or exacerbated by injury arising out of and in the course of" his employment.

At the time the injury is alleged to have happened petitioner was and continuously for the preceding nine years had been employed as bookkeeper by Redlick-Newman Company. He was the sole witness before the referee and according to the uncontradicted testimony given by him he sustained the injury about 4:30 o'clock on the afternoon of Saturday, March 11, 1933, while handling a heavy ledger, weighing between forty and forty-five pounds. There were five such ledgers, each containing approximately 1,800 separate accounts; and part of petitioner's duties required him to distribute the ledgers among girl accountants in the office for the purpose of having them work on the cards contained therein on which the accounts were entered; and in order to transport the ledgers back and forth to said accountants it was necessary for petitioner to lift the ledgers and the trays upon which they rested from a small truck, the bed of which stood about a foot and a half above the floor, to a larger truck, the bed of which was three and a half feet above the floor. On this particular occasion, while attempting so to transfer one of the ledgers from one truck to the other, the ledger slipped out of his grip and was about to fall to the floor. He stooped suddenly and caught it, and in doing so felt a sharp pain or kink, "needlelike" as he described it, in the region of his hip. For a moment he was unable to straighten up; but shortly afterwards he "braced up" and then sat down to his work. Ten or fifteen minutes later he was seized with pains and cramps in both groins, and in the "lower part of the stomach." He also "felt a bulge" in his groin and pains in his leg. He mentioned the matter to the foreman in the office, but not realizing anything serious had happened to him he remained at his work the rest of the day. Upon reaching home that evening he felt sick. He was unable to eat, and felt "all jumpy and tired." He took a hot mustard bath and a physic and went to bed, applying a hot water bottle to the left inguinal region. He remained in bed all the next day, Sunday. In applying the hot water bottle he noticed the swelling on the left side. On Monday morning he was still suffering pain, but feeling somewhat better, went to work. He refrained, however, from doing any lifting. After arriving at the company's office he overheard the secretary arranging for medical care for another employee who had turned his ankle, which prompted petitioner to explain to the secretary the injury he received the Saturday previous; whereupon she instructed him to consult the insurance carrier's doctor, which he did during the noon hour, and was examined by Dr. Gilbert. The next day, Tuesday, March 14, 1933, he called at the office of said commission and filed his application for compensation; and at 2:30 of the same day the referee proceeded with the hearing of the application. The insurance carrier, State Compensation Insurance Fund, was represented by its attorney; but petitioner appeared without counsel. He was informed by the referee that he was entitled to a continuance to obtain counsel if he so desired or could proceed at once and they would "find out all the facts." Petitioner stated he had no objections to proceeding, and thereupon he was sworn, examined by the referee and cross-examined by the attorney for the insurance carrier. At the conclusion of his testimony the matter was left "open five days for filing of report of Dr. Gilbert," a copy of which was to be sent to petitioner and the matter was then to be submitted for decision. However, following the hearing and on the same day thereof petitioner was examined also by Dr. Holmes, assistant medical director of the insurance carrier; and on March 17, 1933, his written report with the one prepared by Dr. Gilbert, both of which were addressed to the insurance carrier, were filed with the commission; and on March 22, 1933, the referee filed his adverse findings, which on the same day the commission adopted and denied petitioner's application.

The record further shows that on March 15, 1933, the day following the hearing before the referee, and prior to the filing of the written reports of the insurance carrier's doctors, petitioner of his own accord consulted Drs. Eloesser and Rogers, and on March 27, 1933, an operation was performed for the reduction of the hernia. Subsequently, and on April 10, 1933, petitioner filed a petition for a rehearing of his application based mainly on the written report of Dr. Rogers; but a rehearing was denied.

[1-3] It is well settled, of course, that reviewing courts may not invade the field of the fact-finding body; and consequently where a conflict of evidence exists the findings of the trier of the facts are conclusive. But it is equally well established that the application of the foregoing rule is limited to cases where the conflict is substantial and real, and not fanciful or fictitious (Thoreau v. Industrial Accident Comm., 120 Cal. App.

97, 7 P.(2d) 1039; Burns v. Faget Engineering Co., 53 Cal. App. 762, 200 P. 818), nor a mere pretense (Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377); and in this regard it has been said that mere conclusions will not serve to meet the definition of substantial or any evidence as against positive, direct evidence of a fact (Barton v. McDermott, 108 Cal. App. 372, 291 P. 591); also that the conclusions of an expert based upon an incorrect or faulty hypothetical case are of no practical value (North Elk Oil Co. v. Industrial Accident Comm., 81 Cal. App. 582, 254 P. 582).

[4] Nowhere is it claimed by respondents in the present proceeding that the incident relating to the falling and sudden grasping of the ledger which petitioner testified was the direct cause of the hernia did not happen; and an analysis of the reports of the insurance carrier's doctors shows that neither went so far as to venture the unqualified opinion, as expressed in the referee's findings, that petitioner's acute condition was not caused or exacerbated by the happening thereof. In this regard Dr. Holmes' summary was: "I cannot believe that the so-called incident had any *particular* bearing upon his present condition." (Italics ours.) And such statement was further qualified by the one preceding it wherein he said: "* * * it must be admitted that the catching of the 35 lb. tray did exert a mild strain upon his muscles." And although Dr. Gilbert in his report stated that in his opinion the hernia already existed, he went on to say: "The sudden effort of last Saturday forced additional intestinal contents into the preexisting hernia calling it to the patient's attention." Furthermore, it is apparent that the qualified opinions thus expressed by the insurance carrier's doctors as to the improbability of the Saturday incident being the original cause of the hernia are based on the false assumption of certain material facts. For example, Dr. Holmes states in his report that petitioner "was lifting a ledger tray off an adding machine truck to place it on a table," and Dr. Gilbert states in his report that petitioner is "a carpenter" and "was moving a steel ledger weighing about forty pounds from one desk to another." It is also apparent that the findings made by Drs. Eloesser and Rogers after having operated on petitioner proved the diagnosis of the insurance carrier's doctors which were founded on external examinations to be unsound and incorrect. That is to say, Drs. Holmes and Gilbert diagnosed the case as a "complete" left hernia; and in this connection Dr. Holmes stated: "The left external inguinal ring is found to be dilated, admitting two fingers with ease. The walls are relaxed and can be stretched without causing more than moderate discomfort" and "with only moderate tenderness." And Dr. Gilbert stated that in his opinion the hernia had been in existence for "a great many years and presents through widely dilated rings"; whereas the operating surgeons found an "incomplete" hernia "probably traumatic in origin"; that it was "very tender on palpation, and the external ring is moderately enlarged, permitting the entrance of index finger"; also that the "peritoneal covering of the herniation appeared thin and of recent origin." Moreover, in clear negation of the theory of a pre-existing hernia, the evidence shows without dispute that during the nine years petitioner was employed by said firm he had never been sick a single day, and that "a year or two" before this accident happened he was given a thorough physical examination by a doctor preliminary to taking out group insurance for his employer; and at that time no defects whatever were found in his condition.

For the reasons stated it is our opinion that when the written reports of the insurance carrier's doctors, upon which are based the referee's findings and the commission's decision, are measured by the legal rules above set forth, the qualified opinions expressed in said reports do not raise a substantial conflict with the positive, undisputed, unimpeached testimony of petitioner that said incident did bring about the acute condition from which he was suffering when examined by said doctors three days after the incident happened, and which admittedly disabled him from work and required an operation for its correction. Accordingly, the referee's finding that said hernia was not caused or exacerbated by an injury arising out of and in the course of said employment and the commission's decision denying petitioner any compensation whatever on that ground are annulled (Singer v. Industrial Accident Comm., 105 Cal. App. 374, 287 P. 567; Winthrop v. Industrial Accident Comm., 213 Cal. 351, 2 P.(2d) 142; Thoreau v. Industrial Accident Comm., supra), and the proceeding is remanded to said commission for further action in accordance with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.

ADAMS v. MARTIN.*

Civ. 9302.

District Court of Appeal, First District, Division 2, California.

May 8, 1934.

Hearing Granted by Supreme Court July 5, 1934.

Guardian and ward ⚷163.

Orders of probate court settling and approving guardian's accounts *held* final and conclusive in action against guardian, brought after revocation of letters of guardianship, to recover assets of incompetent's estate, based on alleged false credits to guardian in approved accounts for alleged care, support, and maintenance of incompetent.

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Kathleen M. Adams, as guardian of the estate of Clyde Lindsay, an incompetent person, against Ralph Martin. From a judgment in favor of the plaintiff, defendant appeals.

Judgment reversed, with directions.

Mills, Hunter & Dunn, Edward C. Mills, and D. Z. Gardner, all of Los Angeles, for appellant.

Crail, Shutt, Penprase & Crail, of Los Angeles, for respondent.

SPENCE, Justice.

From 1920 until 1929 defendant was the duly appointed, qualified, and acting guardian of Clyde Lindsay, an incompetent person. On January 16, 1929, an order was made revoking defendant's letters of guardianship and appointing Kathleen M. Adams in his place and stead. Thereafter said Kathleen M. Adams, as guardian of the incompetent, brought this action against defendant. She alleged in her second amended complaint that defendant had "falsely credited himself" with certain sums "for the alleged care, support and maintenance" of said incompetent. Defendant's demurrer was overruled. His answer admitted that he had credited himself with the various sums set forth in the complaint, but denied the falsity of said credits. He further alleged that all of said credits were set forth in his several accounts filed by him and presented to the court during his administration of the estate of the incompetent; that said accounts were all legally noticed and set for hearing in the probate department of the superior court, and were all regularly heard, settled, and approved by said court; that no appeal has been taken from any of said orders settling and approving said accounts, and that said orders remained in full force and had "become res adjudicata of the matters contained in said account"; and that the balance belonging to the incompetent as shown by his final account, which account was settled and approved on January 24, 1929, had been paid over to the new guardian. Upon the trial, defendant objected to the introduction of any testimony, but the objection was overruled. The testimony introduced regarding defendant's expenditures as guardian was conflicting. The trial court resolved the conflict in favor of plaintiff and entered judgment accordingly. From said judgment defendant appeals.

Appellant sets forth sixteen assignments of error. An examination of these assignments shows that they are but different ways of urging appellant's main contentions, which are as follows: That the probate court had exclusive jurisdiction to hear, examine, and pass upon his accounts which embraced his expenditures as guardian and the credits claimed by him therefor, and that the trial court was without jurisdiction in this action to re-examine said accounts, as the orders of the probate court approving and settling said accounts were final and conclusive. In our opinion, these contentions of appellant must be sustained.

It may first be noted that respondent concedes that appellant reported to the probate court in the guardianship proceeding all of the assets coming into his hands. In other words, there was no claim of concealment of assets in the ordinary sense. Respondent's complaint herein relates solely to alleged false credits set forth in the accounts approved by the probate court. It may further be noted that the record in the guardianship proceedings and the undisputed evidence herein shows that appellant had duly filed and presented five accounts as guardian, in which accounts all of the items now disputed were set forth, and that the orders of the probate court settling and approving said accounts had all become final.

Under the circumstances, the judgment herein must be reversed upon the authority of In re Guardianship of Wells, 140 Cal. 349, 73 P. 1065. The facts there were quite similar, but, in addition to claiming false credits in the accounts which had been approved, it was claimed that the guardian had fraudulently failed to account for certain moneys received

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 572.

by him as guardian. On page 353 of the opinion in 140 Cal., 73 P. 1065, 1066, the Supreme Court said:

"The gist of the petition, and the principal issue in the case, was as to fraud upon the part of the guardian in failing to account to the court or his ward for moneys—rents—belonging to the ward's estate. In fact, this was the only ground upon which, in this case, the lower court could acquire jurisdiction. * * * And the only items of account between the guardian and the ward which the court deals with in the findings are exclusively those contained in the settled accounts. * * * The court, however, had no power to review these matters.

"They were all items—charges for board, lodging, music, books, stationery, including also compensation allowed by the court to the guardian for his services as such—which were embraced in the former accounts. These the court re-examined and revised, making deductions from the allowances previously made for them, and reducing the guardian's compensation. This was clearly beyond the power of the court. All these items had been previously examined and passed on by the court, and the accounts which contain them settled and approved. As to these matters, the orders settling the accounts in which they were contained were final and conclusive. Brodrib v. Brodrib, 56 Cal. 564, 566; Lataillade v. Orena, 91 Cal. 576, 27 P. 924, 25 Am. St. Rep. 219; Estate of Adams, 131 Cal. 417, 63 P. 838; Estate of Grant, 131 Cal. 429, 63 P. 731."

Again in Re Estate of McGue, 180 Cal. 413, at page 415, 181 P. 637, 638, the Supreme Court quoted approvingly from Woerner on Guardianship as follows: "The law is thus stated by Mr. Woerner: 'On the termination of the guardianship * * * the accounting between the guardian and ward, or between them and their respective representatives, is final, and the order, judgment, or decree thereon by the court having jurisdiction is necessarily conclusive against all the world, like any other judgment by the court having jurisdiction of the subject-matter and of the parties. * * * Unless appealed from, revoked, or reopened, such settlement cannot be collaterally attacked * * * in any collateral proceeding.' Woerner on Guardianship, p. 327, § 98. He states only this qualification of the doctrine: 'As to all matters lawfully embraced therein, the final settlement is conclusive; but matters not embraced therein are not concluded, and the ward may recover of the guardian personally a fund which came to the guardian's hands before his appointment, and which was never accounted for in his settlements.' Id. p. 340."

The judgment is therefore reversed, with directions to the trial court to enter judgment in favor of the defendant.

We concur: NOURSE, P. J.; STURTEVANT, J.

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138 Cal.App. 109

WEGER v. ROCHA.

Civ. 4910.

District Court of Appeal, Third District, California.

April 18, 1934.

As Modified May 12, 1934.

Hearing Denied by Supreme Court June 14, 1934.

1. **Trial** 🔑404(2).

In personal injury action tried without jury, finding that release given by plaintiff was void and was secured by fraud, duress, and undue influence *held* sufficient "finding of fact."

[Ed. Note.—For other definitions of "Finding of Fact," see Words & Phrases.]

2. **Release** 🔑15.

Mere nervousness and hysteria of releasor when executing release does not amount to such mental incompetency as to render release void ab initio.

3. **Release** 🔑56.

Inadequacy of consideration for release, though not of itself sufficient badge of fraud to set aside release unless so insufficient as to shock conscience of court, may nevertheless be considered with other circumstances.

4. **Release** 🔑57(2).

Evidence that agent of tort-feasor's insurer, by repeated importunities, induced injured party to sign release for grossly inadequate consideration amounting to less than releasor's expenses, when releasor was highly nervous and hysterical and in serious physical condition, and that agent did not mention to releasor failure to compensate releasor for personal injuries, *held* to sustain finding that release was obtained by fraud and undue influence (Civ. Code, § 1575, subd. 3).

5. **Contracts** 🔑266(1).

Ordinarily, party seeking cancellation or rescission of contract must restore everything of value that has been received.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. **Release** ⚷24(2).

That injured party retained possession of check given for the release until trial of releasor's personal injury action, when it was filed as exhibit in case, *held* not to preclude setting aside release for fraud and undue influence (Civ. Code, § 1575, subd. 3).

Failure of releasor to tender back the check was not fatal to releasor's right to have release set aside for fraud, since no money was paid by releasee or releasee's insurer to releasor and the check did not amount to payment, and it did not appear that releasee had suffered any injurious consequences by reason of anything that occurred in connection with the check.

◆

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by Virginia Weger against Joseph Rocha. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Logan Beamer, of Eureka (McEnerney & Morris, of San Francisco, of counsel), for appellant.

E. S. Mitchell, of Eureka, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiff obtained judgment against the defendant in an action for personal injuries suffered by her in an automobile accident which occurred on the 18th day of July, 1931, on a public highway in Humboldt county. From this judgment the defendant appeals.

No contention is made in the appellant's brief that the judgment of the court is not sustained by the testimony showing gross negligence on the part of the defendant, nor is there any testimony in the record that the judgment is in any particular excessive. In view of the injuries suffered by the plaintiff, such contention would have no basis if made.

The action was tried before the court sitting without a jury. The answer filed by the defendant sets up a special defense alleging settlement with the plaintiff by the payment to her of the sum of $475; and, further, that prior to the action a certain check (miscalled a "draft" in the appellant's brief), left with the plaintiff at the time of the signing of the paper hereinafter referred to, was not returned to the defendant prior to the beginning of this action.

As against the special defense, the plaintiff relied upon testimony to establish fraud, menace, duress, and undue influence, and specially that the signature of the plaintiff to the paper hereinafter referred to was obtained by fraud and undue influence on the part of an agent representing the Banker's Indemnity Insurance Company, insurance carrier for the defendant Rocha.

Finding No. 10 of the court is in the following words and figures: "That the plaintiff, on the 25th day of August, 1931, signed the release attached to the defendant's special defense, but that said release was and is void, and was secured by fraud, duress, menace and undue influence."

The release referred to is in the following words and figures:

"Know all men by these presents, That I, Virginia Weger, of lawful age, residing at 1927 T Street, Eureka, California, for the consideration of Four Hundred Seventy Five and 00/100 ($475.00) dollars, to me in hand paid by Banker's Indemnity Insurance Company, and/or Joe Rocha, the receipt whereof is hereby acknowledged, have released and discharged, and by these presents do, for my heirs, executors, administrators and assigns, release and forever discharge the said Banker's Indemnity Insurance Company, and/or Joe Rocha, of and from all claims, demands, damages, actions, causes of action or suits at law or in equity, or (of) whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by said personal injuries arising out of automobile accident prior to and including the date hereof, and particularly on account of all injuries both to person or property resulting, or to result, from an accident which occurred on or about the 19th day of July, 1931, at or near five miles north of Eureka, California, on Redwood Highway.

"In Witness Hereof, I have hereunto set my hand and seal this 25th day of August, 1931.

"Virginia Weger [Seal]
"Jennie M. Kane [Seal]

"R. O. Bradford } witnesses
"L. H. Guthridge }

"State of California, County of Humboldt—ss.:

"On this 26th day of August in the year 1931, before me personally came Virginia Weger, to me known and known to me to be the person who (is) described in and who executed the foregoing instrument, and acknowledged to me that * * * executed the same.

"Jennie M. Kane."

While the foregoing release appears to have been signed as witnesses to the signature of the plaintiff, by L. H. Guthridge, R. O. Bradford, and Jennie M. Kane, the record shows absolutely that none of those persons were present at the time the release was signed. And as further evidencing to the trial court the questionable character of the instrument, the acknowledgment which appears to have been taken on the 26th day of August, 1931, before Jennie M. Kane, does not evidence the actual facts. Miss Weger did not appear before Jennie M. Kane to acknowledge the instrument, nor is there any showing that Jennie M. Kane ever asked the plaintiff if she acknowledged the instrument. On the contrary, the evidence shows that the agent of the company had the names of the purported witnesses, and also the acknowledgment attached to the instrument of his own volition.

The check left with the plaintiff at the time of signing the release is worded as follows:

"Payable through
"Fidelity Union Trust Company of Newark, N. J.
"Eureka, Cal., August 25, 1931.
"No Protest
"No. 11892

"On demand pay to the order of Virginia Weger * * * first x the sum of Four Hundred Seventy Five and 00/100 dollars $475.00. add'l

"Final x in full settlement of any and all claims for personal injury on account of policy No. AP215623.

Key No.	Class.	File number.	Assured.	Claimant.	Date of acc. or loss
32	AL	61	Joe P. Rocha	Virginia Weger	7-19-31

"Rapp & Company, Inc.
"George B. Rapp, Adjuster.
"To the Bankers Indemnity Insurance Company.
"Newark, New Jersey.
"Form 1008A."

[1, 2] It is first contended that finding No. 10 set out herein is only a conclusion of law, and is not sufficient, even though it might be sustained by the testimony. This contention, however, appears to be without merit, as a finding in almost the exact language as appears in the instant case was approved by the Supreme Court in the case of Hick v. Thomas, 90 Cal. 289–296, 27 P. 208, 376. The finding of the court that the release was void does not appear to be sustained by the testimony. A review of the record leads to the conclusion that at the time of the signing of the instrument the plaintiff was not incompetent and was not unable to comprehend the contents and effect of the instrument. This, however, is not determinative of the issues presented upon this appeal.

Before considering further the findings of the court, it is well to set forth the circumstances surrounding the execution of the release. As stated, the injuries suffered by the plaintiff occurred on the 18th day of July, 1931, resulting in two fractures of the pelvic bone and a fracture or injury of and to the fifth lumbar vertebra. The plaintiff was confined in a hospital for approximately three months. At the time of the execution of the release the plaintiff was not only confined in the hospital, but was in a cast in which she had been placed and kept for a number of days, and in which she was required to remain for many days after the date of the execution of the release. The hospital bills incurred by the plaintiff amounted to the sum of $402.25; doctor's bill, $300; brace, $7.50; aggregating $709.75. The settlement calls for the payment of $475. The testimony of the agent acting for the insurance company and the defendant testified that no consideration was given to the injuries suffered by the plaintiff; that compensation for her injuries formed no part of the settlement; that he made some inquiries as to the probable amount of the hospital and doctors' bills, and took into consideration no other items. This is the effect of his testimony as it appears in the record.

The court found the injuries suffered by the plaintiff, together with the hospital and doctors' bills, to amount to the sum of $8,276.25. As we have stated, no objection is raised that the finding of the court in this particular allows any excessive damages. It necessarily follows that the amount agreed to be paid by the insurance company was and is grossly inadequate. Not only does it fail to meet the hospital and doctors' bills by $234.75, but it leaves the plaintiff absolutely uncompensated for the bodily injuries sustained by her, which were still manifestly apparent at the time of the trial, and which occasioned the plaintiff much pain and suffering. No language is necessary to enforce the conclusion that two fractures of the pelvic bone and an injury to any portion of the vertebra fall within the classification of serious bodily impairment.

The record shows that the agent negotiating the settlement on the part of the insurance company was advised of these injuries, but made no mention thereof to the plaintiff. The record also shows that the agent of the insurance company called upon the plaintiff a number of times; that at the time the release was signed the plaintiff was in a highly nervous and hysterical condition. It likewise shows that the agent of the company spent two hours with the plaintiff in his effort to induce her to sign the release set forth herein; and also that the plaintiff signed the release in order to terminate the last interview. In fact, it does not appear from the appellant's brief to be seriously questioned that the agent of the company did use undue influence in seeking to have the plaintiff sign the release. We base this statement upon the following portion of the appellant's brief, which is the only portion thereof touching the findings of the court upon this question. We quote therefrom as follows: "The evidence conclusively shows that the plaintiff knew the nature and purport of the document she signed (referring to the testimony in the record, giving pages and lines). The only evidence in the case which tends to establish the purported finding of the court that the release was obtained by fraud, menace, duress and undue influence is the testimony of plaintiff's witnesses that she was in a nervous condition." (No citation is made to the record.) This has been held insufficient in the case of Winstanley v. Ackerman, 110 Cal. App. 641, at page 647, 294 P. 449, 452, wherein the court said: "Obviously, nervousness and neurasthenia do not constitute mental incompetency to such an extent as to render the transaction void ab initio even though the transaction may be avoided by a timely rescission and tender of benefits received. We think the failure of the record to disclose a tender of the money received by plaintiff will necessitate a reversal of the judgment." This statement in the appellant's brief may be admitted, and yet it does not set forth any reasons why this court should disturb the finding of the trial court, either on the ground of fraud, menace, duress or undue influence.

[3, 4] Subdivision 3 of section 1575, Civil Code, in defining what constitutes undue influence, reads: "In taking a grossly oppressive and unfair advantage of another's necessities or distress."

Here we have a working woman employed in a woolen mill, confined in a cast flat on her back, in a highly nervous and hysterical condition, suffering much pain, worried by her hospital and doctor's bills, importuned and importuned by the agent of the company offering a settlement amounting to a trifle more than one-half of the expenses just referred to, making no mention of not taking into consideration any compensation for the personal injuries suffered by the plaintiff. A reading of the agent's testimony given at the trial shows conclusively that all that was brought to the attention of plaintiff were the expenses just referred to. The release was not signed until a number of days after the infliction of the injuries from which the plaintiff was suffering. The record discloses that she was still in a serious physical condition.

While inadequacy of the money agreed to be paid, standing alone, is not a sufficient badge of fraud upon which to base a verdict, unless the amount is in itself so insufficient as to shock the conscience of the court, it may nevertheless be taken into consideration with all the circumstances attendant upon and surrounding the transaction.

We find the following in 6 California Jurisprudence, p. 189, which sets forth the rule upon the question of adequacy: "The adequacy of the consideration is an element of the good faith of a transaction, and has no bearing upon whether the consideration is a valuable or a good one. Where parties are both in a situation to form an independent judgment concerning a transaction, and act knowingly and intentionally, mere inadequacy in the price, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the amount named is not adequate, a vendor should so determine in his own mind before he signs the contract, but having signed it and stated the amount for which he will sell, he must live up to his agreement. Any other rule would, it has been said, make a contract worthless and mere waste paper. In fact, inadequacy of consideration alone, without fraud or something of the nature of fraud, is never considered even in equity, except as a defense to the right to enforce specifically an executory agreement. It may be a circumstance more or less potential in the determination of fraud as a question of fact, but inadequacy of consideration, at least unless such as to shock the conscience, is not of itself sufficient to authorize the court to find fraud, as a conclusion of law."

That the sum of $475 is glaringly inadequate as a settlement in this case, where a judgment for $8,276.25 is not questioned as being excessive, appears to us an inescapable conclusion, and sufficient to shock the conscience of the trial judge.

[5, 6] The main contention of the appellant in this case is to the effect that there is no finding made by the court as to the offer to return the check left with the plaintiff by the agent of the company, and also that the testimony does not show any offer to return the same. It does appear from the record that the possession of the check was retained by the plaintiff or by her attorneys until the time of the trial, and that it was filed as an exhibit in the case, and therefore placed within the control and custody of the court. Ordinarily, in the cancellation or rescission of contracts, it is incumbent upon the parties seeking rescission to restore everything of value that has been received. In this case, however, no money was paid by either the insurance company or the defendant to the plaintiff. A check, only, was left by an agent of the insurance company, with the plaintiff. There is nothing in the record indicating that the check was received in payment. Therefore, the law, as stated in 20 California Jurisprudence, p. 920, is applicable here, to wit: "The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. The rule is based upon the obvious ground that nothing is to be considered as payment in fact but that which is in truth such unless something else is expressly agreed to be received in its place." This statement of the law is further supported by the text found in 48 C. J. p. 632, as follows: "A creditor rescinding a conditional payment cannot recover upon the original debt if he fails to account for the paper received, and the necessity of so accounting is not removed by a release from liability on such paper. The obligation to account is satisfied by the production of the paper in court, to be canceled, delivered to the defendant, or otherwise disposed of, as the court may direct, and is also satisfied by showing that such paper has been surrendered or tendered back to the debtor," etc. And further on the text reads: "In such case as that of rescission of a conditional payment, the creditor does all that is required of him if he produces the paper at the trial and offers to deliver it to defendant." Likewise, as said in substance in the case of Peardon v. Markley, 50 Cal. App. 257, 195 P. 70, if it is apparent from the record that a tender, however complete, would have been refused, a tender is unnecessary.

That the taking even of a note of a third person for an existing or prior indebtedness does not amount to payment also appears to be definitely decided in the case of Merchants' National Bank v. Bentel, 166 Cal. 473–477, 137 P. 25.

In 4 Cal. Juris. 767, referring to the case of Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797, we find the following pertinent language: "As stated by McFarland, J., in the leading case, there are exceptional cases where restoration or an offer to restore before suit brought is not necessary, as for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore; or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by final decree fully adjust the equities between the parties."

The check in this case given by the insurance company is of no higher dignity than would have been the promissory note of the insurance company. Neither instrument would have amounted to payment, and as stated in the other authorities cited, when delivered in court, became a piece of paper, subject to the orders of the court. Nor does it appear that the defendant in this case has suffered any injurious consequences by reason of anything that occurred in connection with the check set forth herein.

The judgment is affirmed.

We concur: **PULLEN, P. J.; THOMPSON, J.**

MARKHAM v. FRALICK et al.*

Civ. 9481.

District Court of Appeal, Second District, Division 2, California.

May 5, 1934.

Hearing Granted by Supreme Court July 2, 1934.

Landlord and tenant ⚷291(6).

Where statutory notice of default in payment of rent was given to lessees but not to subtenants, lessor *held* entitled to judgment in unlawful detainer action brought against lessees only without joining subtenants; latter not being necessary parties (Code Civ. Proc. §§ 1161, 1164).

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Blanche B. Markham, as executrix of the estate of William F. Markham, deceased, against Allan Fralick and another. From a judgment in favor of the defendants, the plaintiff appeals.

Reversed, with directions.

Harlan G. Palmer, of Los Angeles, and Charles D. Thompson, of Hollywood, for appellant.

Roger Marchetti, of Los Angeles (A. V. Falcone, of Los Angeles, of counsel), for respondents.

CRAIG, Justice.

In an action in unlawful detainer founded upon a lease of certain real property judgment was rendered in favor of the defendant lessees, from which the plaintiff appealed.

By an instrument in writing executed by the respondents as lessees and William F. Markham, since deceased, as lessor, and dated August 31, 1926, it was agreed that said lessees should have and hold certain real property together with all buildings and improvements thereon for the period of ninety-nine years; that they would pay a sum in cash upon execution of said instrument and stipulated amounts every six months thereafter during the remainder of said leasehold period, together with taxes and assessments "as so much rent." The property leased consisted of about one block in the city of Los Angeles and a number of dwelling houses for rental to residents. The respondents entered by agent, collected the rents from their tenants who at the time of trial were still in possession, and at all times from the date of said leasehold respondents continued so to occupy said premises. Upon default in payment of taxes, assessments, and certain semiannual amounts, written notice in the usual form demanding that within three days they pay the same or surrender possession was served upon respondents. Thereafter suit was commenced by the executrix of the estate of said deceased lessor praying judgment for restitution of the premises so leased, for the amounts then due and unpaid on account of rent and for taxes and assessments "as so much rent." All of the foregoing facts were admitted by answer, but possession at any time after service of said notice was denied, and by an affirmative defense said lessees alleged that upon receipt of said three-day notice they caused to be served upon the plaintiff "a notice of compliance by defendants with the provisions and requirements set out in plaintiff's said three-day notice * * * and of the surrendering by defendants of the said premises to the plaintiff." It was not contended that respondents ever resided upon or physically occupied the premises in question, nor that they assumed actual supervision over or the collection of income from said premises otherwise than by such agent. From the latter's testimony and that of respondent Fralick it appeared upon receipt of said three-day notice and the service of their said "notice of compliance" the respondents obtained from the agent at their office a statement in writing that the latter was on that day advised by his employers that he no longer was their agent and that he was directed so to inform each of their tenants as well as the attorney for their lessor, and that since said date he had done no act or thing intended as the act of either lessee with respect to said premises. It was admitted and the trial court found that notice was not given by either party to the subtenants of the lessor's demands. Judgment was entered in favor of the lessees upon a finding that the lessor was "entitled to take nothing by reason of her complaint."

It is contended that the mere claim of surrender, disclaimer of agency, and failure to notify or join subtenants was not a sufficient defense to the action against said lessees in unlawful detainer. Section 1161 of the Code of Civil Procedure provides in part: "A tenant of real property * * * is guilty of unlawful detainer, when he continues in possession, in person or by subtenant, * * * after default in the payment of rent * * * and three days' notice in writing, requiring its payment * * * shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 39 P.2d 804.

subtenant." Section 1164 thereof provides that: "No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him." As already observed, it was conceded in effect that the respondents appeared, that they were proper parties, and were guilty of the offense charged, and it is the contention of the appellant that it was error to render judgment amounting to nonsuit and to refuse to render judgment against such proper defendants notwithstanding nonjoinder of said subtenants. The Legislature has ordained that a tenant is guilty of unlawful detainer when he continues in possession by subtenant after default in the payment of rent and proper notice to such tenant and subtenant, but there is no penalty or bar to an action embraced in the statute which arises from a failure to press demands upon persons not parties to a lease and who may not be in default or guilty of any charge alleged in the complaint against privies to the lease and responsible to the lessor regardless of the agreement between his lessees and such third parties. As was stated by the District Court of Appeal and quoted by the Supreme Court in Telegraph Avenue Corporation v. Raentsch, 205 Cal. 93, 269 P. 1109, 1111, 61 A. L. R. 366, in response to a contention that section 1161 of the Code of Civil Procedure was inequitable and unfair in that it did not permit of a set-off or counterclaim, "the Code sections relating to unlawful detainer provide a uniform, though special and summary, proceeding for a quick and ready determination of the forfeiture of the lease, and these provisions relate to all actions brought for that purpose. * * * Failure of the respondent (plaintiff therein) to plead that it had served notice on all the subtenants and to join them as parties to the action was raised by demurrer going to the sufficiency of the complaint. It does not appear that the subtenants were in default, and, if they were not, it would certainly have been futile to have given them notice to pay the rent or quit, and it would likewise have been unnecessary to join them as parties defendant in this action." And in Tujague v. Superior Court, 69 Cal. App. 35, 230 P. 198, 199, therein quoted with approval, it was said that while it may be conceded that the clause of section 1164 of the Code of Civil Procedure providing that "no person other than the tenant of the premises and subtenant * * * need be made parties defendant" amounts to an intimation that the latter are necessary parties, the very next clause, "nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him," refutes the contention that such third persons are necessary parties, and that, in an unlawful detainer action, subtenants need not be served, but that, even though there be a nonjoinder, the court is required to proceed and render judgment against the individual properly before the court. This disposes of other questions advanced.

The judgment is reversed, with directions that proper findings of fact and judgment be entered in accordance with admitted allegations of the complaint and with the views herein expressed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

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138 Cal.App. 443

In re PETERSON'S ESTATE (WEBB, Atty. Gen., Intervener).

Civ. 9323.

District Court of Appeal, Second District, Division 1, California.

May 7, 1934.

Wills 🔑229.

State, under escheat statute, may intervene and contest probate of will as against objection that state was not interested party, and could not contest will (Probate Code, §§ 231, 370).

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings in the matter of the estate of Ole Peterson, deceased, wherein Edward J. Cotter, executor named in the alleged last will and testament of the decedent, and as special administrator with general powers of the estate, and another, filed a petition for the probate of the decedent's will, contested by Frank Bryson, public administrator of Los Angeles county, and wherein U. S. Webb, Attorney General, intervened. From a judgment denying the probate of the will, the petitioners appeal.

Judgment affirmed.

John E. Sisson, George W. Seith, and Arch G. McLay, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

YORK, Justice.

On December 21, 1931, Ole Peterson, deceased, in the presence of witnesses affixed his signature (by mark) to a purported last will and testament, while lying ill in the General Hospital at Los Angeles. By the terms of said instrument, his entire estate was left to one Elsie Skinner, a neighbor of decedent; there being no known relatives surviving him.

Edward J. Cotter, an attorney at law, was named in the will as executor, and he petitioned the court for letters testamentary, whereupon the public administrator of Los Angeles county filed a contest to the probate of the will. The executor and the beneficiary filed demurrers to the contest, which were sustained with leave to amend but no amendment was filed by the public administrator. The attorney general of the state of California filed a petition in intervention by virtue of section 1269a of the Code of Civil Procedure, and the executor and administrator demurred thereto, demurrers were sustained, and the Attorney General filed an amended petition in intervention; upon the issues framed by the amended petition in intervention and the answers thereto by executor and beneficiary, trial was had before the court sitting without a jury, and thereafter judgment was rendered denying petition of the executor for the probate of the last will and testament of Ole Peterson, deceased. Motions for new trial and to vacate the judgment were heard and denied. In addition to denying the petition of executor for probate of the will, the judgment provided that Mrs. Skinner was not entitled to any part of the estate of decedent under and by virtue of the instrument dated December 21, 1931, and decreed that the petition of the public administrator of the county of Los Angeles for letters of administration be granted.

It was found by the court that on the 21st day of December, 1931, and for a long time prior to that date, and continuously down to the time of his death, deceased "was not competent to make a last will and testament because of insanity and unsoundness of mind, and that at the time of the attempted execution of said purported will on the 21st day of December, 1931, and for some time prior thereto, the said Ole Peterson was suffering from a malady known as arteriosclerosis myocarditis senility, complicated by bronchial pneumonia, and that at the time of the attempted execution of said purported will, on the 21st day of December, 1931, and for a long time prior thereto, and at all times thereafter, and until the time of his death, the said Ole Peterson, deceased, was by reason of said malady, irrational and incompetent of transacting any business or of knowing the natural objects of his bounty and was then and there incapable of making a last will and testament; and that the said instrument heretofore referred to as the last will and testament of the said Ole Peterson, deceased is not the last will and testament for the reasons hereinabove set forth."

The court further found that "by reason of his said malady, and by reason of his confinement occasioned thereby, the said Ole Peterson was during all of said time peculiarly susceptible to the suggestions and influences of those close to him, and particularly that during said time the said Ole Peterson was peculiarly susceptible to the suggestions and direction of the said Elsie Skinner; that while knowing the susceptibility of the said Ole Peterson during said time and taking advantage thereof, the said Elsie Skinner did, on the 21st day of December, 1931, call upon the said Ole Peterson, deceased, while he was in bed and suffering from said malady, and did then and there persuade, direct, urge and influence the said Ole Peterson by undue and improper persuasion and influence to make and execute the said purported document, being the will granting and disposing of the estate of the said Ole Peterson, deceased, in favor of the said Elsie Skinner, and that the said instrument was made by the said Ole Peterson acting under the duress and undue influence of the said Elsie Skinner in the manner and in the particulars hereinbefore referred to. * * *"

As conclusions of law from the foregoing, it was found that the document dated December 21, 1931, was not a valid will, or any will of the decedent; that Elsie Skinner was not entitled, by reason and by virtue of said document, to take any part of the estate of Ole Peterson.

Upon this appeal appellants maintain that the state is not an interested party within the meaning of section 370, Probate Code, and is therefore precluded from contesting the will in this estate, and further that, although respondent alleges that the right of the state to intervene is given by virtue of the provisions of section 1269a, Code of Civil Procedure, that that section applies only where the estate has actually escheated to the state, as provided in section 231 of the Probate Code, viz.: "Sec. 231. *Escheat procedure.* If the decedent leaves no one to take his estate or any portion thereof, under the laws of this state, the same escheats to the state as of the date of the death of the decedent." Appellants then contend that in the instant case there was some one to take; i. e., the beneficiary named in the will, who takes by purchase and not by descent.

While the authorities are not in harmony on the question of the right of the state to oppose or set aside the probate of a will, some states recognize such a right and among them is the state of California. In Re Estate of McCabe (Cal. Sup.) 29 P.(2d) 195, the state filed a contest to two documents, admitted to probate as the last will and testament of the decedent, on the ground that they did not in fact constitute a will, nor, if they did, were they executed as required by the law of wills. The contest further alleged that the decedent died without heirs at law, and moreover that one Frank Dalecsic, named in said documents, was not a son or heir at law of said decedent. Finally, it was alleged that the state was the only person or entity entitled to receive said estate. Both general and special demurrers were sustained by the court; the special ground of demurrer being that the state had failed to allege facts and circumstances which showed its interest in said estate and its right to appear in said proceeding by contest of the will. Upon appeal the Supreme Court held that the allegations were sufficient to show the interest of the state and also sufficient to show the facts and circumstances of such interest, citing sections 1269, 1269a, Code of Civil Procedure.

Upon authority of the cited case, we hold that the state has sufficient interest in the probate of the will in the case before us to sustain its right to intervene, and that there was no error on the part of the trial court in overruling demurrers of appellants to the amended complaint in intervention.

After a careful examination of the evidence shown in the bill of exceptions, we are of the opinion that the evidence was amply sufficient to support the findings of the court and the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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138 Cal.App. 353

BIBER et al. v. O'BRIEN.

Civ. 8581.

District Court of Appeal, First District, Division 1, California.

April 27, 1934.

Hearing Denied by Supreme Court June 25, 1934.

1. **Nuisance 🔑60.**

Legislature may declare that to be a nuisance which is so in fact.

2. **Nuisance 🔑1.**

Any act or thing done or maintained in violation of law may be a nuisance.

3. **Nuisance 🔑1, 59.**

"Nuisances" may be public or private or both; the distinction lying not in number of persons thereby affected but in the special injury resulting to a particular individual.

[Ed. Note.—For other definitions of "Nuisance," see Words & Phrases.]

4. **Nuisance 🔑72.**

Where alleged nuisance would constitute a private wrong for which an action might be maintained, it is none the less actionable because wrongdoer is also liable to indictment for a common nuisance.

5. **Nuisance 🔑6.**

Violation of a penal statute does not of itself create a "private nuisance," nor does the failure to obtain a license or permit required by law.

[Ed. Note.—For other definitions of "Private Nuisance," see Words & Phrases.]

6. **Nuisance 🔑18, 41.**

Where a structure is erected or maintained in violation of law and constitutes a nuisance to an adjoining landowner, action for damages or equitable relief will arise.

7. Nuisance ⚷=72.

Where rights of individuals are involved in suit for equitable relief or damages on account of a nuisance, defendant cannot rely upon the fact that his conduct was authorized by statute or that it was not forbidden, but plaintiff must show exceptional damage not suffered by the public generally.

8. Nuisance ⚷=2.

Where a structure is not of itself a nuisance, it cannot be complained of on the ground that it was erected and maintained to annoy an adjoining owner unless statute declares such structures to be nuisances, since intent with which a structure was erected is immaterial.

9. Health ⚷=32.

Hotel "mezzanine floor" of full ceiling height, with nine guest rooms and halls and covering from 40 to 75 per cent. of ground floor, *held* a separate "story" so as to make semifireproof structure more than six "stories" contrary to statute (St. 1923, p. 794, § 12).

> A "story" is a habitable space between two floors or a set of rooms on the same floor or level. A "mezzanine floor" is a "story" of diminished height introduced between two "stories."
>
> [Ed. Note.—For other definitions of "Story," see Words & Phrases.]

10. Nuisance ⚷=76.

In action for damages on account of unlawful structure, facts showed that building was a "hotel" and not an "apartment house" within statute requiring that certain portions of lot upon which an "apartment house" is erected shall be left unoccupied (St. 1923, pp. 788, 795, §§ 10, 13, 14).

> Facts disclosed that the structure involved was seven stories in height, that each room contained a recess in the wall about six feet broad and two feet deep in which was installed a refrigerator, a sliding bread shelf, other shelves and drawers and cupboards, a sink with hot and cold water service with drainboards on each side of the sink, two electric outlets with wiring suitable for the use of electric cooking appliances, and a mechanical exhaust ventilation system was installed in the toilet and each recess. Permit of occupancy was issued by the city upon owner's agreement in writing that under no circumstances should cooking or light housekeeping be permitted in any guest room. There was no violation of this agreement except by plaintiffs' agent, who did cooking on one occasion with electrical apparatus taken for that purpose.
>
> [Ed. Note.—For other definitions of "Apartment House" and "Hotel," see Words & Phrases.]

11. Nuisance ⚷=72.

Statute providing that every person who suffers from unlawful act or omission of another may recover damages from wrongdoer did not change rule requiring that exceptional damage other than that suffered by public generally is essential to maintenance of action on account of unlawful structure (Civ. Code, § 3281).

12. Nuisance ⚷=72.

Depreciation in value of property solely because of proximity to unlawful structure is not such exceptional damage as justifies action for damages by adjoining landowner.

13. Nuisance ⚷=72.

Increase in fire hazard on account of semi-fireproof hotel in excess of statutory height *held* not such exceptional damage as justified action for damages by adjoining landowner (Civ. Code § 3281; St. 1923, p. 794, § 12).

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by George V. Biber and others against R. J. O'Brien. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Aitken & Aitken, of San Francisco, for appellants.

Walter H. Linforth, Wm. M. Cannon, and Theodore J. Roche, all of San Francisco, for respondent.

PER CURIAM.

Plaintiffs for many years have been the owners of a lot on Sutter street in San Francisco upon which stands a five-story apartment building. This building was erected in 1911. The westerly 42.7 feet of the rear line of this lot abuts upon the rear of a lot facing on Bush street owned by defendant. In 1927 defendant erected upon his lot a building known as the Mayflower Hotel. Plaintiffs allege that defendant's building is an unlawful structure, and that they have suffered damage by reason of its erection. They aver that the building was designed and intended as an apartment house; that it is a semifireproof building seven stories in height, although the State Housing Act prohibits a semifireproof structure of more than six stories in height; that, being an apartment house, it covered more of the lot than the act permitted, and that it immediately abutted the rear line thereof and was not set back sixteen feet therefrom as required by the act in such cases; further, that the structure was designed and erected with intent to violate the law and to injure plaintiffs; that the latter have been injured and their building exposed to damage by fire, the lives and health of the plaintiffs and their tenants endangered, and their comfort disturbed by reason thereof. As a result, they claimed a depreciation in the value of their building, the loss of rents, and that certain expenditures on their property were made necessary by defendant's acts.

These allegations with immaterial exceptions were denied, and the cause came on for trial before a jury. At the conclusion of plaintiffs' case the court directed a verdict for the defendant, and, from the judgment entered thereon, plaintiffs appealed.

According to section 10 of the State Housing Act (St. 1923, pp. 781, 788) an apartment house is "any building, or portion thereof, more than one story in height, which is designed, built, rented, leased, let or hired out to be occupied, or which is occupied as the home or residence of three or more families living independently of each other and doing their cooking in the said building," and a kitchen is defined as "any room used or intended or designed to be used for cooking and preparation of food."

Sections 13 and 14 required certain portions of the lot upon which an apartment house is erected to be left unoccupied.

The fact that defendant's building is a semifireproof structure is undisputed; and section 12 of the act provides that "no semifireproof apartment house or hotel hereafter erected shall exceed six stories in height at any point. * * *"

Section 6 makes the violation of any of its provisions a misdemeanor punishable by fine or imprisonment or both; and also provides that except as otherwise therein provided the procedure for violations of the act, or for the abatement of a nuisance in connection with a building or the premises thereof shall be as set forth in the charter and ordinances of the municipality in which the proceeding is instituted.

Sections 7 and 8 make it unlawful to erect any building in any incorporated town, city, or city and county without obtaining a permit from the department charged with the enforcement of the act, namely, the department or officer thereof so empowered by ordinance (section 1), and require before occupancy a "permit of occupancy to be issued by such department."

In addition, section 76 of the act provides that "in case any apartment house, hotel or dwelling or any part thereof, is constructed, altered, converted or maintained in violation of any of the provisions of this act * * * or in case a nuisance exists in any such apartment house, hotel, or dwelling, or upon the lot on which it is situated, said department may institute any appropriate action or proceeding to prevent such unlawful construction * * * or maintenance, to restrain, correct or abate such violation or nuisance, to prevent the occupation of said apartment house, hotel or dwelling, to prevent any illegal act, conduct or business in or about such apartment house, hotel or dwelling or lot."

Defendant contends that his building is a hotel and not an apartment house; that it is a properly constructed six-story building and not a fire menace; also that the act places the sole and exclusive duty of enforcing its provisions upon state and municipal authorities and grants no private right of action; and, further, assuming the structure to be illegal, that it is not a public nuisance, but, if so, plaintiff proved no special damage by reason thereof.

[1-4] The Legislature may declare that to be a nuisance which is such in fact (Los Angeles County v. Spencer, 126 Cal. 670, 59 P. 202, 77 Am. St. Rep. 217; Laurel Hill Cemetery v. City and County of San Francisco, 152 Cal. 464, 93 P. 70, 27 L. R. A. [N. S.] 260, 14 Ann. Cas. 1080; Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385); and, if an act or thing is done or maintained in violation of law it may constitute a nuisance (People v. Wing, 147 Cal. 382, 81 P. 1104). Nuisances may be public, or private, or both [46 Cor. Jur. "Nuisances," § 3, p. 646; Yolo County v. Sacramento, 36 Cal. 193; Baldocchi v. Four Fifty Sutter Corp., 129 Cal. App. 383, 18 P.(2d) 682], the distinction lying not in the number of persons affected by it but in the special injury which results to a particular individual by reason of the injurious conduct or condition (Yolo County v. Sacramento, supra; Fisher v. Zumwalt, 128 Cal. 493, 61 P. 82; McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082, 1085; 20 Cal. Jur. "Nuisances," § 8, p. 270). And when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience, for which an action might be maintained in favor of a person injured, it is none

the less actionable because the wrong is committed in a manner and under circumstances which render the guilty party liable to indictment for a common nuisance. In such cases the damage cannot properly be said to be common or public, however numerous the cases of similar damage arising from the same cause. Lind v. San Luis Obispo, 109 Cal. 340, 42 P. 437.

[5-7] The act in question contains no express declaration that structures erected in violation of its provisions shall be deemed nuisances. It does, however, impose penalties for such violations; but the violation of a penal statute does not of itself create a private nuisance. Carter v. Chotiner, 210 Cal. 288, 291 P. 577. Nor does the failure to obtain a license or permit required by law necessarily have that effect. 46 Cor. Jur. "Nuisances," § 24, p. 660. However, it has frequently been held that, if a structure is erected or maintained in violation of law, and constitutes a private nuisance as to an adjoining landowner, an action for damages or equitable relief will lie. First Nat. Bank of Mt. Vernon v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185; Aldrich v. Howard, 7 R. I. 199; Harris v. Poulton, 99 W. Va. 20, 127 S. E. 647, 40 A. L. R. 334; Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 A. 483, 54 A. L. R. 361; Knight v. Foster, 163 N. C. 329, 79 S. E. 614, 50 L. R. A. (N. S.) 286; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Stetson v. Faxon, 36 Mass. (19 Pick.) 147, 31 Am. Dec. 123; Yolo County v. Sacramento, supra; Baldocchi v. Four Fifty Sutter Corp., supra; Cushing, etc., Co. v. Gray, 152 Cal. 118, 92 P. 70, 125 Am. St. Rep. 47. And where the rights of individuals are involved, a defendant cannot rely upon the fact that his conduct was authorized by statute or was not forbidden [Woodruff v. North Bloomfield, etc., Co. (C. C.) 18 F. 753; Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P. (2d) 733; Eaton v. Klimm, 217 Cal. 362, 18 P. (2d) 678; Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484; 20 Cal. Jur. "Nuisances," §§ 22, 23, pp. 286, 288]; but in such cases the plaintiff must show that he has suffered exceptional damage other than that suffered by the public generally (Perrin v. Mountain View, etc., Ass'n, 206 Cal. 669, 275 P. 787).

Plaintiff first contends that defendant's building is an unlawful structure because it is an apartment house, and being such violates the provisions of the Housing Act as to the portion of the lot it may lawfully cover. As the basis for the claim that it is an apartment house it is alleged that the building has kitchen facilities therein designed for cooking.

The evidence shows that each room contained a recess in the wall about six feet broad and two feet deep. In each recess was installed a refrigerator, a sliding bread shelf, other shelves and drawers and cupboards, a sink with hot and cold water service, with drainboards on each side of the sink. Two electric outlets with wiring suitable for the use of electric cooking appliances were also contained therein, and a mechanical exhaust ventilation system was installed in the toilet and each recess. The latter are referred to by plaintiffs as kitchenettes and by the defendant as service pantries. Upon the completion of the building, the department of public health of the city and county of San Francisco issued a permit of occupancy following an agreement by defendant in writing that under no circumstances should cooking or light housekeeping be permitted in any guest room therein. The record discloses no evidence that the rooms contain stoves or cooking utensils, or that any cooking was done therein except in one instance. A witness, who resided in Berkeley, testified that on one occasion at plaintiffs' request he engaged a room therein. He took with him a portable electric stove, cooking utensils, dishes, and food, and occupied the room for one night and part of one day. During this time he prepared a meal. He further testified that he had no knowledge of any cooking in other rooms, and no attempt was made to prove other instances of the kind; it being plaintiffs' contention that it was sufficient for them to show that the building was so designed and might be so used.

It appears that the authorities were satisfied of the owner's lawful purpose and issued a permit of occupancy, and there is no evidence of any departure from this purpose except in the one instance and under the circumstances shown.

[8] As stated, the fact alone that an unlawful condition exists is not sufficient to constitute a private nuisance; and the above testimony without more furnishes no reasonable ground for the conclusion that it was his intention to let the rooms to families, or to permit cooking therein, or that the structure has been or will be operated otherwise than as a hotel. As the intent or motive of the person who erects or maintains a structure or makes certain uses of his property is not material in determining whether there is a nuisance, so, if a structure is not of itself a

nuisance, it cannot be complained of on the ground that it was erected and maintained with the object of annoying an adjoining owner unless the statute declares such structures to be nuisances. 46 Cor. Jur. "Nuisances," p. 661.

[9] With respect to the question whether the building is a seven-story structure, as maintained by plaintiffs, the evidence shows that in addition to the main floor which opens upon the street there are six floors of living rooms. One of these is immediately over the main floor, and is called a mezzanine floor. It is, however, as testified, of "full ceiling height" and contains nine guest rooms with hallways and baths. What percentage of the space of the ground floor is covered by the mezzanine floor is not clear from the evidence. The architect stated this to be 40 per cent., while appellant, basing his contention on the plans of the building, claims about 75 per cent. The primary object of the requirement that buildings over a certain height be of fireproof construction was, of course, the protection of its occupants; the difficulty of escape in case of fire being augmented in proportion to the increase in height. A story has been defined as the habitable space between two floors (Hunter v. Narragansett Electric Lighting Co., 50 R. I. 196, 146 A. 624, 625; Vallen v. Cullen, 238 Mass. 145, 130 N. E. 216), and as a set of rooms on the same floor or level (Lagler v. Bye, 42 Ind. App. 592, 85 N. E. 36); and a mezzanine floor has been defined as a story of diminished height introduced between two higher stories (Century Dictionary). The evidence was, we think, sufficient to support the conclusion that the floor in question was a separate story within the meaning of the act.

[10] Of course, a six-story nonfireproof building creates some fire hazard to the community and adjoining property; but, its erection not being illegal, no right of action on the ground of increased hazard arises. If our conclusion is correct that the building is not an apartment house within the meaning of the act, then plaintiffs' damage, if any, is due to increased fire hazard, and they have no other ground for complaint as the structure, with the exception of the extra story, complies with the act.

[11] According to section 3281 of the Civil Code, "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." Plaintiffs claim that the effect of this section is to extend their right of recovery beyond what has generally been declared to be the rule. But this provision—which was based on Field's draft of the New York Civil Code, section 1832 (Deering)—is merely declaratory of an elementary rule. Coats v. A., T. & S. F. Ry. Co., 1 Cal. App. 441, 444, 82 P. 640; Wolff v. Los Angeles, 49 Cal. App. 400, 193 P. 862. See Draft Proposed New York Civil Code, published in 1862, section 1495, wherein Sedgwick on Damages is referred to as the source of this provision; also in the Report of the Commissioners prefacing Field's Draft, at page vii, it is said: "All the Commissioners profess is that they have endeavored to collect those general rules known to our law which are applicable to our present circumstances and ought to be continued."

[12, 13] As hereinbefore stated, an individual complaining of an unlawful structure must show that he has suffered some exceptional damage other than that suffered by the public generally. An increase in fire hazard or in insurance rates has been generally held not to constitute such damage. McCloskey v. Kreling, 76 Cal. 511, 18 P. 433; Siskiyou, etc., Co. v. Rostel, 121 Cal. 511, 53 P. 1118; 46 Cor. Jur. "Nuisances," § 51, p. 680. Nor will the fact alone that property will be depreciated in value by the mere proximity of an unlawful structure have that effect. Severy v. Central Pacific R. Co., 51 Cal. 194; Bigley v. Nunan, 53 Cal. 403. Plaintiffs' sole contention on this phase of the case is that the structure, being unlawful in the respect stated, is therefore a nuisance; and, being in close proximity to their building, the increased fire hazard necessarily causes them special detriment different in kind from that suffered by others. In support of this they rely on the case of Smith v. Collison, 119 Cal. App. 180, 6 P.(2d) 277. There the trial court found that the unlawful structure would cause an increase in fire hazard, and also that the business proposed to be carried on therein would occasion excessive and loud noises by reason of automobile traffic, the collection of dirt and rubbish upon plaintiff's property, and other sources of annoyance within a restricted residential zone. The latter facts were sufficient to sustain the judgment; and the opinion indicates no intention to depart from the rule declared in the cases cited. Nor was this the effect of other cases cited by plaintiffs, viz. Fisher v. Zumwalt, supra; City Store v. San Jose, etc., Co., 150 Cal. 277, 88 P. 977; Willson v. Edwards, 82 Cal. App. 564, 256 P. 239; Williams v. Blue Bird Laundry Co., supra.

Defendant's building not being an apartment house within the statute, there was no proof that plaintiffs suffered actionable injury on account of its erection and maintenance, and a verdict for defendant was properly directed. We do not mean to hold, however, that, should the same be hereafter conducted as an apartment house contrary to law, plaintiffs would in a proper case be without remedy.

The judgment is affirmed.

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138 Cal.App. 418

COOK v. SINGER SEWING MACH. CO. et al.

Civ. 7800.

District Court of Appeal, Second District, Division 1, California.
May 2, 1934.

1. Arrest ⚷63(4).

To justify peace officer in making arrest, without warrant, for commission of felony, it must appear that officer's "suspicion" of guilt or his "belief" in assumed facts that arrested person has committed felony was properly founded on relevant circumstances or credible information; mere suspicion in and of itself not being sufficient (Pen. Code, § 836, subd. 3).

> "Suspicion" is weaker than "belief," since suspicion requires no real foundation for its existence, while "belief" is necessarily based on at least assumed facts.
>
> [Ed. Note.—For other definitions of "Belief" and "Suspicion," see Words & Phrases.]

2. False Imprisonment ⚷31.

In action for false imprisonment, circumstances regarding theft of sewing machines sold by plaintiff for former employer *held* to establish that peace officer was legally justified in arresting plaintiff (Pen. Code, § 836, subd. 3).

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Clifford Cook against the Singer Sewing Machine Company, D. M. Fountain, and others. From an adverse judgment, the last-named defendant appeals.

Reversed.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and George A. Dockweiler, Deputy City Atty., all of Los Angeles, for appellant.

J. Q. Adams and L. B. Binford, both of Los Angeles, for respondent.

HOUSER, Justice.

Defendant appeals from a judgment that was rendered against him and in favor of plaintiff in an action for damages alleged to have resulted from a false imprisonment of plaintiff by defendant.

From the record herein, in substance, it appears that, during a period of time when plaintiff was employed as a salesman by the Singer Sewing Machine Company, he sold on the installment plan and thereafter delivered a sewing machine to each of two persons. Shortly thereafter plaintiff left the employ of the Singer Sewing Machine Company and entered the employ of another sewing machine company. In the course of events, each of the purchasers of said sewing machines notified the Singer Sewing Machine Company that she did not wish to proceed with the purchase of the sewing machine which theretofore had been delivered to her, but that she wished the Singer Sewing Machine Company to "repossess" it, following which a man "in a dark sedan automobile," who falsely represented himself as being the agent of the Singer Sewing Machine Company, unlawfully and feloniously claimed and took possession of said sewing machine. On the discovery by the Singer Sewing Machine Company of the theft of said sewing machine, it reported such fact to the Los Angeles police; whereupon defendant, who was a police officer, and another member of the police force, were duly assigned to investigate the matter. In the course of such investigation, defendant interviewed each of two officers of the Singer Sewing Machine Company, one of the women to whom one of the sewing machines originally had been delivered, and an officer of the sewing machine company with whom plaintiff was then employed. From such source of information, defendant was told that one Acosta, who as a sewing machine salesman was a former coemployee of plaintiff, had stated that he knew the whereabouts of the two stolen sewing machines; that Acosta and plaintiff "worked" together, were often seen together, and that together they "hung around pool halls"; that, on the night of the day on which the two sewing machines were stolen, plaintiff was seen with Acosta in a dark automobile sedan, which the latter had either "borrowed or stolen" from one George French, and that the "automobile that had picked up the stolen machines was a dark sedan, and that the car that picked up one of them was owned by one George French"; that plaintiff was "short of funds," and that before leaving the employ of the Singer Sewing Machine Company, without its knowledge or consent, plaintiff had pawned two other of its sewing machines; that Acosta also had misappropriated one sewing machine that belonged to his employer; that when asked by defendant if he was acquainted with plaintiff, at first Acosta denied that he was acquainted with him, but later admitted the fact. Acting upon such information, defendant placed plaintiff under arrest and thereupon took him to the police station, where he was detained for a space of five hours thence next ensuing, at the expiration of which time, following further investigation of facts connected with the matter, plaintiff was released from custody.

[1] In substance, subdivision 3 of section 836 of the Penal Code provides that a peace officer may make an arrest "when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."

The principal question raised by appellant is whether, in view of the evidence regarding the information which defendant had received, he had "reasonable cause for believing" the plaintiff had stolen the sewing machines.

The action in the case of Potter v. Seale, 8 Cal. 217, was one for damages which resulted from an alleged malicious prosecution. It was there said that "probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." And the definition thus announced has received judicial recognition and approval at least in Michel v. Smith, 188 Cal. 199, 205, 205 P. 113, and in Murphy v. Murray, 74 Cal. App. 726, 731, 241 P. 938. The case of People v. Kilvington, 104 Cal. 86, 92, 37 P. 799, 43 Am. St. Rep. 73, contains a quotation taken from Bacon v. Towne, 4 Cush. (Mass.) 217, which may be more satisfying, to wit, that "there must be such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty." And again, as a résumé of several authorities cited in the footnote thereto, the rule announced in 2 Ruling Case Law, 451, is that "probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." However, in Gulf, etc., Ry. Co. v. Shieder, 88 Tex. 152, 30 S. W. 902, 905, 28 L. R. A. 538, it is said that the word "suspicion" is defined as being "the imagination of the existence of something without proof, or upon very slight evidence, or upon no evidence at all." In substance, the same definition of the word is given in Webster's New International Dictionary. To the same effect, see State v. Hall (Mo. App.) 285 S. W. 1009. And in Giddens v. Mirk, 4 Ga. 364, 370, the court said that "suspicion" is weaker than "belief."

In the case of Union Indemnity Co. v. Webster, 218 Ala. 468, 118 So. 794, 801, wherein numerous authorities were cited in support of the rule there announced, it was held that (syllabus): "Under Code 1923, § 3263, permitting arrest by officer without warrant, where he has reasonable cause to believe person arrested has committed a felony, 'reasonable cause to believe' involves a state of facts or circumstances such as would lead a reasonable man of ordinary caution, acting impartially, reasonably, and without prejudice, to believe the person arrested to be guilty. * * *"

It is apparent that "suspicion" requires no real foundation for its existence. "Belief" is necessarily based upon at least assumed facts. It would therefore seem a "contradiction of terms" to say in effect that "suspicion" is a conclusion or condition of mind which results from a consideration of pertinent facts and circumstances by a man of ordinary care and prudence. That is what engenders "belief"; and "belief" (rather than "suspicion," founded upon "reasonable cause" therefor) that the person proposed to be arrested has in fact committed a felony is what is required by the provisions of section 836 of the Penal Code before a peace officer will be justified in making such arrest. Stated negatively, in and of itself mere suspicion will not suffice as a legal reason for an arrest. But in order that, without a warrant so to do, an arrest by a peace officer of a person for the commission by the latter of a crime amounting to a felony, may be legally justified, it must appear that his "suspicion" of the guilt of the person proposed to be arrested, or his belief in the assumed fact that the arrested person has committed a felony, be properly founded upon relevant facts, circumstances, or credible information conveyed to him. 5 Cor. Jur. 418, and authorities there cited. But in that connection, before making an arrest the officer is not required to have definitely and finally established the truth of the facts or the certainty of the information upon which he relies. His justification primarily depends upon the quality and quantity of the assumed evidence presented to him, rather than upon its conclusiveness as to facts. As is said in People v. Kilvington, 104 Cal. 86, 93, 37 P. 799, 801, 43 Am. St. Rep. 73: "In considering this question of probable cause upon the part of the defendant to arrest the deceased, we are to look only at the facts and circumstances presented to him at the time he was required to act. * * *" Otherwise stated, "* * * probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances, which would be sufficient to induce a reasonable belief in the truth of the accusation." 2 R. C. L. 451.

To reiterate, it is not whether the facts upon which the officer acted would support the verdict of "guilty" and the ensuing judgment rendered thereon, but rather whether to the lay mind, or to the mind of a reasonable prudent man, the facts were sufficient to afford "reasonable cause for believing" that the person arrested had committed the particular felony which related to such facts. 25 Cor. Jur. 473, and authorities there cited.

[2] Judged by such authorities, however apparent it may be to the legal mind that many of the "facts and circumstances" herein, if submitted to judicial inquiry, would be deemed hearsay, irrelevant and inadmissible as evidence of the guilt of the plaintiff of the offense, of grand theft, nevertheless acting in the capacity of peace officer, in forming his "belief," defendant was entitled to be influenced by such "facts and circumstances" as any reasonable and prudent man probably would have been influenced thereby; and, if on consideration of the assumed facts and circumstances hereinbefore set forth it should appear that they furnished "reasonable cause for believing" that plaintiff had committed the felony, by stealing the sewing machines in question, it should follow that defendant was acting within his legal rights in placing plaintiff under arrest.

With so much in mind, and adverting to the "facts and circumstances" which defendant had a right to take into consideration, it is obvious that, while not conclusive, or possibly not even convincing, of plaintiff's guilt in the premises, to a greater or lesser extent, dependent upon the weight to be attached thereto, they did indicate, if not an actual physical felonious taking of the sewing machines by plaintiff, a conscious, intentional, and deliberate participation by him in the criminal act. Considering some of the outstanding "facts," it was plaintiff who had sold the sewing machines and he knew their location. Presumably he had some knowledge of the ability of, or the intention of, the persons to whom they had been sold to make payment of the installments of the purchase price of the sewing machines as such installments fell due. He was "short of funds"; he was a close associate of Acosta, who was an employee of the Singer Sewing Machine Company, and who well may have known of the several requests of the purchasers of the sewing machines that the respective machines be "repossessed." The automobile in which one of the sewing machines was transported after it was stolen was in the possession of Acosta on the day on which the theft was committed; and after such theft occurred plaintiff was seen riding with Acosta in the same automobile. Besides which, Acosta had made the statement that he knew the whereabouts of the stolen sewing machines. Even without giving weight to the fact that theretofore plaintiff and Acosta each had been guilty of misappropriating property of which the Singer Sewing Machine Company was the owner, and casting aside as immaterial the false statement made by Acosta regarding his acquaintance with plaintiff, it is most probable that a reasonably prudent person, in possession of the facts to which attention hereinbefore has been specially directed, would have an honest and sincere belief that plaintiff had been a conscious and intentional participant in the commission of the criminal offense. In addition to all of which the good faith of defendant in making the arrest is amply evidenced by the fact that, before arresting plaintiff, he interviewed four different persons from whom the information was obtained and upon which he confidently relied in his action in the premises. It is the conclusion of this court that, considering the "facts and circumstances" hereinbefore set forth, defendant was legally justified in making the arrest of plaintiff.

No other point suggested by appellant as constituting a just ground for reversal of the judgment requires consideration by this court.

It is ordered that the judgment be and it is reversed.

We concur: CONREY, P. J.; YORK, J.

138 Cal.App. 448

PICKWICK STAGES SYSTEM et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9603.

District Court of Appeal, Second District, Division 2, California.

May 7, 1934.

Rehearing Denied June 6, 1934.

Hearing Denied by Supreme Court July 5, 1934.

1. Venue 🔑71.

In action for personal injuries sustained without state, where two defendants, appearing by demurrer and, claiming to be the only defendants having any connection with or interest in the action, moved for change of venue to county of their residence, court had no power, pending the motion, to act on demurrer to complaint, and order overruling demurrer was nullity (Code Civ. Proc. § 395).

2. Venue 🔑71.

Motion for change of place of trial to county of defendant's residence operates as supersedeas or stay of proceedings and must be disposed of before any other step can be taken (Code Civ. Proc. § 395).

Proceeding for writ of mandate by the Pickwick Stages System and another against the Superior Court in and for Los Angeles County and others.

Writ granted.

Willis I. Morrison and Lasher B. Gallagher, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, and Russell H. Pray and Walhfred Jacobson, both of Long Beach, for respondents.

CRAIG, Justice.

The petitioners, having been ordered to file their answer pending a motion for a change of place of trial, in the hearing on motion for change of place of trial and after the overruling of their demurrer, ask that the superior court be required to set aside said ruling and to hear and determine such motion.

[1, 2] By a complaint filed in the county of Los Angeles against numerous defendants, including petitioners, it was alleged that personal injuries were sustained in the state of Oregon through the negligence of defendants. A motion and demand for a change of venue to the city and county of San Francisco, and affidavits in support thereof, were filed. Petitioners appeared by demurrer to said complaint. During argument upon the motion, counsel interrupted the proceedings and moved that the same go off calendar and that the demurrer be overruled, which motion was granted. If the grounds of petitioners' motion for a change of venue were tenable, that is, that they are the only parties defendant who have any connection with or interest in the suit, the superior court of Los Angeles county is without jurisdiction thereof. Code of Civ. Proc., § 395. That it "had no power to act upon the demurrer when it did (Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209) and its order in that regard is a nullity," has long been settled law (Nolan v. McDuffie, 125 Cal. 334, 58 P. 4). Such an application "operates as a supersedeas or stay of proceedings, and * * * must be disposed of before any other step can be taken." Walsh v. Superior Court, 44 Cal. App. 34, 185 P. 998, 999.

It is ordered that the writ issue as prayed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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138 Cal.App. 404

PEOPLE v. RICHARDSON.

Cr. 1790.

District Court of Appeal, First District, Division 2, California.

May 1, 1934.

Rehearing Denied May 16, 1934.

1. Jury 🔑33(3).

Constitutional guaranty of "trial by jury" includes right to trial by jury in county or vicinage; "vicinage" meaning jury of county wherein trial is had (Const. art. 1, § 7).

> The word "vicinage" is subject to various definitions, mainly depending upon the sense in which it is used, and means the neighborhood, or, as applied to juries, in modern use, a jury of the county wherein trial is had.
>
> [Ed. Note.—For other definitions of "Trial by Jury" and "Vicinage," see Words & Phrases.]

2. Jury 🔑33(3).

Statute giving any county jurisdiction of criminal action for escaping from prison *held* not violative of constitutional guaranty of trial by jury (Const. art. 1, § 7; Pen. Code, § 787).

3. Jury ⚷9.

Common-law right to trial by jury guaranteed by Constitution *held* not right to jury trial as known to ancient common law, but right as it existed at common law when State Constitution was adopted (Const. art. 1, § 7).

4. Common law ⚷11.

"Common law at time State Constitution was adopted" includes whole body of common law of England as it stood at that time, influenced by statute.

[Ed. Note.—For other definitions of "Common Law," see Words & Phrases.]

5. Jury ⚷33(3).

Common-law right to "trial by jury" existing when State Constitution was adopted *held* not to include right to trial by jury selected from vicinage or county where crime was committed (Const. art. 1, § 7).

6. Jury ⚷9.

Essential attributes of common-law "trial by jury" guaranteed by Constitution are number, impartiality, and unanimity (Const. art. 1, § 7).

7. Statutes ⚷66.

Legislature *held* empowered to pass laws fixing place of trial in criminal actions generally (Pen. Code, § 787; Const. art. 4, § 25).

8. Criminal law ⚷108(1).

Trial for escape from state prison road camp could be had in county other than county where escape occurred or accused was apprehended (Pen. Code, § 787).

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Jack B. Richardson was convicted of an escape from the state prison, and he appeals. Affirmed.

Wallace S. Myers, of San Anselmo, and Hilary H. Crawford, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was a prisoner committed to the state prison at San Quentin. While working under the surveillance of prison guards in a road camp in Butte county, he made his escape. He was subsequently apprehended in Los Angeles county and returned to the prison at San Quentin. He was tried and convicted in the superior court in Marin county on the charge of escape, and from the final judgment of conviction he appeals.

The sole question raised by appellant is that of jurisdiction. He contends that "The Superior Court of the County of Marin had no jurisdiction in this case for the reason that defendant had a constitutional right to be tried by a jury composed of persons from either the County of Butte where the alleged escape occurred or from the County of Los Angeles where defendant was apprehended." In our opinion this contention is without merit.

Section 787 of the Penal Code provides: "The jurisdiction of a criminal action for escaping from prison is in any county of the state." This section has been held to apply to escapes from road camps as well as to escapes from within the prison walls. Bradford v. Glenn, 188 Cal. 350, 205 P. 449; People v. Crider, 76 Cal. App. 101, 244 P. 113; People v. Vanderburg, 67 Cal. App. 217, 227 P. 621. It is therefore clear that the superior court of Marin county had jurisdiction under the terms of said section and that appellant's contention must fall if said section is constitutional.

Appellant's claim of unconstitutionality is based upon the provisions of article 1, § 7, of our Constitution, which provides in part, "The right of trial by jury shall be secured to all, and remain inviolate." This is substantially the same provision as was placed in our original Constitution of 1849. Art. 1, § 3. Appellant takes the position that the right to trial by jury, which was secured by these constitutional provisions, was the common-law right of trial by jury and that one of the essential attributes thereof was the right to a trial by jurors selected from the vicinage. He further takes the position that any statute purporting to confer jurisdiction upon the court of any county other than the county where the crime was committed or the county where the defendent was apprehended is in violation of said constitutional guaranty and therefore void.

Appellant cites and relies upon People v. Powell, 87 Cal. 348, 25 P. 481, 11 L. R. A. 75. The language of the first portion of the opinion in that case lends apparent support to appellant's contention, but we do not believe that said decision is conclusive. The Supreme Court there was considering section 1033 of the Penal Code. The court held that said section was unconstitutional in part, but further held that, even if the section was valid in its entirety, the showing made on the application for change of venue was insufficient. In other words, the decision rested upon two grounds. While that portion of the opinion relating to the constitutional question has never been expressly overruled by the Supreme Court, we believe that it has been impliedly repudiated by said court in People v. Prather, 134 Cal. 386, 66 P. 483, 724, and Bradford v. Glenn, 188 Cal. 350, 205 P. 449. Furthermore, a petition for a writ of prohibition entitled, Vincent v. Superior Court, San Francisco No. 15081, was recently filed in the Supreme Court. The petitioner in that proceeding is the appellant on a companion appeal now pending in this court. People v. Vincent, 32 P.(2d) 436. Both said Vincent and appellant, Richardson, escaped from the road camp in Butte county and both questioned the jurisdiction of the superior court of Marin county. After the case against Vincent had been set for trial in that court over his objection, he applied to the Supreme Court for a writ of prohibition. In support of his petition he raised the identical question presented on this appeal, and he cited and relied upon the opinion in People v. Powell, supra. Said petition was denied by the Supreme Court on January 15, 1934, and said denial must be interpreted as a ruling sustaining the validity of said section 787 of the Penal Code. It is true, as pointed out by appellant, that the case of People v. Powell, supra, was referred to in People v. Martin, 188 Cal. 281, at page 288, 205 P. 121, 21 A. L. R. 1399, but the first-named case was merely distinguished in the last-mentioned opinion. It may also be noted that within a short time after the case of People v. Martin, supra, was decided, the Supreme Court handed down its opinion in Bradford v. Glenn, supra, in which the validity of said section 787 of the Penal Code was assumed.

[1, 2] We believe that the language found in the opinion in Ex parte McDonald, 20 Cal. App. 641, 129 P. 957, indicates the correct interpretation of the right to trial by jury as secured by our Constitution. The court there had under consideration section 785 of the Penal Code. The court said on page 642 of 20 Cal. App., 129 P. 957: "It is claimed by petitioner that the section above referred to is unconstitutional as in derogation of the right to trial by jury, which by the Constitution remains inviolate; that this right of trial by jury guarantees a common-law jury, which is by a jury of his peers of the vicinage or county where the crime is alleged to have been committed. The position taken by petitioner as to his right to a trial by a jury of his peers in the county or vicinage is unassailable. The word 'vicinage' is subject to various definitions, mainly depending upon the sense in which it is used. The Standard Dictionary defines it as the neighborhood, or, as applied to juries, 'in modern use, a jury of the county wherein trial is had.' We are of opinion, therefore, that, if the statute guarantees to the accused the right of trial by jury in the place by law designated as the place for trial, it confers upon him the right contemplated by the Constitution. The authorities cited, to the effect that the trial must be in the county wherein the offense was committed, have no application in this state, where, under the Constitution, the place of trial is subject to legislative determination." Under this view appellant's constitutional right to trial by jury was not invaded by the statute which related merely to the place of trial.

[3-6] We are fully aware of the fact that a different interpretation of the so-called common-law right to trial by a jury of the vicinage is to be found in the language of some of the decisions. We believe, however, that these decisions hark back to the days of the ancient common law when the accused could only be tried by a jury selected from the county in which the offense had been committed. In early times the rule was so strict that, if an offense was committed partly in one county and partly in another, such offense was not punishable at all. See People v. Powell, supra, page 358 of 87 Cal., 25 P. 481. But the common-law right to trial by jury which was guaranteed by our Constitution was not the right to trial by jury as known to the ancient common law, but was the right to trial by jury as it existed at common law at the time that the Constitution of this state was adopted. People v. Martin, supra, page 285 of 188 Cal., 205 P. 121; Ex parte Wong You Ting, 106 Cal. 296, 299, 39 P. 627. When we refer to the "common law" at the time that our Constitution was adopted, we include the whole body of the common law of England as it stood at that time, influenced by statute. Martin v. Superior Court, 176 Cal. 289, 293, 168 P. 135, L. R. A. 1918B, 313. As so influenced by statute, the common-law right to trial by jury no longer had as one of its essential attributes a right to trial by a jury selected from the vicinage

or county where the crime was committed. It is conceded that statutes had been enacted in England permitting the prosecution of many crimes either in the county where the crime had been committed or in the county where the accused had been apprehended. It also appears that statutes had authorized the prosecution of certain crimes in any county where the accused was in custody. We need only cite by way of example the statute of 1828 relating to the crime of bigamy, which statute is quoted on page 287 of 188 Cal., 205 P. 121, 124, People v. Martin, supra, as follows: "Any such offence may be dealt with, enquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county." These statutes constituted a recognition of the fact that, owing to the development of the trial by jury and the resulting changes in the nature thereof, many of the reasons existing in earlier times for requiring the trial to be had in the place where the crime had been committed had ceased to exist. We therefore conclude that the real essential attributes of the so-called common-law jury trial were at all times "number, impartiality and unanimity" (People v. Peete, 54 Cal. App. 333, 366, 202 P. 51); that at the time that our Constitution was adopted the only right which the accused had under the common law of England with respect to the place from which the jury should be selected was a right to have the jury selected from the vicinage or county which might be fixed by law for the place of trial; and that in the present case appellant's right to a jury trial as contemplated by our Constitution was secured to him when he was accorded a trial by a jury which possessed the essential attributes above mentioned and which was duly selected from the county in which the cause was tried pursuant to the statute fixing the place of trial.

[7] This view is strengthened by a consideration of our Constitution as a whole. There are no express provisions therein designating the place of trial of criminal actions except those relating to prosecutions for libel (article 1, § 9), and there are no express limitations upon the power of the Legislature to fix the place of trial in criminal actions generally. Furthermore, we find that the Legislature was prohibited from passing any "local or special laws" providing for "changing the venue in civil or criminal actions" (article 4, § 25), and we must conclude from the very expression of that limitation that the Legislature is possessed of the power to pass general laws for that purpose (5 Cal. Jur. p. 587).

[8] From what has been said it follows that section 787 of the Penal Code was a valid enactment and that appellant was properly tried and convicted in the superior court of Marin county.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

138 Cal.App. 775

PEOPLE v. VINCENT.

Cr. 1791.

District Court of Appeal, First District,
Division 2, California.
May 1, 1934.

Criminal law 🔑108(1).

Trial for escape from state prison road camp could be had in county other than county where escape occurred or accused was apprehended.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Raymond E. Vincent was convicted of escape from state prison, and he appeals.

Affirmed.

Hilary H. Crawford, of San Francisco, and Wallace S. Myers, of San Anselmo, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

This is a companion case to People v. Richardson, 32 P.(2d) 433, the opinion in which last-named case has been this day filed. Defendant here was likewise a prisoner committed to the state prison at San Quentin. He made his escape from the road camp in Butte county and was subsequently apprehended at Salt Lake City. He was extradited and was returned to the prison at San Quentin. Thereafter he was tried and convicted in the superior court of Marin county on the charge of escape and from the final judgment of conviction he appeals.

While separate briefs have been filed herein, said briefs are almost identical with the briefs filed in the Richardson Case. No new points are raised. For the reasons set forth in the opinion of People v. Richardson, the judgment herein is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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138 Cal.App. 236

NOAH v. BLACK & WHITE CAB CO. et al.

Civ. 8096.

District Court of Appeal, Second District, Division 2, California.
April 24, 1934.

1. Appeal and error 🔑1048(7).

In action before court without a jury, admission of defendant's deposition as modified by him was not error, where original answers, changes made in absence of attorneys for plaintiff who took the deposition, and reasons therefor were before court, and plaintiff was afforded opportunity of cross-examination (Code Civ. Proc. § 2052).

2. Appeal and error 🔑1050(1).

Admission of plaintiff's covenant not to sue other parties involved in automobile collision *held* harmless, where contention of remaining defendant was that he should have benefit of it in case he were found a joint tort-feasor, and court found that such defendant was not guilty of any negligence.

3. Carriers 🔑318(7).

In action by taxicab passenger for injuries sustained in collision, finding that collision was due solely to negligence of taxicab driver and not to motorist making left turn at intersection *held* sustained by evidence.

4. Carriers 🔑318(7).

In action by taxicab passenger for injuries sustained in collision, finding that motorist made left turn at intersection with due care *held* supported by evidence, though motorist did not at all times watch approaching taxicab that later collided with him.

◆

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Harry Arland Noah against the Black & White Cab Company and others. From a judgment for the defendant W. A. Barnett, the plaintiff appeals.

Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Chase, Barnes & Chase, of Los Angeles, for respondent.

DESMOND, Justice.

The plaintiff appeals from a judgment entered in favor of defendant Barnett by the court sitting without a jury. As to all other defendants dismissals had been entered before the trial.

The action was for damages claimed as the result of a collision between two automobiles at the junction of two thoroughfares in the city of Los Angeles. Plaintiff, a passenger in a Black & White taxicab, was being driven in a westerly direction on Wilshire boulevard, while the defendant Barnett was driving his Hupmobile in an easterly direction. Arriving at the junction of Highland avenue, Barnett turned to the north; the collision between the two vehicles occurring in the northerly portion of the intersection of the two streets, when the taxicab struck the Hupmobile at or near the right rear fender. The shock of the collision was such as to throw plaintiff with considerable force against the interior of the cab, injuries resulting therefrom.

Plaintiff rests his appeal upon three grounds, stated in his brief as follows: "Point 1. The court erred in refusing to permit the deposition of the defendant and respondent W. A. Barnett to be received in evidence in its original form. Point 2. The court erred in admitting evidence over the objection of plaintiff. Point 3. That said judgment is not supported by the evidence." We shall consider these contentions in their order.

[1] As to point 1, it appears that prior to the trial of the action attorneys for the plaintiff took the deposition of defendant Barnett, who later signed it, but not in the presence of plaintiff's attorneys, and not until he had made certain changes in figures, indicating the distances between various points, and interlined certain language that might be considered as explanatory or in amplification of answers made when under examination. The attorneys for plaintiff were unaware of these changes until the case came to trial, and objected to the court's considering the deposition with the changes as made (the original replies also appearing), contending that the deposition as originally taken and not

changed in any particular should be before the court. Section 2052 of the Code of Civil Procedure provides that "a witness may also be impeached by evidence that he has made, at other times, statements inconsistent, with his present testimony." There was no denial by the witness upon his examination in court that he had made statements under his original examination by deposition that differed from those which he made in court and which he entered in his deposition. In fact, he explained to the court why he made the changes. Since the trial judge was definitely advised of the original answers given when the deposition of the witness was taken, and of the conditions under which the changes therein were made, and since he had the opportunity to hear in court, on direct and cross-examination, the testimony of Barnett upon these very matters, we fail to see how the rights of plaintiff were in any way prejudiced by this procedure. We therefore hold the first point not well taken.

[2] As to point 2, it is contended that the court erred in permitting the introduction in evidence of a document entitled "Option Agreement," which was signed by plaintiff February 11, 1931, from which it appears that for a consideration he agreed to execute a covenant not to sue certain of the defendants, including the Black & White Cab Company and the Yellow Cab Company, for damages arising out of this accident. The defendant Barnett had set up a claim in his answer that the release of the other defendants operated to his benefit if he should be found to be a joint tort-feasor with them. If the admission of this document was erroneous, and we do not imply that it was, still the plaintiff did not suffer from the ruling, for the reason that the court did not find the defendant Barnett to be a joint tort-feasor, but did find "that the act of said driver of said taxicab in which the plaintiff was riding in so entering said intersection at such a negligent, illegal and reckless rate of speed, and his negligent acts in colliding with the automobile driven by the defendant and cross-complainant, W. A. Barnett, was the sole, proximate cause of the accident referred to in said complaint, and the injuries and damages, if any, suffered by the plaintiff, Harry Arland Noah." There was also a specific finding that plaintiff's injuries were not due to any carelessness or negligence of Barnett.

[3] In regard to the third point, insufficiency of the evidence to sustain the judgment, we note that there was evidence before the court that for some little distance before arriving at the corner of the intersection the defendant Barnett extended his hand to the left to indicate a left-hand turn; that he not only made the turn, but, when he arrived at the point where the collision took place, the front wheels of his Hupmobile were considerably north of the north curb line of Willshire boulevard. In other words, at that moment he had actually entered Highland avenue. There was evidence to the effect, that the taxicab, instead of swerving to the left of the Hupmobile and clearing it completely, swerved to the right, thereby causing the collision. Upon these and other items of evidence the court reached its conclusion that the negligent operation of the taxicab by its driver constituted the sole proximate cause of the accident, and we believe there was sufficient evidence before it to support the judgment.

[4] Appellant contends that, because Barnett did not watch the approaching taxicab continuously from the time he started to turn into Highland avenue, a finding that he was not negligent is unsupported. This contention is disposed of satisfactorily, it seems to us, by respondent's counsel as follows, quoting from his brief: "Counsel for appellant have quoted certain portions of respondent Barnett's testimony to show that he did not watch the approaching taxicab at all times while he was making the turn. This is a correct statement of his testimony. But we have contended, and do contend, that there is no duty, as a matter of law, resting upon any driver to look at all times in one direction while traversing an intersection. We agree that every driver must 'ever be alert and watchful,' must use ordinary care at all times, and at an intersection, and particularly in making a left hand turn, a driver is required to exercise a greater care. Whether or not Barnett, while making the left hand turn, exercised that degree of care, greater or less, commensurate with the circumstances existing at that time and place, is a pure question of fact for the court to determine. This it did adversely to appellant. * * * It is the rule in all of such left hand turn cases, as set forth in Donat v. Dillon, 192 Cal. 426, 221 P. 193: 'It was therefore a question for a trial court to determine upon all the evidence and the reasonable deductions therefrom whether the defendant, after having seen the approaching machine, continued to exercise the care and prudence which a reasonable man would have exercised under the circumstances.' Donat v. Dillon, 192 Cal. 426, 221 P. 193. In the instant case, the court,

with the entire evidence of the case before it, held that the left hand turn made by respondent Barnett was proper, and made in the exercise of due care, commensurate with the duty resting upon respondent in making such turn."

Judgment affirmed.

I concur: STEPHENS, P. J.

SMARDA et ux. v. FRUIT GROWERS' SUPPLY CO. et al. *

Civ. 4966.

District Court of Appeal, Third District, California.

May 4, 1934.

Rehearing Granted June 1, 1934.

1. **Negligence** 🔑93(2).

Contributory negligence of husband who was driving automobile at time of accident *held* imputable to wife who was passenger.

2. **Automobiles** 🔑168(9).

Whether speed of approximately 20 miles per hour at time when heavy rain was falling and when driver of automobile was blinded by headlights of approaching automobile was lawful or reasonable rate of speed depends on circumstances of particular case (St. 1931, p. 2120, § 113(a).

3. **Automobiles** 🔑245(78).

Generally, it is question of fact for jury to determine whether driver of automobile was proceeding at careful and prudent speed, but, if contributory negligence is apparent from record, it becomes duty of court to so declare (St. 1931, p. 2120, § 113(a).

4. **Trial** 🔑142.

Where evidence is such that different conclusions upon matter can rationally be drawn therefrom, question is presented for jury.

5. **Automobiles** 🔑168(9).

Driving automobile at speed of approximately 20 miles per hour during heavy rain in evening, while driver was blinded by glaring headlights of approaching automobile, and at time of collision with rear of truck stopped on paved highway, *held* contributory negligence as matter of law (St. 1931, p. 2120, § 113(a).

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Andrew Smarda and wife against the Fruit Growers' Supply Company and others. From a judgment in favor of the plaintiffs, the defendants Clark A. Morse and Van M. Morse appeal.

Judgment reversed.

M. J. Cheatham, of Red Bluff, and Carr & Kennedy, of Redding, for appellants.

J. Oscar Goldstein, of Chico, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment upon a verdict of the jury for damages in an automobile accident. Plaintiffs had judgment, from which the defendants appeal.

About 5:45 on the evening of December 21, 1931, Andrew Smarda and his wife, Anna Smarda, were proceeding southerly in their automobile on the Pacific Highway, near the town of Corning. Mrs. Smarda was seated in the front seat beside her husband. It was raining very hard as they approached the northerly limits of Corning. When they had reached a point on the highway approximately where the "city limits" sign of the north boundary of the city of Corning was located, a large car with glaring headlights approached from the opposite direction and so obscured their vision they could see nothing in front of them. The paved portion of the highway at this point is 20 feet in width, approximately straight and level. About this time plaintiff reduced the speed of his automobile until he was traveling at a speed approximately 20 miles an hour. He continued at this speed for approximately 275 feet, when he collided with a Fageol truck standing in the highway, demolishing the car and causing severe injuries to Mrs. Smarda.

The passenger car was equipped with an automatic windshield wiper in front of the driver's seat, but, owing to the rain and the glare of the headlights of the approaching automobile, neither Mr. nor Mrs. Smarda were able to see anything in front of them, but did see the "city limits" sign and the fence and power poles on the right of the highway. On this point plaintiff Smarda testified on direct examination:

"* * * I slowed down because a heavy rain been setting in and I keep on slowing and I seen that here that second stop sign for the city limits. I kept on slowing down, went at the rate of twenty not over 25 miles and as I passed the city limits kept on going

*For subsequent opinion see 36 P.2d 701.

slow with my foot on the brakes all the time because I been slowing down. A heavy car from the opposite direction been coming with powerful headlights, blinded my eyes so I couldn't see no left hand side but I could see telephone and power line poles, and I could have a clear vision of the right hand side of the road. * * * Well, I just been blinded, as I say to the left, but I could see clear to the right because I seen that city limits and seen that pole and as soon as it had been just like a flash that car passed and the truck loomed right in front of us. * * * I got 4 wheel brakes. The brakes locked or something and the car just shot forward on the wet pavement and she skidded on the wet pavement with all the force she had into that truck, the truck being at a standstill. * * *

"Q. How long did it last? A. The car (referring to the car with the glaring lights) went awful speed. Looked like it happened in a second."

On cross-examination the witness continued: "Q. You continued to drive in a southerly direction with those lights shining in your eyes? A. At a slow speed keeping my foot on the brake."

Upon the taking of the testimony of Mr. Smarda by deposition prior to the trial, he said in answer to the question: "Now when was the first, Mr. Smarda, that you saw the truck with which you collided? A. Well I tell you. We cross that bridge coming over to Corning, that's where I slowed down before you come to the city limits, because cars are passing at awful speed the opposite direction, and I slow down and cross that bridge, see, then passed the city limit, the big heavy car with powerful headlights approaching me, then I couldn't see no truck, nothing. * * *"

The truck in question, owned by Clark A. Morse and operated by Van M. Morse, was also proceeding southerly along the Pacific Highway, and had reached a point about 275 feet south of the northern "city limits" sign, when one of the gasoline reservoirs became empty. The truck stopped on the highway with the left side of the truck about 10 inches to the right of the center of the highway. The driver alighted and turned on the reserve gas reservoir, and had just returned to his cab when the impact between his truck and the car of plaintiffs occurred. Whether or not the lights on the truck were burning is in dispute. Plaintiffs claim the lights were not burning until after the collision, when they were flashed on; while the driver testified the lights, including the tail and side lights, were burning all of the time, as he had turned them on about an hour previously, and, when he alighted to turn on the gasoline tank, saw them burning at that time. We may assume, however, that the implied finding of the jury was that the tail-lights of the truck were not burning. Plaintiff saw the truck an instant before the impact, but too late to avoid the collision.

Upon this state of facts, defendants contend the verdict in favor of the plaintiffs is not supported by the evidence, or, in other words, that the plaintiffs were guilty of contributory negligence as a matter of law.

[1] There is no question that if Andrew Smarda, the husband, was guilty of contributory negligence, such negligence is imputable to the wife. Basler v. Sac. Gas & Elec. Co., 158 Cal. 514–518, 111 P. 530, Ann. Cas. 1912A, 642; Solko v. Jones, 117 Cal. App. 372, 374, 3 P.(2d) 1028.

[2] Plaintiff testified that immediately prior to the impact he was proceeding at a speed approximately 20 miles an hour, but whether or not this was a lawful or reasonable rate of speed depends on the particular circumstances, and is subject to the provisions of subdivision (a) of section 113 of the California Vehicle Act (St. 1923, p. 553, amended by St. 1931, p. 2120), which reads in part as follows: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[3-5] While ordinarily it would be a question of fact for the jury to determine whether or not the driver of a car was proceeding at a careful and prudent speed, having due regard to the surrounding circumstances, yet, if contributory negligence is apparent from the record, it becomes the duty of the court to so declare.

"Where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn therefrom—then the case presented is one for the jury." Firth v. Southern Pacific Co., 44 Cal. App. 511, 186 P. 815, 816. Inasmuch as the rule of comparative negligence is not applied in our jurisdiction, we are compelled to say that where, as here, the facts show the negligence of the driver continues up to the very moment of the collision, his negligence must be held to constitute the proximate cause of the injury.

In Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 715, 41 A. L. R. 1027, the circumstances were quite similar to those here presented. It is there said:

"(1) He was traveling, up to the time the glare reflected from the lights of the approaching automobile * * * at the rate of 25 miles an hour; (2) when the glare struck his eyes he was a distance of between 150 and 200 feet from where he collided with deceased; (3) the glare so obstructed his vision that he was unable to see an object on the highway before him, although his lights were in good condition and under ordinary circumstances he was able by them to discern an object before him at a distance of from 75 to 100 yards; (4) he did not see the deceased until after his car struck him; (5) when the glare first struck his eyes and blinded him, with the result as indicated, he diminished the speed of his car so that thereafter and until he struck deceased, he was still traveling at a speed of between 20 and 25 miles an hour; (6) he did not put on his brakes, nor turn off either the gas or ignition; (7) his brakes were in perfect order and he said he could have stopped his car between the time the glare first struck his eyes and the time he struck deceased, but that he did not do so, nor make any attempt to do so."

The court then proceeds to a consideration of the care required of a driver under such conditions, as follows:

"'Careful and prudent manner and at a rate of speed not greater than is reasonable and proper,' is relative and contemplates the peculiar circumstances and conditions under which a car may be operated over a public highway at a particular time—whether it be after nightfall and dark or in the daytime and light, the width of the highway and whether it is one which, by reason of its connections, is or may naturally be expected to be at all times subject to a heavy or light traffic. In other words, said section requires the exercise of that amount of care in driving a motor vehicle over the highways which the circumstances or conditions of the particular occasion exact, having in view the character of the highway and the use to which it is then being put. As is said in 29 Cyc. pp. 428, 429: 'The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. The greater the risk of danger the greater must be the care. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger.'

"Under the circumstances of the present case—the narrowness of the unpaved portion of the highway, the darkness of the night and the blinding of Kennell by the glare of the lights reflected from the headlights of the approaching machine—the highway over which Kennell was traveling was beset by danger of an extraordinary character from the time his vision became so obscured as to make it impossible for him to see plainly the road before him to the time that he struck the deceased. Thus the ordinary care with which Kennell was charged in driving his car over the highway required such an amount of such care as was commensurate with the exactions of the extraordinary dangerous circumstances under which he was then operating his car."

In Havens v. Loebel, 103 Cal. App. 209, 284 P. 676, 678, plaintiff, with his minor son, was approaching an intersection, and, blinded by the rays of the setting sun, drove into the intersecting highway and collided with a car driven by the defendant. This court held that plaintiff was guilty of contributory negligence as a matter of law in that he was traveling at the rate of 30 miles per hour with his eyes blinded by the sun, he could not or did not see the approach of the other car, and permitted his car to proceed under conditions rendering it impossible to see the car until within 4 or 5 feet of it. In that case the court reversed the judgment in favor of the plaintiff and held he was guilty of contributory negligence, and quoted with approval from the case of Hammond v. Morrison, 90 N. J. Law, 15, 100 A. 154, as follows: "The defendant did not deny that the decedent came to his death in the way above stated, but attempted to excuse himself upon the ground that just before the collision the street lights which he had passed were reflected into his eyes by the windshield of his car, so that he was unable to see in front of him, and that this temporary blindness was the cause of the collision. His own story demonstrates his lack of care. No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his windshield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Having seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being."

The Supreme Court of Michigan, in the case of Budnick v. Peterson, 215 Mich. 678, 184 N. W. 493, declares the rule that, if the vision of an automobile driver is obscured from the glaring lights of an approaching automobile, it is his duty to slacken his speed and have his car under such control that he may stop it immediately, if necessary.

In Meads v. Deener, 128 Cal. App. 328, 17 P.(2d) 198, the court, in accordance with the general rule, held the driver was negligent in not bringing his car under control, so that he could stop it immediately, when blinded by the approaching rays of the sun.

Such seems to be the general rule not only in California but in many other jurisdictions. Steele v. Fuller, 104 Vt. 303, 158 A. 666; Sellon v. Tanner, 252 Mich. 231, 233 N. W. 224; House v. Ryder, 129 Me. 135, 150 A. 487.

The same statement by appellant that he had the right of way is answered in the case of Donat v. Dillon, 192 Cal. 426, 221 P. 193, 194, where it was there claimed the defendant had the right of way; the court saying: "A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him."

Respondent directs our attention to the case of Grimes v. Richfield Oil Company, 106 Cal. App. 416, 289 P. 245, 251, where respondent, driving at a rate of speed not in excess of 40 miles an hour, at an early hour in the morning, collided with a load of machinery overhanging the rear end of the trailer. There was no tail-light or any light visible to him from the rear of the truck or trailer. He did not see the truck or trailer until within 50 or 100 feet from the rear end thereof, and too close to stop with safety. In attempting to pass to the right of the trailer, he collided with the overhanging load, causing the injury. In that case, respondent was using ordinary care in the operation of his car. It could not be said as a matter of law his own negligence contributed to the injury. The rule is thus laid down in California "that every person has a right to presume that every other person will perform his duty and obey the law, and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person, provided, of course, that such person himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time." Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Swartz v. Feddershon, 92 Cal. App. 285, 268 P. 430; Barton v. Studebaker Corporation of America, 46 Cal. App. 707, 189 P. 1025.

Respondent also relies upon the case of Gammon v. Wales, 115 Cal. App. 133, 300 P. 988. In that case the plaintiff was proceeding along a public highway about 7:30 p. m. on an evening in May, when he collided with a truck of defendant parked on the highway, whereby he suffered permanent injury. Defendant pleaded contributory negligence. At the conclusion of plaintiff's evidence the court granted a nonsuit. The evidence showed that at the time of the accident it was dark, and the highway was wet and slippery. The truck had been left unattended on the highway without either headlights or tail-lights. It further appeared that plaintiff was traveling on his proper side of the highway at a lawful speed at the time of the collision. If, however, it had appeared that plaintiff was at the time of the collision proceeding at an unlawful rate of speed in view of all the conditions, or if he were driving with his eyes blinded by the glare of the sun's rays, or by the dazzling lights of an on-coming car, or, as the cases say, as if blindfolded, contributory negligence would then be said to exist. The Gammon Case cannot therefore be held applicable to the present case.

Respondent next directs our attention to Silvey v. Harm, 120 Cal. App. 561, 8 P.(2d) 570, but there also Silvey, whose car collided with the unlighted truck or trailer of defendant, was himself without fault.

In Pattee v. King et al. (Cal. App.) 24 P.(2d) 564, the same rule was applied. Plaintiff himself was without fault. Apparently he was proceeding in a lawful manner, and solely as a result of the negligence of the defendant the damage was incurred.

It seems to us clearly apparent from the record, and the abundant authorities establishing the rule in California, that the negligence of plaintiff, which was the proximate cause of the injury, bars his recovery, and the judgment must be, and the same is hereby, reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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138 Cal.App. 466

JONES v. LESLIE et al.

Civ. 5095.

District Court of Appeal, Third District, California.
May 8, 1934.

1. **Attachment** 🔑263.
Whether bond given to release attachment is delivered is question of intention, which must be that instrument shall be operative (Code Civ. Proc. § 540).

2. **Attachment** 🔑263.
Statutory bond given to release attachment requires no formal acceptance by sheriff (Code Civ. Proc. § 540).

3. **Attachment** 🔑263.
Statutory bond given to release attachment, where properly executed, approved by court, filed in action, and acted upon by sheriff, *held* substantially delivered and operative as statutory bond, although not physically delivered to sheriff (Code Civ. Proc. § 540).

4. **Attachment** 🔑350.
In action on bond given to release attachment, sheriff's return certifying receipt of writ of attachment and of bond, and return of writ of attachment without further service, *held* sufficient to show that sheriff released attachment (Code Civ. Proc. § 540).

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by H. O. Jones against Charles C. L. Leslie and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

H. H. Harris and David E. Field, both of Los Angeles, for appellants.

Hill, Morgan & Bledsoe, Charles P. McCarthy and W. M. Farrer, all of Los Angeles, for respondent.

RANKIN, Justice pro tem., delivered the opinion of the court.

This is an action to recover judgment upon an undertaking given by defendants as sureties for Balboa Motor Corporation, a corporation, to obtain the release of property attached and prevent the further levy of a writ of attachment issued out of the superior court of Orange county, in an action wherein H. O. Jones was plaintiff and Balboa Motor Corporation, a corporation, was defendant. The bond was given before the return of the writ by the sheriff and pursuant to the provisions of section 540 of the Code of Civil Procedure. Said bond, after reciting the issue and levy of the execution, and that the defendant was desirous of having its property released from the attachments, by its terms bound the defendants to the effect that, in consideration of the release from said attachment of the property levied upon, said sureties do jointly and severally undertake in the sum of $10,600 and promise that, in case plaintiff recover judgment, they will on demand pay to plaintiff the amount of such judgment, together with interest and costs. The bond was entitled in the action in which the writ of attachment was issued and was executed February 27, 1925, and on the same date approved by the judge and filed by the clerk of the court in said action. March 11, 1925, the sheriff made return on said writ of attachment, certifying as follows: "I hereby certify that I received the within writ of attachment on the 21st day of February, 1925, and the defendant having given me a bond, as required in said writ, in an amount sufficient to satisfy the demand, besides costs, I herewith return this writ of attachment without further service."

[1-3] Appellants contend that the undertaking sued upon is not a statutory bond because it was never delivered to the sheriff and that it never became effective as a common-law bond as it was never delivered to the plaintiff. It is conceded that the bond was not given pursuant to an order of release of attachment as provided in sections 554 and 555 of the Code of Civil Procedure, applicable when the writ of attachment has already been returned by the sheriff. Therefore, if the bond is effective as a statutory bond, it was given pursuant to section 540 of the Code of Civil Procedure. The only objection to it as such statutory bond is that it was not physically delivered to the sheriff. No statutory provision relating to delivery of the

bond other than that found in said section 540 is cited.

The evidence as to the delivery of the bond consisted of the record showing it was filed in the pending action by the clerk of the court; the testimony of the witness Earl Abbey, deputy county clerk of Orange county, to the effect that he was the custodian of the records and files in the action of Jones v. Balboa Motor Corporation, in which action the writ of attachment was issued; that he does not know of any instructions given to his office as to what to do with the bond; the testimony of defendant Charles C. L. Leslie to the effect that his name appears on the bond; that at the time the bond was filed he gave no instructions to the clerk as to what to do with it; that he never instructed anyone to deliver it to the sheriff, and on cross-examination he stated: "I signed the bond in the Court House of Orange County. The best of my recollection is that I was there before the judge and answered certain questions about the sufficiency of my property, so as to entitle me to become a surety. My recollection is that after the court asked me the questions I signed the bond in the Court House at Santa Ana and was there when the court approved it and then the court or the clerk of the court handed the undertaking to Mr. O. W. Hines, who was the president of the Balboa Motor Corporation. I do not know what Mr. Hines did with it."

Also defendant C. D. Lesher testified that he had no conversation about the bond with the sheriff, and that he gave the county clerk of Orange county no instructions to deliver it either to the sheriff or to Mr. Jones, the plaintiff.

Upon this showing we are entitled to infer that O. W. Hines, president of the Balboa Motor Corporation, for whose benefit the bond was given, delivered it to the clerk for filing.

Delivery is always a question of intention which must be that the instrument shall be operative. The defendants, it appears from the testimony, knew what the bond was for. They signed and executed the bond for the purpose of preventing any further service of the writ and to secure the release of property already levied upon. The record sufficiently shows that the sheriff was informed of the execution of the bond and that it accomplished its purpose. A bond given under the provisions of said section 540 requires no formal acceptance by the sheriff. Kast v. Pacific Surety Co., 185 Cal. 450, 197 P. 339. No case is cited to us which deals with the technical question as to the necessity of physical delivery of the bond to the sheriff. However, the principle involved is discussed in the case of Passow & Sons v. U. S. Fidelity & Guar. Co., 177 Cal. 31, 170 P. 1124, 1129. In that case a bond given pursuant to section 540 was delivered to the plaintiff, and not to the sheriff, and in considering an objection that the bond was invalid because not delivered, the court said: "In the present case all that appears is that the undertaking was 'executed and delivered' to the plaintiff and that thereupon the attachment was discharged and the property released. The undertaking is set out in full in the complaint, and in the findings. It is entitled in the action and merely promises that if the plaintiff recover judgment the surety will on demand pay the amount thereof to the plaintiff. It was executed and delivered to the plaintiff only in the sense that it was passed to the plaintiff instead of to the sheriff. It does not appear that the plaintiff himself released the property, but only that upon such delivery the property was released. So far as appears, the delivery to the plaintiff was for convenience only, and the property was released by the sheriff in the usual way as upon the giving of the undertaking provided in section 540. This being the case, it should be regarded as an undertaking given in pursuance of that section, and as governed, with respect to a suit thereon, by the provisions of section 552."

The bond in question, having been properly executed, approved by the court, filed in the action, and acted upon by the sheriff, there was in our opinion a substantial delivery of the bond, and it was valid and operative as a statutory bond.

[4] Appellant next contends that no evidence was offered to prove that the attachment was released. There is no merit in this contention, as the return of the sheriff is sufficient to indicate that he had knowledge of the bond and recognized its legal effect. The testimony of the defendants sufficiently shows that, subsequent to the return made by the sheriff on the writ of attachment, all the property of the Balboa Motor Corporation was accounted for and disposed of by the officers of that corporation.

After a careful examination of the record, we are satisfied that the evidence is sufficient to support the findings and judgment.

For the reasons herein stated the judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

1 Cal.App.(2d) (Supp.) 761

PEOPLE v. GARCIA et al.

Cr. 1029.

Appellate Department, Superior Court, Los Angeles County, California.

April 27, 1934.

1. Druggists 🔑12.

Complaint charging that defendants were proprietors or owners of "certain pharmacy, store or shop" where drugs and medicines were sold at retail and failed to place registered pharmacist in charge *held* insufficient as not bringing store or shop within statutory definition of "pharmacy" (St. 1933, pp. 2192, 2198, §§ 1, 13).

> Such complaint did not directly allege that defendants were proprietors of pharmacy, by reason of use of disjunctive "or" in phrase "pharmacy, store or shop," and there was no allegation that store or shop had upon it or in it any of signs mentioned in statute using words "pharmacist," "pharmaceutical chemist," "apothecary," "druggist," "pharmacy," "drug store" or "drugs."
>
> [Ed. Note.—For other definitions of "Pharmacy," see Words & Phrases.]

2. Indictment and Information 🔑111(1).

Under counts charging defendants with selling drugs and medicines without being registered under Pharmacy Act, charge need not negative exceptions contained in act (St. 1933, p. 2198, § 12; St. 1929, p. 239, § 16).

3. Criminal law 🔑1169(1).

Any error in admission of evidence was harmless, where court could take judicial notice of facts stated by witness.

4. Criminal law 🔑304(4).

Judicial notice extends to meaning of words and to all matters of science and common knowledge.

5. Druggists 🔑1.

Words "drugs," "medicines," "chemicals," and "poisons," in pharmacy statute, are to be understood in their usual, natural, and ordinary sense, since no express definition is stated (St. 1933, p. 2192, § 1).

> "Drug" is any substance used as medicine or in composition of medicine for internal or external use, a substance or preparation used in treating disease.
>
> [Ed. Note.—For other definitions of "Drug," see Words & Phrases.]

6. Druggsts 🔑12.

Under Pharmacy Act prohibiting sale of drugs and medicines by unregistered persons, "aspirin," which is definite substance known also as acetyl salicylic acid, and citrate of magnesia, are "drugs or medicines" (St. 1933, pp. 2192, 2198, 2199, §§ 1, 12, 17; St. 1929, p. 239, § 16).

> [Ed. Note.—For other definitions of "Aspirin" and "Drug or Medicine," see Words & Phrases.]

7. Criminal law 🔑304(2).

Use of "citrate of magnesia" as purgative or cathartic is matter of common knowledge.

8. Druggists 🔑12.

Under Pharmacy Act, to bring article within exception from provisions respecting sale of drugs or medicines by unregistered persons, article must be proprietary medicine, and must be registered, trade-marked, or copyrighted (St. 1933, p. 2198, § 12).

9. Druggists 🔑12.

In prosecution for sale of drugs or medicines by unregistered persons, burden of proving case within exceptions in statute was on defendants (St. 1933, p. 2198, § 12).

10. Criminal law 🔑419, 420(12).

In prosecution for sale of drugs and medicines by unregistered persons in which defendants claimed articles sold were within statutory exceptions, letters supporting such defense from patent lawyer and from makers of articles sold were properly excluded as hearsay (St. 1933, p. 2198, § 12).

11. Criminal law 🔑1188.

Error in judgment after conviction in not directing whether sentences should run concurrently or consecutively does not require that convictions be disturbed, but case will be remanded with directions to proceed in proper manner without new trial (Pen. Code, § 669).

Appeals from Municipal Court of Los Angeles; Thomas L. Ambrose, Judge.

Fernando Garcia and others were convicted of violating the State Pharmacy Act, and they appeal.

Reversed and remanded, with directions.

Saul S. Klein, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Ernest K. Maine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

SHAW, Presiding Judge.

We have before us on a single record appeals in four cases which were tried together, and which all involve charges of violation of our statute regulating the practice of pharmacy (St. 1905, pp. 535, 540, 541, 543, §§ 1, 12, 13, and 17, as amended by St. 1933, p. 2192, section 16, as amended by St. 1929, p. 239). All of these cases arose since the amendments of 1933 became effective. The Pharmacy Act, in addition to the portions to be later specifically mentioned, contains provisions for the appointment of a state board of pharmacy, with power to regulate the practice of pharmacy, to examine and register as pharmacists and assistant pharmacists all applicants whom it shall deem qualified as such, and to issue certificates of registration, which must be annually renewed, to those found qualified. The secretary of this board is required to keep a register in which the names, titles, qualifications, and places of business of all registered persons shall be entered. The statute also prohibits the sale of drugs and medicines by unregistered persons.

[1] In cases numbered 48313 and 48314 in the trial court, the complaints contain altogether six counts charging that the defendants "being then and there the proprietors or owners of a certain pharmacy, store or shop (giving its location) where drugs and medicines are sold at retail and displayed for sale at retail did wilfully and unlawfully fail to place a registered pharmacist in charge of said store or shop." The provision of the Pharmacy Act relating to this matter is contained in section 13, as amended, and reads as follows: "Any proprietor of a pharmacy, who shall fail, or neglect to place in charge of such pharmacy a registered pharmacist, * * * shall be guilty of a misdemeanor." Section 1 of the act, as amended, defines a pharmacy as: "Every store or shop where drugs, medicines or chemicals are dispensed or sold at retail, or displayed for sale at retail, or where prescriptions are compounded, which has upon it or in it as a sign, the words 'pharmacist,' 'pharmaceutical chemist,' 'apothecary,' 'druggist,' 'pharmacy,' 'drug store,' 'drugs,' or any of these words."

The complaints above quoted do not directly allege that the defendants were proprietors of a pharmacy, by reason of the use of the disjunctive "or" in the phrase "pharmacy, store or shop," nor is the matter descriptive of their store or shop sufficient to bring it within the statutory definition of a pharmacy. There is entirely lacking any allegation that the store or shop had upon it or in it any of the signs mentioned in the statute. The clause of the definition above quoted which is introduced by the words "which has upon it or in it" is obviously restrictive, and its effect is that a store or a shop where drugs are sold at retail, etc., is not a pharmacy, for the purposes of the act, unless one of the signs mentioned is upon it or in it. These complaints are insufficient, and the proof is no better than the charge, for there is no evidence in regard to signs.

[2] In cases numbered 48312 and 48315 there are three counts charging that the defendants, not being registered under the act, at various times sold "drugs and medicines, towit: aspirin," and three other counts in the same form charging sales of citrate of magnesia. Objection is made to these complaints because they do not negative certain exceptions contained in the act, particularly those in sections 12 and 16, as amended. Section 12, as amended, declares that "nothing in this act shall apply to" physicians supplying medicines to their patients, or to wholesale dealers' business, or to proprietary medicines (with certain limitations), and section 16, as amended by St. 1929, p. 239, provides that permits may be issued by the state board of pharmacy for the sale of "simple household remedies and drugs" therein listed, in rural districts, on certain conditions stated in the section, by persons not registered. These provisions are not descriptive of the offense but are mere exceptions and need not be negatived in a complaint. Ex parte Hornef, 154 Cal. 355, 360, 97 P. 891; People v. H. Jevne Co., 179 Cal. 621, 626, 178 P. 517; People v. Ruddick, 107 Cal. App. (Supp.) 785, 792, 288 P. 45.

[3-5] In proof of these complaints a witness testified that the substances mentioned therein are drugs or medicines. This was permitted over defendant's objection that the witness was not qualified to give such an opinion, and this ruling is assigned as error. We doubt the qualification of the witness, but the error, if any, was harmless, for the reason that the court could take judicial notice of the facts stated by the witness. Judicial notice extends to the meaning of words and to all matters of science and common knowledge. In re Berry, 147 Cal. 523, 82 P. 44, 109 Am. St. Rep. 160; People v. Associated Oil Co., 211 Cal. 93, 105, 294 P. 717.

The Pharmacy Act uses several forms of expression to describe the substances which are within its purview. The most general one is in that provision of section 1, as amended, prohibiting the sale of "any drug, poison, medicine, or chemical" by unregistered persons. The phrase "drugs, medicines or chemicals" is found three times; the expression "drugs, medicines and poisons" appears five times; the phrase "medicines or poisons" is used once; the word "drug" appears alone once; and the phrase "drugs and medicines" is used twice. These different phrases are scattered through the act in a random fashion without any apparent plan or reason for different meanings in the different places where they are used, and we incline to the view that the same meaning was intended by all of them. No express definition of any of these words is set forth in the statute; consequently they are to be understood in their usual, natural, and ordinary sense. The word "drug" is defined by Webster's Dictionary as follows: "Any substance used as a medicine or in the composition of medicines for internal or external use," and the same authority gives this meaning to "medicine": "Any substance or preparation used in treating disease; a medicament; a remedial agent; a remedy; a physic." Like definitions are given in other dictionaries, and in 19 Corpus Juris, 766, "Drug," and 40 Corpus Juris, 626, "Medicine." See, also, Town of Selma v. Brewer, 9 Cal. App. 70, 77, 98 P. 61, for a similar use of the word "drug." Similar definitions of the word "drug" are found in Penal Code, § 383, and in Statutes of 1907, p. 230, both of which relate to adulteration of drugs and are to some extent in pari materia with the Pharmacy Act. The two definitions last mentioned, however, are more comprehensive and probably could not be adopted here in their entirety.

[6, 7] Aspirin is a definite substance, known also as acetyl salicylic acid, and is much used for medicinal purposes. While we find in State v. Jewett Market Co., 209 Iowa, 567, 570, 228 N. W. 288, 289, a statement that aspirin was discovered in Germany, that its formula was secret, and that it was originally made only by the possessor of this formula, the word has long since transcended all such limitations of meaning, and is commonly used to denote the substance above mentioned regardless of its manufacture. We find it so defined and the medical uses of the substance described in the following dictionaries and encyclopedias: Standard Dictionary (Eds. 1914 and 1924); Shorter Oxford Dict. (1933); Stedman's Med. Dict. (1914); Green's Encyc. & Dict. of Med. & Surg. (1906); Encyc. Britannica (Eds. 1911 and 1929); New International Encyc. (1924); Encyc. Americana (Eds. 1920 and 1931), and Nelson's Encyc. This general agreement of the reference books on the subject is sufficient to show a case where the court may take judicial notice of the facts stated, and warrants us in holding that aspirin is a drug or medicine. Such also was the holding in State v Zotalis, 172 Minn. 132, 214 N. W. 766, and State v. Jewett Market Co., supra.

Citrate of magnesia also is within the statute. Its use as a purgative or cathartic is a matter of common knowledge which we find stated in several encyclopedias. It is also listed in the United States Pharmacopoeia. We have found no other use for it mentioned anywhere. It is clearly a drug or medicine.

[8-10] It is further contended that the aspirin and citrate of magnesia sold were excepted from the operation of the Pharmacy Act by the following provisions of section 12, as amended: "Nor does this act apply to registered, trade marked, or copyrighted proprietary medicine, registered in the United States Patent Office, but does apply to the sale by or through any mechanical device, of drugs, medicines and proprietary medicines registered or trade marked in the United States Patent Office. Nor does this act apply to the sale of proprietary medicines, when manufactured under the supervision of a registered pharmacist in the State of California, for which trade marks may have been filed with the Secretary of State of California, by merchants possessing a license issued by the Board of Pharmacy as described in section 16 of this act."

The last sentence of this quotation indicates that the words accompanying the term "proprietary medicine" in the sentence first quoted were not intended to define that term but to impose additional limitations on the articles described by the exception. To bring an article within the exception stated by this first sentence, two things are necessary: (1) It must be a proprietary medicine; and (2) it must be "registered, trade marked or copyrighted * * * registered in the United States Patent Office."

We are not required to determine whether the articles in question were proprietary medicines because, even if we assume that they were, there is no showing that the other requirements of the exceptions above quoted were met. The burden of proving a case within the exception was on the defendants. In this behalf they offered in evidence certain letters, one from a patent lawyer in Washington and one from the makers of the citrate of magnesia in question, the contents of which are not stated in the record, but these letters were not received in evidence. The ground of their exclusion does not appear, but, since they were plainly hearsay, such exclusion was proper.

[11] By the judgments in cases numbered 48312 and 48315 two jail sentences of ten days each were imposed on one of the defendants, and two jail sentences of thirty days each were imposed on the other defendant. Section 669 of the Penal Code requires that in such a case the judgment shall direct whether the sentences are to run concurrently or consecutively, but no provision in that respect was made in any of these judgments. This was an error, but, since it does not affect the findings that the defendants were guilty, the convictions need not be disturbed. It has been frequently held in like cases that a reversal on such a ground does not require a new trial, but merely that the case be sent back with directions to the trial court to proceed in the proper manner. People v. Babdaty (Cal. Super.) 30 P.(2d) 634: People v. Jones, 87 Cal. App. 482, 499, 262 P. 361; People v. O'Brien, 122 Cal. App. 147, 158, 9 P.(2d) 902.

We have considered other points made by appellants, but find no merit in them.

The judgments against the defendants Victoriana Garcia and Fernando Garcia, in the two cases which are numbered 48313 and 48314 in the municipal court, are reversed, and said causes are remanded to the municipal court, with directions to dismiss the said complaints; the judgments against Fernando Garcia on counts 1 and 3, in case numbered 48312 in the municipal court, and the judgments against Antonio Gonzales on counts 2 and 3, in case numbered 48315 in the municipal court, are reversed, and said two causes are remanded to the municipal court, with directions to arraign said defendants Fernando Garcia and Antonio Gonzales for judgment on said counts respectively, and thereupon to render new and proper judgments against said defendants.

We concur: BISHOP, J.; FOX, J.

220 Cal. 601

PEOPLE v. FLEMING.

Cr. 3636.

Supreme Court of California.
April 26, 1934.

Rehearing Denied May 24, 1934.

1. Pledges 🔑31(4).
Pledgee's unauthorized application of pledged bonds to his own use is illegal conversion thereof as between him and pledgor.

2. Embezzlement 🔑11(1).
Wrongful conversion, amounting to embezzlement, exists from moment of pledgee's refusal to comply with pledgor's demand, after paying debt, for return of pledged bonds theretofore illegally applied to pledgee's own use.

3. Embezzlement 🔑11(1).
Broker's use of bonds, pledged by customer as security for price of stock, which broker never purchased, to secure loan to broker, constituted grand theft by embezzlement (Const. art. 4, § 26).

4. Criminal law 🔑434.
Broker's books and sales records, showing that no stocks were purchased for customer pledging bonds as security for price, *held* admissible in broker's trial for grand theft in using bonds to secure loan.

5. Embezzlement 🔑44(2).
Evidence in trial for grand theft of bonds, pledged to corporation of which defendant was president as security for price of stock never purchased by it, *held* to justify inference that defendant knew bonds were wrongfully used as security for loan to corporation.

6. Embezzlement 🔑35.
Evidence of theft of money, paid broker by customer on price of stock, which broker failed to purchase, *held* not fatal variance from allegation of theft of shares of stock (Pen. Code, § 956).

7. Embezzlement 🔑35.
Description of offense in information for theft with sufficient certainty to identify act warrants conviction, though evidence shows theft of property different than that described in information (Pen. Code, § 956).

8. Indictment and Information 🔑71.
To sustain conviction, there must be such degree of identity between allegations of indictment or information and facts in evidence as to protect defendant fully from another prosecution for same offense.

9. Embezzlement 🔑22.
Broker, applying to his own use money paid by customer in installments aggregating over $200 on price of stock never purchased by broker, was guilty of grand theft, though no payment amounted to more than such sum.

10. Indictment and Information 🔑125(9).
Different asportations from same owner, prompted by one design, purpose, or impulse, constitute single act warranting conviction of theft, regardless of time.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

E. K. Fleming was convicted of grand theft, and he appeals.

Affirmed.

Prior opinion, 17 P.(2d) 1042.

Clare Woolwine, Cooper & Collings, and Harold W. Judson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

Upon consideration of this appeal, we hereby adopt as the opinion of this court herein, the following opinion heretofore prepared by Mr. Presiding Justice Conrey for the honorable District Court of Appeal, Second Appellate District, Division 1:

Appellant, with two others, was brought to trial before the court, without a jury, on several charges of grand theft, as stated in counts 1, 3, 4, and 5 of the indictment. At the trial the action was dismissed as to the codefendants Philips and Glanz, and count 5 was dismissed. Defendant Fleming was found guilty on counts 1, 3, and 4. He appeals from the judgment, and from an order denying his motion for a new trial.

In the first count of the indictment it was alleged that on or about April 1, 1930, the defendants and each of them did unlawfully take certain personal property of John L. Brandt, being two $1,000 bonds issued by the kingdom of the Serbs, Croats, and Slovenes In the third count it was alleged that on or about May 2, 1930, the defendants did unlawfully take away ten shares of the capital stock of the Chrysler Motor Car Company, of the value of $591.25, the personal property of G. G. Stewart. In the fourth count it was alleged that on or about May 3, 1930, the defendants did unlawfully take away ten shares of Chrysler Motor Car Company, of the value of $500, the personal property of Mrs. M. A. Stewart.

The evidence shows that the crimes charged, if they were committed at all, were committed by embezzlement. E. K. Fleming &

Co. was a corporation authorized to transact business as a broker in this state. Stock & Bond Guarantee Company was a corporation authorized to transact business as a broker in this state. Defendant Fleming was the president and actively engaged in the management of E. K. Fleming & Co., which company at the time of these transactions was the principal owner and in control of the Stock & Bond Guarantee Company. Fleming also occupied a like position in relation to this latter company. The several transactions out of which these embezzlement charges grew took the form of purchases of corporation stocks, or agreements for such purchases, from or by agency of one or the other of these brokers and their several customers, Brandt in the first count, G. G. Stewart in the third count, and Mrs. M. A. Stewart in the fourth count; and subsequent sales (or supposed sales) of shares of stock by, or through the agency of, said brokers or one of them, for account of their said customer Brandt.

The several grounds of appeal upon which defendant relies are, that on each count the evidence is insufficient to sustain the decision; that the court erred in admitting in evidence certain books and other documents; that the court erred in overruling defendants' objections to certain incompetent and hearsay evidence; that the court erred in denying defendants' motion for a new trial. The principal questions of law presented by counsel herein relate to the obligations of a broker arising from the deposit of securities in marginal transactions, and to the personal criminal liability of an officer of a corporation for misappropriation of property delivered to the corporation.

First count. (Brandt case.) It is contended that the evidence is insufficient to sustain the decision. On or about March 28, 1930, John L. Brandt called at the office of Stock & Bond Guarantee Company, and there met Jack Williams, sales manager, who represented the company in the ensuing transaction. Brandt delivered to Williams, for the company, a check for $100 to apply on the purchase of certain stocks, and signed two contracts, numbered 3388 and 3389. These contracts were admitted in evidence (Rep. Tr., pp. 13 and 628), and are before the court. They are agreements signed by Brandt, on printed forms of the Stock & Bond Guarantee Company, showing sales by the company to Brandt, of described shares of stock, and the payment by him of certain small amounts on account of the purchase price. It is in evidence that it was orally agreed between the company (by Williams) and Brandt that the bonds delivered by Brandt to Williams for the company were to be used as collateral, but were not to be sold. It is appellant's contention that these were merely marginal sales in which the company was Brandt's broker; that is to say, that the broker was to buy for Brandt, and pay for, the shares of stock; that thereby the broker would lend to Brandt that portion of the purchase price not covered by Brandt's cash payment. As security for this loan the broker would hold, as collateral, the purchased shares, together with the bonds received from Brandt. Taking this as the effect of the contracts as a whole, we have the further fact on April 1, 1930, Brandt ordered additional stock purchases, gave a check for $200, and deposited the two bonds described in the indictment herein. Brandt testified (Rep. Tr., p. 19) concerning this transaction as follows:

"I told him I didn't wish to have those bonds sold; I wanted them for further protection to the purchase. * * * He said that would be all right; he would see they would not be sold.

"Q. Did you say anything to Williams, that you would furnish any additional margin, in case it was called on the purchase of this additional stock? A. I think that question was discussed, and I told him that, if necessary, I could supply additional."

Nevertheless, the evidence is that on the same day, when the bonds were delivered by Brandt to Williams, that is, on April 1, 1930, the Stock & Bond Guarantee Company, by Fleming as its president, borrowed $1,200 from Western National Bank, and used these bonds as security therefor; also that the borrowed money was credited to the general account of the Stock & Bond Guarantee Company in the bank. Some weeks later a receiver of the Stock & Bond Guarantee Company was appointed. Brandt then made inquiries, and for the first time was informed that the bonds had been used as above stated. Then, finding no other way to recover the bonds, he redeemed them at the bank by paying the amount of the loan. It further appears that the stocks which had been purchased on Brandt's order had been "sold," or at least reported to him as sold, as directed by him, and that the transactions showed a profit. There had been only one call on him for further payment or security, after April 1st, and he had complied with that demand. Before any receiver had been appointed, Brandt's indebtedness to the broker had been paid, and Brandt was entitled to have the Serb bonds returned to him.

On the facts, which in substance were as above stated, the question is presented: Was there an embezzlement of the Serb bonds by the Stock & Bond Guarantee Company, and by appellant as its acting officer in the loan transaction at the Western National Bank?

It is contended by appellant that under the facts of this case there could be no embezzlement. The theory as stated, in substance, is that, when the broker executes an order, in a marginal transaction, he is the customer's agent buying from or selling to a third party;

and that, when he provides funds to complete the order and to carry the securities purchased, he deals with his customer as a principal, advancing his own money and retaining the customer's property as security, with all the rights and obligations which attach to an ordinary loan of money on the security of personal property. The precise point is that, in order to embezzle, one must be a fiduciary agent, and that in the course of business of a broker for a customer in a marginal transaction the broker holds the customer's securities as a creditor holding property in pledge, and not as an agent of the customer. Counsel points to the following statement by Meyer on "The Law of Stockholders and Stock Exchanges" (p. 331), where the writer said: "The broker has the right, as a matter of law, to rehypothecate his customer's securities for an amount not in excess of the customer's indebtedness against such securities. This right exists with respect to securities which the broker has purchased for the customer on margin, as well as with respect to securities which are initially deposited by the customer as margin." Criminal cases are cited which seem to apply the stated rule to prosecutions for embezzlement. Among these are Buddeke v. State, 31 Ohio Cir. Ct. R. 529; State v. Peck, 299 Mo. 454, 253 S. W. 1019.

[1-3] The general rule is that, as between a pledgee and his pledgor, the pledgee's application of pledged bonds to his own separate use in excess of his rights as pledgee is an illegal conversion of the property. When there has been such conversion and the pledgee has failed to comply with demand made upon him for return of the bonds after payment of the pledgor's debt, "there can be no doubt that from that moment there existed a wrongful conversion amounting to embezzlement." People v. Tambara, 192 Cal. 236, 219 P. 745, 747. The question at issue here is thus made to depend upon the particular question as to whether or not in this case it has been proved that the broker, acting through or with participation of the defendant, applied Brandt's bonds to its own use in excess of its rights as pledgee. It may be that, in accordance with the authorities relied upon by appellant, if the Stock & Bond Guarantee Company had actually purchased for Brandt the stocks ordered by him, as in good faith was required by the nature of the transaction, it would have had the right to pledge the Serb bonds as security for a loan at the bank; subject, of course, to Brandt's right to have them returned to him whenever his indebtedness to the broker was paid. But there is evidence which justified the court in finding that no such purchase of stock for Brandt was actually made, and that the conditions which might have authorized the use which was made of the Serb bonds did not exist. In the brief for respondent we find a careful analysis of the sales records of the Stock & Bond Guarantee Company, and of E. K. Fleming & Co., which appears to accurately summarize the evidence in the record as taken from the books and documents of those corporations. The books also show extensively that these transactions shown in the brief are exemplars of a similar method of doing business, as extensively carried on by these corporations, and by the defendant as their principal executive officer. There was evidence sufficient to show, as stated by counsel for respondent, that in reality there was no purchase or sale of the ordered stocks, and no money advanced for the customer. Each order seems to have been handled entirely as a bookkeeping transaction between Stock & Bond Guarantee Company and E. K. Fleming & Co. and the defendant E. K. Fleming. It follows that neither the defendant or either of his said companies acquired any interest in the securities placed in their hands by Brandt, and that their use of such securities for the purpose of raising money for themselves would constitute grand theft on the theory of embezzlement. The so-called sales were of the character commonly known as "wash" sales, and were in themselves illegal. Const. of Cal., art. 4, § 26.

[4] Appellant assigns as error that the court overruled his objections and received in evidence the before-mentioned books and other records which constitute the numerous exhibits to which in part we have referred. Without going into a detailed description of these documents, let it suffice to say that they were properly received because they furnished appropriate evidence to establish the very facts which, as we have seen, were necessary to develop and establish the precise and crucial fact that the right to pledge Brandt's bonds did not exist. If there were any errors in rulings upon the objections made, assuredly they were of minor importance, and without appreciable effect upon the result of the action.

[5] It is further contended by appellant that there is no proof whatever that he knew of the limitations or restrictions upon the right of Stock & Bond Guarantee Company to pledge the bonds at the time when he caused such pledge to be made, or at all. But there can be no doubt that appellant was the actual and active manager of both companies; that he employed the subordinates through whom he conducted the business of both companies; that "daily sales sheets" were given to him; that he knew not only in general, but largely in detail, the manner in which the business was being transacted. The receiver, MacLeod, testified that, when he told appellant that various persons were claiming that they had paid up for stock which should have been bought, "and that they had bought stock on contracts that were supposed to be bought at the time they bought it; and I asked Mr.

Fleming what the condition was. He said, 'you know as well as I do.' I said, 'What do you mean by that?' He said, 'There is about a quarter of a million short we haven't bought stocks.'" We think that the evidence is sufficient to justify the inference that, at the time when Brandt's bonds were pledged to the bank, appellant knew that the bonds were being wrongfully used in that way. People v. Epstein, 118 Cal. App. 7, 4 P.(2d) 555.

[6-8] Counts 3 and 4 of the information differ from the first count in that the thefts charged relate to shares of stock purchased through the broker and not to securities deposited by the customer. The two Stewart transactions described in the counts 3 and 4 and the evidence concerning them are substantially alike. The customer at the time of ordering the shares to be purchased for him paid an installment on account of the purchase price, and from time to time made further payments until the full purchase price was paid, but the stock never was delivered. It is contended by appellant that the evidence is insufficient to prove that the broker ever had actual possession of the stock, and therefore is insufficient to establish the corpus delicti of the crime charged. We are in agreement with the contention that the evidence fails to show that the broker ever had actual possession of the stock. On the contrary, in the Stewart transactions, as in the Brandt transactions, it might fairly be inferred from the evidence that the broker never purchased the shares of stock which he was supposed to be buying for the customer. The actual embezzlement consisted in the taking of the money of the Stewarts, and applying it to the broker's own use without completing the transaction, as in due course of business its agreement with the customer required it to do. But appellant further contends that on an information charging theft of described shares of stock he cannot be convicted of theft of the money paid on account of the purchase. It is contended that this would be a fatal variance between the allegations and the proof. To this the reply seems to be sufficient that such difference between the description of property taken as stated in the information and the evidence showing property actually taken is provided for by the Penal Code, as amended in the year 1927. "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission is not material." Pen. Code, § 956. The plain intention here is that, when the offense itself is described with sufficient certainty in other respects to identify the act, a conviction thereof may be sustained notwithstanding the fact that the description of the property stolen as shown by the evidence is different from the property stolen described in the information. We, of course, do not mean to say that one crime may be charged in the information and an entirely separate crime relating to other property, or relating to an entirely different transaction, may be proved, or that a conviction thus obtained could be sustained. There must be some evidence that the acts constituting the offense of which the defendant is convicted are substantially the same as those referred to in the charge contained in the information. There must be at least such degree of identity between the allegations in the indictment or information and the facts produced in evidence that, when the defendant has been once in jeopardy by reason of such charge, he shall be fully protected from another prosecution for the same offense. Applying this test to the case at bar, it is our opinion that the conviction of the defendant in accordance with the evidence in this case is entirely sufficient to protect him from any subsequent prosecution for theft either of the described shares of Chrysler stock or of the moneys paid by the Stewarts covering the purchase price thereof.

[9, 10] In each of the two Stewart transactions the purchaser made payments which in the aggregate constituted the full purchase price and entitled the customer to the delivery of the stock which was supposed to have been purchased for him, or her. But appellant contends that, since no one of the payments thus made on account of said purchase was of an amount exceeding the sum of $200, therefore he could not in any event be guilty of any crime greater than petit larceny. It appears, however, that these payments of successive installments upon a single contract did amount to more than $200 on each contract. The exact time when the misappropriation was completed is not material, and perhaps is not established by the evidence, more than that the installments were paid at certain specified times and that the stock was not delivered when the payments had been completed and delivery was due. We think that the case is controlled by the rule stated in People v. Mills B. Sing, 42 Cal. App. 385, 396, 183 P. 865, 869, where it was said: "The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time." Or as was said in People v. Hatch, 13 Cal. App. 521, 534, 109 P. 1097, 1103: "It may happen that an aggregate amount may finally be appropriated by one act which was received in many items and at different times."

The judgment and order are, and each of them is, affirmed.

220 Cal. 731

McMICKENS v. McMICKENS.

L. A. 13575.

Supreme Court of California.

May 9, 1934.

Divorce ⚷171.

Judgment dismissing action for reformation of divorce decree entered pursuant to property settlement between parties *held* res judicata in subsequent action for reformation of same decree on same grounds of alleged mutual mistake, since judgment of dismissal was conclusive of everything necessarily determined by such judgment.

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In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Eva G. McMickens against James T. McMickens. From a judgment entered on an order sustaining a demurrer to the plaintiff's complaint without leave to amend, plaintiff appeals.

Affirmed.

Jackson Hayes, of Los Angeles, for appellant.

M. C. Spicer, of Los Angeles, for respondent.

SHENK, Justice.

Appeal from a judgment entered on an order sustaining a demurrer to the plaintiff's complaint without leave to amend.

From the complaint it appears that in March, 1928, the plaintiff sued the defendant for divorce on the ground of extreme cruelty; that the parties entered into a property settlement agreement including an agreement for the plaintiff's custody of the seven year old son of the parties and for the payment by the defendant of the support and education of said child; that the court entered its interlocutory decree adjudging the plaintiff entitled to a divorce and adopting the provisions of the property settlement agreement between them. The agreement and the decree provide for the payment by the defendant to the plaintiff of the sum of $30 monthly for the care, maintenance, and "ordinary public schooling" of said minor child until he is 21 years of age, and, in addition, such other and further sums as may be necessary, right, and proper on account of the "higher education" of said child, whether it be at boarding or military school, or otherwise, until he arrives at the age of 21 years, but not to exceed $1,200 per year for such additional expense. The interlocutory decree has become final. It also appears that the defendant paid the expenses of the child's schooling in a military academy in the fall and winter of 1928–1929, but that he refused to make any further payment on account of such expenses; that on a return to an order to show cause the court ruled that such schooling was not the "higher education" for which the defendant was obligated under the terms of the agreement and the decree.

It is further alleged that in September, 1929, the plaintiff commenced an action in the superior court in and for Los Angeles county, numbered 287107, for the reformation of said agreement and decree to accord with the true intent and understanding of the parties. It is alleged in the complaint in said action, in addition to the foregoing introductory facts, and in the complaint in the present action, that during the negotiations respecting the settlement of the property rights of the parties in the pending divorce action, they reached an oral agreement that beginning in the fall of 1928 the minor child should be entered in some military or other boarding school to be selected by the plaintiff and should continue in such school until his entrance into some college or university; that the defendant agreed to pay to the plaintiff $30 a month to be used in maintaining a home for the child during his homecomings and for his general care and maintenance, but that the defendant in addition would pay the expenses of attendance at military or boarding school beginning at said time not to exceed $1,200 per year; that through the inadvertence of her attorneys the agreement was not so expressed, but that the plaintiff believed at all times that the agreement to pay for military and boarding school from that time as well as during his high school and college years was expressed by the language used in said agreement.

Allegations respecting the mutuality of the mistake made by the parties are included in both complaints. In action No. 287107 and in the present action the plaintiff asked for reformation of said agreement to accord with the alleged true agreement of the parties. In addition, in the present action, the plaintiff sought a judgment interpreting the agreement and declaring the respective rights and duties of the parties pursuant to said agreement and said interlocutory decree.

The complaint in the present action alleges further that the defendant interposed a demurrer to the complaint in said action No. 287107 on the special grounds, in addition to general grounds, that the matters sought to be adjudicated thereby had theretofore been adjudicated in the divorce action between the parties, and that said complaint was an unauthorized collateral attack upon such judgment. The complaint herein shows that a judgment of dismissal of said action number 287107 was entered upon an order sustaining said demurrer without leave to amend. That judgment has become final.

All of the foregoing instruments, pleadings, and judgments are made a part of the complaint in the present action.

The defendant interposed his demurrer to the present complaint on the ground, among others, that it appeared on the face thereof that all of the matters sought to be adjudicated have heretofore been adjudicated in said divorce action and in said action No. 287107. Whereupon the order was made upon which the present judgment of dismissal was entered.

No error was committed by the order sustaining the demurrer without leave to amend. Any consideration of the merits of the plaintiff's position in the controversy has been foreclosed by the entry of the judgment of dismissal in the action numbered 287107. The judgment entered in that action "is conclusive of everything necessarily determined by such judgment." Peterson v. Weissbein, 75 Cal. 174, 177, 16 P. 769, 770, quoting from Freeman on Judgments, § 267; 15 Cal. Jur. 124, 126. The question whether the agreement was open to the interpretation contended for by the plaintiff, and the question whether under the facts stated in that complaint, which are the same facts alleged in the present complaint, the plaintiff was entitled to any relief by reformation, were necessarily involved in and determined adversely to the plaintiff by the judgment there.

The plaintiff contends that nevertheless she is entitled to a consideration of the merits of her cause of action for declaratory relief. The complaint, however, shows that no controversy exists between the parties as to the defendant's duties and liabilities under the agreement between the parties for the additional expense involved in the child's education when he enters high school. The disagreement resulted from the use of the phrases "ordinary public schooling" and "higher education" appearing in said agreement and said decree. No claim is made that the ordinary meaning of those phrases as so used is not the meaning ascribed to them by the defendant.

It therefore appears that all questions respecting the interpretation of said agreement and said decree as to which there is a dispute have been foreclosed by the judgment in the former action, and that the demurrer was properly sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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220 Cal. 591

McNEIL v. EAST BAY STREET RAILWAYS, Limited, et al.

S. F. 15052, 15053.

Supreme Court of California.

April 26, 1934.

Rehearing Denied May 24, 1934.

1. Railroads ⇨288.

Railroad fireman exercising due care had right to assume that street car motorman would not attempt to cross track ahead of oncoming train.

2. Railroads ⇨297(6).

In action for injuries to passenger in street car which collided with train, evidence of railroad's negligence *held* insufficient for jury.

3. Carriers ⇨280(3).

Motorman owed passenger utmost care.

4. Carriers ⇨320(21).

In action by street car passenger against street car company for injuries sustained in crossing collision between train and street car, evidence of street railroad's negligence *held* for jury.

5. Appeal and error ⇨837(2).

In determining whether verdict was excessive. reviewing court should consider rulings in similar cases involving equally serious injuries, and also earning power of money and its increased purchasing power.

6. Damages ⟹132(3).

$35,761 for injuries, including broken back, causing much pain and suffering, *held* not excessive.

Plaintiff was compelled to lie on his back in hospital from 8 to 10 weeks, with a cast extending from the nipple line to the knee on the left side and to the groin on the right side; the bones did not knit, so that, when the cast was removed, it was replaced by a steel spinal brace, without which plaintiff could not walk; the break of the vertebra lighted up a chronic arthritic condition which had been dormant and painless, and attendant consequences included a sacroiliac slip, inflammation of the sciatic nerve, and an enlargement of one leg; plaintiff testified that he suffered excruciating pain and insomnia, and that he was becoming neurotic; and special damages in the sum of $4,000 were proved.

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In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by John D. McNeil against the East Bay Street Railways, Limited, and others. Judgment for plaintiff, and defendants the Western Pacific Railroad Company and others and defendant the Key System Transit Company bring separate appeals.

Reversed as to the Western Pacific Railroad Company and others, and affirmed as to the Key System Transit Company.

Prior opinion, 25 P.(2d) 476.

C. W. Dooling, of San Francisco, and Brown, Ledwich & Rosson, of Oakland, for appellant Western Pacific R. R. Co.

Brobeck, Phleger & Harrison, of San Francisco, and Chapman, Trefethen, Richards & Chapman, of Oakland for appellant Key System Transit Co.

Myron Harris, Leo A. Sullivan, William H. Older, and John Jewett Earle, all of Oakland, for respondent.

PER CURIAM.

A hearing was granted in this case to enable us to consider more at length the points made on the respective appeals. After such re-examination we are satisfied with the conclusions reached by the District Court of Appeal and adopt the opinion prepared by Mr. Justice Sturtevant of the First District, Division 2, as the opinion of this court. It is as follows:

While riding as a passenger on a street car operated by the defendant Key System Transit Company, hereinafter called "Transit Company," the plaintiff was injured when the car was struck by the engine of the train operated by the Western Pacific Railroad Company, hereinafter called "Railroad Company." He sued for damages. He named as defendants both companies and their trainmen who were in charge. The jury returned a verdict in the sum of $35,761 and costs in the sum of $651.68. The defendants have appealed, and have brought up one transcript but two sets of briefs.

Appeal by Western Pacific Railroad Company and Its Agents.

The accident occurred at the intersection of Twenty-Third avenue and East Twelfth street, which intersect each other at approximately right angles, in the city of Oakland, at about 7:25 or 7:30 a. m. (daylight) on May 12, 1930. Twenty-Third avenue runs in a general northerly and southerly direction and East Twelfth street in a general easterly and westerly direction. The Transit Company operated its street cars from Oakland to Alameda and vice versa, on a set of double tracks on Twenty-Third avenue which crossed East Twelfth street. The easterly set of said street car tracks was used for Oakland, or north-bound traffic, and the westerly set for Alameda, or south-bound traffic. Twenty-Third avenue was approximately 38 feet wide from curb to curb. These street car tracks were laid approximately in the center of Twenty-Third avenue, were each of standard gauge width, namely 4 feet 7 inches, were 6 feet 3 inches apart, and the most easterly rail of the easterly set of tracks was approximately 12 feet westerly of the easterly curb of Twenty-Third avenue and approximately 21½ feet westerly of the easterly property line of Twenty-Third avenue.

Defendant Railroad Company operated both freight and passenger trains, with steam as the motive power, in an easterly and westerly direction on a single set of standard gauge railroad tracks on East Twelfth street; said railroad tracks being a part of its main line of railroad from Oakland to Salt Lake City. The railroad tracks were not laid in the center of East Twelfth street, but to the south thereof; the southerly rail thereof being 16.60 feet north of the southerly curb of East Twelfth street, and the northerly rail being 30.65 feet south of the northerly curb of East Twelfth street.

The street car involved in the collision out of which this case grows was north-bound on Twenty-Third avenue, proceeding on the easterly set of tracks from Alameda toward Oakland, and was operated by defendant C. R. Jones, an extra man, who was acting as motorman and conductor. He was discharged immediately after the accident. The train was a regular passenger train from Salt Lake City, west-bound on East Twelfth street to the Oakland Mole, and consisted of an engine, tender, and ten cars.

At the time of the accident, and for some months prior thereto, there was in operation at the intersection of Twenty-Third avenue and East Twelfth street a system of traffic signals installed by the city of Oakland to control vehicular and pedestrian traffic in all directions at the intersection. These traffic signals were lights operated in conjunction with bells, there being such a signal located at each of the four corners of the intersection. The signal on the north side of East Twelfth street immediately west of the property line of Twenty-Third avenue showed its signal to west-bound traffic on East Twelfth street (the direction in which the train was proceeding). The signal on the northeast corner showed its signal for north-bound traffic on Twenty-Third avenue (the direction in which the street car was proceeding). Each traffic lantern had a red, amber, and green light in it, the red signaling for traffic to stop, the amber that pedestrians might proceed, and the green that all traffic might proceed. The traffic lights were synchronized to the extent that, while the amber and green were showing at the northeast corner for north-bound traffic on Twenty-Third avenue, a red light would be showing for east and west bound traffic on East Twelfth street and vice versa. The green light for traffic on Twenty-Third avenue showed for twelve seconds, during which time, and for four additional seconds, while the amber preceding this green was showing, a red light would show for traffic on East Twelfth street, making a total showing of the red light for traffic on East Twelfth street of sixteen seconds in all, provided no train passed over the contact point (hereinafter described) during said sixteen seconds. The normal period for the red signal for traffic on Twenty-Third avenue was twenty-nine and a half seconds, during which time the amber showed three and one-half seconds for traffic on East Twelfth street and the green twenty-six seconds for traffic on East Twelfth street.

After the traffic signals were installed, an additional device, operated by trains on said railroad track, was added thereto, so that, when the pony, or front wheels of an engine of a west-bound train reached a point on said railroad tracks two hundred and twenty feet east of the most easterly rail of the street car tracks, the train was given control over all traffic signals at the intersection. At this point, two hundred and twenty feet distant as aforesaid, there was installed on the railroad tracks a contact point, or insulated joint, frequently referred to in the testimony as a "tripper," which operated on these traffic signals, so that, when the pony wheels of the engine passed over the railroad tracks at this point, this contact caused the traffic signals at the intersection to instantly show a green light, or proceed signal, to the engineer on the train and for all east and west bound traffic on East Twelfth street, and at the same time caused the traffic signals for Twenty-Third avenue traffic to instantly show a red light, or stop signal, for all traffic on Twenty-Third avenue, regardless of what the signals were prior thereto, and also caused all bells in the light signals to start ringing. The only delay that could occur would be by the operation of the insulated joint, which took only a fraction of a second to operate. Under the signal system, the light remained green for the train and red for Twenty-Third avenue traffic, and all bells in the traffic signals rang until the rear wheels of the last car of the train crossed the intersection. In other words, in addition to any other warning given by the train to north and south bound traffic on Twenty-Third avenue, when the pony wheels of the engine reached this insulated joint, the traffic signals turned red for Twenty-Third avenue traffic and the bells therein began to ring. The obvious purpose of this signaling system was to give the train the right of way over all traffic at the intersection, and to give warning of its approach.

Prior to the installation and location of this contact point, a field inspection was made by the engineers of the Railroad Commission, the electrical and police departments of the city of Oakland, and the Western Pacific Railroad Company, and its location fixed after such field inspection. After its installation, another field inspection was made to see how the signals operated, and the location and installation of the contact point, and its control over the traffic signals at Twenty-Third avenue was approved by the Railroad Commission and the city of Oakland several months prior to this accident.

The aforesaid distance of 220 feet was fixed so that a train could stop, if necessary, between the contact point and Twenty-Third avenue, and it was decided that this was a safe distance for traffic on Twenty-Third avenue to clear the railroad tracks. A maximum speed of fifteen miles an hour for trains between this contact point and the street car tracks was determined upon at the time of installation.

The street car stopped south of the east curb of Twenty-Third avenue, or in the normal place for it to stop. Estimates of the witnesses of the distance that the front of the street car stopped from the nearest rail of the railroad tracks varied from about 20 feet, fixed by the fireman, to 30 to 35 feet, fixed by the motorman and other witnesses. The street car remained stopped at this place from something over half a minute to a minute. It was about a minute ahead of time, during which time the motorman waited until it was time for him to start. The signal for Twenty-Third avenue traffic was green for the street car while it was stopped, but, being about a minute ahead of time, the motorman waited until the signal again turned to green (the time from one green signal to another for him was twenty-nine and one-half seconds). He then proceeded "very slowly," and estimated his speed from the time he started until he saw the train as "something like two miles an hour."

Defendant A. W. Fuller, who was the locomotive fireman, was riding in the cab on the left side of the engine. His deposition was taken and read in evidence. He testified on his deposition that, when he was about 200 or 250 feet east of the easterly rail of the street car tracks, he first saw the street car, standing still, slightly back of the curb line on East Twelfth street—three or four feet. At that time he could see about two-thirds of the intersection from the southerly curb toward the north. At that time there was "plenty of traffic on East Twelfth street," and from that time until the time of the collision there was no north-bound or south-bound traffic on Twenty-Third avenue, either pedestrian or vehicular. After seeing the street car stopped, as aforesaid, the fireman did not continue to observe it at all times, but looked directly ahead, watching for automobile traffic, and he next saw the street car "just after it started to move." He estimated the front of the engine was then about 75 to 100 feet east of the square formed by the crossing of the railroad tracks and the street car tracks, and that the street car had then moved about 4 feet, or was about even with the southerly curb line of East Twelfth street, and was just barely in motion. He continued to observe the street car from that time until it was hit by the locomotive. He could also see the motorman, who did not look toward the fireman up to the time of the collision. His best judgment was that the street car did not average more than 3 or 4 miles per hour from the time he first saw it moving until the collision. When he noticed the street car moving out into his line of travel and that the motorman was not looking in the direction of the approaching train, he immediately called to the engineer to "plug her," and the instant he did so the emergency brakes were applied.

The fireman stated in his deposition that, when he first saw the street car moving, he waited "for a little time" before he called to the engineer to "plug her." On his deposition, he also testified that, after he noticed the street car moving, he noticed the motorman in "a matter of a second," and, as soon as he observed that the motorman was not looking, he hollered to the engineer "plug her." He estimated that, from the time he first saw the street car moving until he called "plug her," the train traveled "probably 25 feet or less." Although the fireman knew the street car was moving, he did not believe it was going to cross the track in front of the train.

On the trial the fireman estimated that the street car traveled from 4 to 6 feet during the second's time that he observed the motorman looking away from the train before he called to the engineer to "plug her"; but he also testified on the trial: "How far the car traveled is just guess work on my part." He also testified on the trial that the best he could fix the location of the front of the street car when he called to the engineer to "plug her" was that it was somewhere between the curb and a distance of from 4 to 6 feet from the railroad tracks. He stressed that it was almost impossible for him to do other than guess at distances, and in this connection gave this answer: "It is almost impossible to measure distance sitting in the cab of a locomotive going along a street that is full of traffic which is liable to come in contact with the train at any time." He also testified on the trial that from the time he observed the motorman until he called to the engineer to "plug her" was like the time that it takes for the snapping of fingers, saying in this regard: "The little time that I noticed the motorman was not looking was like that (snapping fingers). I never came to the conclusion that he was going to cross the track."

Although the engineer immediately applied the emergency brakes upon receiving the call from the fireman to "plug her," it was then impossible to stop the train before the engine reached the street car tracks; so the engine struck the street car approximately in the middle thereof, and shoved the rear end of it off its track a distance of somewhere between 25 and 35 feet.

From the time the emergency brakes were applied, the train traveled 80 or 85 feet, which was a "very good stop" for a train going twelve miles an hour.

The street car was 45½ feet long, not including the fender. The fireman estimated the time that the street car was standing still from the time he first saw it until he saw it moving as about seven seconds. The street car at no time increased its speed.

[1, 2] These defendants claim they were not negligent. We think there is no evidence that they were. It is not claimed that there was any act of negligence unless the engineer or the fireman was negligent. As to the engineer, it is clear that he was at his post of duty and duly attentive. There is not a particle of evidence that any stop signal or sign of danger was seen or could have been seen by him or that he could have seen the street car. As to the fireman, he was at his post of duty and duly attentive. It is true he saw the street car and saw its movements. Considering all of the facts as recited above, nothing shows, or tends to show, that he was negligent. He was not called upon to stop the train nor to notify the engineer until he became aware that the street car was actually going to attempt to cross the track in front of the on-coming train. When the fireman was exercising due care regarding the agency

which he was helping to operate, he had the right to assume that the motorman in charge of the street car would exercise due care and would not actually attempt to cross the track. Young v. Southern Pacific Co., 189 Cal. 746, 754, 210 P. 259; Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68. When, thereafter, he came to a realization that the motorman was going to make said attempt, the fireman acted promptly. But it was then too late. Be that as it may, such facts do not show negligence on the part of any one of these defendants.

By reason of our conclusions on the point just discussed it is unnecessary to discuss other points presented by these defendants.

Appeal by the Key System Transit Company.

[3, 4] This defendant contends it was not negligent. It called C. R. Jones, who was acting as motorman of the defendant's car at the time of the accident. He testified that shortly prior to the accident he had come to a stop on the south side of the steam railroad track. He was ahead of time, and paused for a short time. He was operating a one-man car, and the front door was standing open. He was seated and was looking up the track in the direction from which the train later appeared. He saw no train, and he heard no bell or whistle. When it was time to go, he waited for the corner automatic signal. When it showed green, he closed the door, started to move forward, and turned his head to the left, and continued looking in that direction because high buildings on that side narrowed the scope of his vision. With his eyes turned to the left, he continued to advance until he was on the track. He then looked to his right. The train was nearly on top of him. He advanced the spark and attempted to speed across. The uncontradicted facts are that, from the point where his car was when the motorman was looking east up the track of the Western Pacific, the track is visible for 730 feet, and that the whistle was blown just before the train came on to East Twelfth street—two blocks distant. Thereafter the automatic bell on the engine was ringing continuously. After the engine crossed "the tripper," the bells in the automatic street signals rang continuously. For the safety of the plaintiff (a passenger in his car), the motorman was bound to exercise the utmost care. We cannot say the evidence showed that he did so.

It is also claimed that the cause of the accident was the negligence of the Western Pacific Railroad Company. In view of what we have stated above, it is not necessary to dwell further on that claim.

[5, 6] Finally, it is claimed that the damages are excessive. The point is presented under three headings. It is said "that when viewed in the light of similar cases involving equally serious injuries, the earning power of money, and the tremendously increased purchasing power of money, the damages are so excessive as to necessitate the conclusion that they were the result of passion or prejudice on the part of the jury." That this court should consider the rulings in similar cases involving equally serious injuries has been held. Maede v. Oakland High School Dist., 212 Cal. 419, 425, 298 P. 987. No doubt it should also consider the earning power of money and its increased purchasing power. But, when we come to apply said rules to this case, we are stopped by the facts developed at the trial. The accident occurred May 12, 1930. The plaintiff's back was broken. He was taken to a hospital. A cast was placed on his body extending from the nipple line to the knee on the left side and to the groin on the right side. The plaintiff was compelled to lie on his back from eight to ten weeks. The bones did not knit. When the cast was removed, it was replaced by a steel spinal brace which he was wearing at the time of the trial and without which he could not walk at that time. The break of the vertebra lighted up a chronic arthritic condition which had been dormant and painless. Attendant consequences included a sacroiliac slip, inflammation of the sciatic nerve, and an enlargement on one leg. The plaintiff testified that from the date of the accident to the date of the trial he suffered excruciating pain, that he suffered insomnia, was becoming neurotic, and that since the accident he had not had anything like a good sound night's sleep. Special damages in the sum of $4,000 were proved. The trial was held nineteen months after the accident. It thus appears that the evidence before the jury was such that it was within its rights in making a most substantial award. The defendant argues that, if this verdict is not excessive, then, if it had been rendered in 1927, the amount should have been $61,000 and more. Perhaps so. On the other hand, the plaintiff may argue that, if it had been rendered in 1911, it would not have been excessive (Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513), and that it is not now. We think we are not entitled to say the verdict, under the facts as shown by the evidence, was excessive.

The judgment as to the defendants Western Pacific Railroad Company, a corporation, H. L. Davis, and A. W. Fuller is reversed. The judgment against the defendant Key System Transit Company, a corporation, is affirmed.

1 Cal.(2d) 8

In re LEONARD'S ESTATE.

NEILSON et al. v. BARNES.

L. A. 14530.

Supreme Court of California.

May 17, 1934.

1. Wills ⚷302(6).

Evidence *held* to support finding that instrument claimed to be holographic will was not signed by testatrix so as to constitute it her last will though decedent's name appeared at top of will, which was entirely written by her.

2. Wills ⚷386.

Due execution of will is fact question and its determination by trial court will not be overthrown on appeal from judgment denying admission of instrument to probate unless such determination is without support in evidence.

3. Wills ⚷384.

Admission of decedent's declaration, made after writing of alleged holographic will, to effect that she did not intend it as her last will, if erroneous, was not prejudicial where instrument was not signed by testatrix so as to constitute it her last will.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

In the matter of the estate of Mary L. Leonard, deceased. From an order denying admission of an alleged holographic will to probate, Loretta G. Neilson and others appeal, opposed by R. E. Barnes.

Affirmed.

Oliver O. Clark, of Los Angeles, and Frederick H. Newhouse, of Hollywood, for appellants.

W. R. Barnes and Leonard S. Barnes, both of Los Angeles, for respondent.

SHENK, Justice.

The appeal herein is taken by some of the heirs at law and next of kin of Mary L. Leonard from an order denying admission to probate of a document claimed to be the holographic will of the decedent. The document was entirely written and dated by the hand of the decedent. Objection to its admission was made on the ground that it was not executed in accordance with legal requirements, in that it was not signed by the decedent.

The instrument is dated "May 20 1929." It commences in the following manner:

"In the name of God I

Mary L. Leonard

Los Angeles Calif at the age of 70 years and being of sound and disposing mind and memory."

It bequeathes $2,000 for a monument for her mother's grave and her own. It states that $5 is given to each of her brothers and sisters and the children of deceased brothers and sisters, and no more. It then recounts in detail her reasons for giving no more to those relatives; mentions hurts and heartaches; that she had given thousands of dollars to certain of them and real property to others and had not been appreciated, but that she had been turned out. The instrument provides that the entire estate is to go to erect a home for aged couples and makes certain restrictions as to its use and as to the qualifications of those who shall be admitted. She appoints a niece, Loretta G. Neilson, one of the appellants, as the executrix to act without bonds and forbids her to employ one of the decedent's brothers, W. R. Barnes, as her attorney. It then states some of the facts relating to a controversy with her brother Ed Barnes, which resulted in a suit by the brother against her. The last words and punctuation in the instrument are "We had our suit and he got licked———". No signature appears at the end of the instrument. It is also apparent from the instrument that the year of the date had been changed from 1922 to 1929. The decedent died on December 28, 1932, at the age of about 76 years.

[1, 2] The probate court found that the instrument was not signed by Mary L. Leonard so as to constitute it a last will and testament. The court found further that the decedent's name appearing at the top was descriptio personæ and not intended as an executing signature; that the instrument was incomplete and unfinished, and ended abruptly several inches from the bottom of the page, with a dash following the last word; that the date had been changed by erasing the figure 2 and substituting the figure 9, so as to make the year appear as 1929; and that there was nothing on the face of the instrument which showed an intention on the part of the author to adopt the name appearing in the exordium clause as an executing signature.

The main ground of the appeal is that the evidence does not support the findings of the probate court. This ground obviously lacks merit. In Estate of Streeton, 183 Cal. 284, one of the cases relied upon by the appellants, it is stated at page 288, 191 P. 16, 18: "The test to be applied in determining whether a will has been 'signed by the hand of the testator himself,' as required by section 1277 of the Civil Code, was stated in Estate of Manchester, 174 Cal. 417, 163 P. 358, Ann. Cas. 1918B, 227, L. R. A. 1917D, 629, as follows: 'The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature.' * * * Had the name appeared in the exordium, the logical inference from the context would probably have been that it was intended merely to identify the person making the will, and additional facts might have been necessary to raise the inference that it was also intended as a signature in execution of the will. (Citing cases.)" The holding in that case that the due execution of a will is a question of fact, and its determination by the trial court is not to be overthrown unless that determination is without support in the evidence (Estate of Streeton, supra, page 289 of 183 Cal., 191 P. 16), is applicable on an appeal from a judgment denying admission of an instrument to probate as a will.

The evidence in the present record fully supports the findings of the probate court. See Estate of Bernard, 197 Cal. 38, 239 P. 404; Estate of Devlin, 198 Cal. 721, 247 P. 577.

[3] The contention is also made that the court erred in admitting in evidence certain alleged declarations of the decedent made after the writing of the instrument, to the effect that she did not intend it as her last will and testament. Assuming error in this respect, in view of the foregoing showing that the instrument itself fully supports the court's findings, and that the judgment would be affirmed on that evidence alone, it cannot be said that any prejudice resulted to the appellants by the admission in evidence of such declarations.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.

220 Cal. 759

BEARDEN v. COLLINS, Registrar of Voters.

S. F. 15157.

Supreme Court of California.

May 16, 1934.

Judges 🔑**8.**

Where death of superior court judge occurred on April 19th during year in which election would have been regularly held to elect successor for ensuing term, constitutional provision respecting vacancies in such office *held* not to contemplate that election of successor should be delayed until the following year (Const. art. 6, § 8).

Const. art. 6, § 8, provides that vacancy in office of judge of superior court shall be held at next succeeding general state election after the first day of April next succeeding the accrual of such vacancy by election of judge for full term to commence on first Monday of January after first day of January next succeeding his election.

SHENK, J., WASTE, C. J., and STURTEVANT, Justice pro tem., dissenting.

In Bank.

Petition by A. C. Bearden for writ of mandate to compel C. J. Collins, Registrar of Voters of the City and County of San Francisco, to omit from proceedings leading to the primary election, all reference to a certain office of judge of the Superior Court.

Writ denied.

Sullivan, Roche, Johnson & Barry and W. T. Sweigert, all of San Francisco, for petitioner.

John J. O'Toole, City Atty., of San Francisco, for respondent.

Paul C. Dana, of San Francisco, amicus curiæ.

PRESTON, Justice.

Petitioner seeks a peremptory writ of mandate commanding respondent as Registrar of Voters of the City and County of San Francisco, State of California, to omit from the proceedings leading up to the primary election to be held August 28, 1934, all reference to the office of judge of the superior court of the state of California in and for the city and county of San Francisco, designated as office No. 3. In response to an order to show cause, respondent has filed a demurrer to the petition.

It appears that in 1928 Judge George H. Cabaniss was duly elected to the superior court of said city and county for a full term of six years, ending on the first Monday after the first day of January, 1935. He duly qualified and thereafter acted as such judge until April 19, 1934, on which date he died. His death, therefore, occurred during the year in which an election would have been regularly held to elect his successor for the ensuing full term of six years. Petitioner contends that the effect of the death of Judge Cabaniss on said date will be to delay the election of his successor to the general election of 1936 and that no election to fill said office can be held during the year 1934.

In support of this position she relies on section 8 of article 6 of the state Constitution, which provides: "The term of office of judges of the superior courts shall be six years from and after the first Monday of January after the first day of January next succeeding their election. A vacancy in such office shall be filled at the next succeeding general state election after the first day of April next succeeding the accrual of such vacancy by the election of a judge for a full term to commence on the first Monday of January after the first day of January next succeeding his election. The Governor shall appoint a person to hold such vacant office until the commencement of such term."

Petitioner argues that the second sentence of said provision is so clear and unambiguous that there is no room for judicial interpretation or construction thereof. If we accept this contention, it follows that no election can be held in 1934 to fill said office, and this is so even though the Governor might choose not to appoint any person to fill said vacancy and thus the office would remain vacant until the first Monday after the first day of January in 1937. This necessarily must be the argument of petitioner, otherwise she has no standing in court as the vacancy has not as yet been actually filled.

Again, following the same reasoning, had Judge Cabaniss lived until after election day of this year, and yet not stood for re-election, or had he run, been defeated, and thereafter, and before the first Monday after the first day of January, 1935, had resigned or died, the judge-elect could not qualify as such officer for the ensuing term and his election would be void.

We cannot agree that such results were contemplated by the people in adopting said constitutional provision. Said clause, within itself, gives convincing evidence that the intent was to provide for the filling of vacancies for the remainder of the existing term in which they might occur and that the deferred election for this purpose must be held before the expiration of such term; that when such election is held it is not to fill the vacancy for the unexpired portion of the existing term, but is an election for the full ensuing term. Clearly, the provision does not contemplate a deferred election in a year when the general law provides for a regular election to fill the new term to begin the following year. Therefore, when a term is expiring at the close of the year of a general election, the occurring of a vacancy at any time in such year is a false quantity, except that, under the last sentence of said provision, the vacancy can be filled by the governor until the commencement of the new term. Moreover, in order to harmonize the first sentence of said provision and other related provisions of the Constitution with the sentence under construction, it is necessary to give it the above meaning.

Again, to give the provision the construction contended for by petitioner would be to arbitrarily add two years to the term of the office held by Judge Cabaniss, which expires at the end of the present year, and to follow such addition by conducting an election to fill a vacancy almost two years after expiration of the term in which it occurred.

Under article 6, § 6, of the Constitution, it was clearly the intent of the framers that the people should reserve to themselves the right to elect such judges and their successors at regular intervals and that any other mode of filling said offices should be by use of an emergency method to fill vacancies until a general election should be held.

We therefore construe said constitutional provision above quoted to mean that the election of a successor to Judge Cabaniss shall proceed in the same manner as though no vacancy in the office has occurred and that the successor elected by the people at the coming election shall hold said office for the full term of six years, commencing on the first Monday after the first of January, 1935, and that any appointee named by the governor hereafter shall hold office only for the remainder of the present unexpired term, which ends on said first Monday after the first day of January, 1935.

The petition for writ of mandate is denied.

We concur: LANGDON, J.; SPENCE, Justice pro tem.; KNIGHT, Justice pro tem.

SHENK, Justice.

I dissent.

There can be no escape from the conclusion that section 8 of article 6 of the Constitution in plain and unambiguous language provides that a vacancy in the office of superior judge shall be filled by election at the general election occurring after the first day of April next succeeding the accrual of the vacancy, and that at such election the person elected shall hold for a full term of six years; also that the Governor shall appoint a person to fill such vacant office until the commencement of that full term.

When the Constitution, as to the facts presented, speaks plainly and with no uncertainty, the court should obey. Every canon of jurisprudence is to that effect. In such case there is no opportunity for construction. It is, of course, a cardinal rule that the intention of the lawmakers should be followed; but this rule is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity. In such case the office of the judge is to declare what is contained therein, "not to insert what has been omitted, or to omit what has been inserted." Section 1858, Code Civ. Proc.; Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 366, 5 P.(2d) 882. The Constitution itself declares that its provisions are mandatory and prohibitory. Section 22, art. 1. If the language used shows plainly and unequivocally a definite purpose, it is the duty of the courts to carry that purpose into effect. When no two meanings can be placed on the language used, it is mandatory, the courts are not at liberty to look elsewhere, and are bound to obey it. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P. 1117; 5 Cal. Jur. p. 598, and cases cited. If the meaning of the provision in question were doubtful, one need go no further than the argument sent to every voter in the state in 1926 to ascertain its meaning as understood by the voters. The argument was as follows: "If a vacancy occurred after April first of an election year, the time is too short to circulate petitions and satisfactorily prepare for an election at the August primary, and in such case the governor will make an appointment to fill the vacancy until the next election year." This argument may be resorted to for aid (which is not necessary here), in ascertaining the meaning of the amendment. Beneficial Loan Society v. Haight, 215 Cal. 506, 11 P.(2d) 857; Cypress Lawn C. Ass'n v. San Francisco, 211 Cal. 387, 295 P. 813; Yosemite L. Co. v. Industrial Acc. Com., 187 Cal. 774, 204 P. 226, 20 A. L. R. 994; Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A. L. R. 750. There should be no hesitancy on the part of the court to apply the constitutional provision in its plain and unambiguous sense, especially as applied to the facts presented. If under a different state of the facts its literal enforcement would lead to an absurdity or tend to thwart the preferential right to elect, that situation may adequately be dealt with when it arrives. It might well be argued that if a vacancy occurred at a time when the machinery of election, under the Constitution and statutes providing for elections, had already occupied the field and the electorate were then in process of election for the forthcoming full term, or the full term about to commence had already been filled by an election, in such event the election might proceed, or the position be deemed filled by the election; but we have no such case before us. On the contrary, we are confronted with a state of facts which renders the plain meaning of the Constitution directly applicable with no results leading to absurdity or even inconvenience.

It is highly significant that in 1928 sections 3 and 4a of article 6 of the Constitution, with reference to vacancies in the Supreme Court and District Courts of Appeal, were amended to provide by explicit language for the contingency which the majority are now reading into and adding to section 8 by a process of construction. Moreover, the Constitution of 1879, (section 6, art. 6) provided: "If a vacancy occur in the office of judge of a superior court, the Governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term." What the majority have done has been to re-establish the rule of 1879, notwithstanding the last expression of the people in the amendment of 1926. In my judgment the plain and unmistakable mandate of the amendment, as to the facts now presented, should be given full effect by the issuance of the writ.

We concur: WASTE, C. J., STURTEVANT, Justice pro tem.

1 Cal.(2d) 34

In re FRANK'S ESTATE.

FRANK v. DUNCAN et al.

L. A. 13957.

Supreme Court of California.

May 17, 1934.

1. Wills 🔑**206.**

Will *held* properly admitted to probate as against contention that there was no estate upon which will could operate, where there was personalty of value of $100, $3,000 claim against three of children of deceased, and equitable claim against deceased's widow, and court found existence of property not exceeding $25,000 in value.

2. Wills 🔑**163(4).**

Proponent of will did not have burden to prove that testator at time will was executed was free from undue influence because attorney who drafted will was also attorney for proponent, where record showed that testator had been client of same attorney for a long time and that proponent did not actively participate in drafting of will and did not unduly benefit thereunder.

In Bank.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Application by Linnie Duncan for the probate of the will of Christopher H. Frank, deceased. From an order admitting the will to probate, Eva L. Frank, contestant, appeals.

Affirmed.

Raymond J. Kirkpatrick and John J. Selover, both of Long Beach, for appellant.

Russell H. Pray and William N. Deatherage, both of Long Beach, for respondents.

SHENK, Justice.

The appeal herein is from an order admitting to probate the last will and testament of Christopher H. Frank, deceased.

The decedent left a last will by which he bequeathed his estate to his five children. He named one of his daughters, Linnie Duncan, executrix. He expressly omitted any bequest to his wife, Eva L. Frank. The latter instituted a contest and opposition to the probate of the will on the grounds of the alleged unsoundness of mind and incompetency of the testator to execute a will and undue influence alleged to have been exercised upon the testator by his children. The court found the testator to have been of sound and disposing mind and competent to make a will, that the will was his own voluntary act, and that no undue influence was exercised upon him. The court entered its order admitting the will to probate. The appeal is by the contestant.

[1] The contentions on the appeal are that the burden rested on the proponent to prove that the testator at the time the will was executed was free from any undue influence, that the burden was not met, and that there was no proof that there was any estate upon which the will could operate. A sufficient answer to the last contention is that the contestant concedes the existence of personal property of the value of $100 and a claim in the sum of $3,000 against three of the children of the deceased. The petition for letters alleged the existence of an equitable claim against the widow of the decedent based on the alleged right to have set aside certain transfers of property made by the testator in his lifetime to the contestant. The court found the existence of property not to exceed $25,000 in value. This is sufficient to support the order admitting the will to probate on this issue. Estate of Rees, 60 Cal. App. 92, 212 P. 234.

[2] The contention that the burden of proof rested upon the proponent is based on testimony that the attorney who drafted the will was also the attorney for the daughter Linnie Duncan, prior to the time of the events involved. The contestant relies upon this as creating a confidential relationship between the daughter Linnie Duncan and the testator, and, because of the added circumstance that her attorney prepared the will, it is claimed that the burden of proof shifted to the proponent.

An examination of the record refutes any intimation that the fact that the attorney prepared the will bears any relation to any part which Linnie Duncan may have taken in the execution of the will, and the evidence does not show that she took any part at all. The record shows affirmatively that the decedent had been a client of the same attorney for some time. In the absence of any showing of active participation on the part of Linnie Duncan and of a showing that she unduly benefited under the terms of the will, and there is no showing as to either, the principles stated in Estate of Lances, 216 Cal. 397, 14 P.(2d) 768, relied upon by the contestant, do not apply. The appeal is without merit.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

220 Cal. 729

Ex parte VICTOR.

Cr. 3728.

Supreme Court of California.
May 9, 1934.

Public service commissions ⚷19(3).

Order of railroad commission requiring imprisonment of person found guilty of violation of its order, to satisfy fine upon default in payment thereof, and supplemental order committing such person to county jail upon default, *held* not void as being beyond power of commission (St. 1915, p. 168, § 81; Code Civ. Proc. § 1218; Const. art. 12, § 22).

> Petitioner was found guilty of a violation of an order of the state railroad commission and was ordered punished by a fine of $500 and by five days' imprisonment in the county jail. The commission further ordered that in case of default in payment of fine, the petitioner should be committed to the county jail until the fine be paid or satisfied in proportion of one day's imprisonment for each $5 of the fine.

In Bank.

Original application by Walter J. Victor for a writ of habeas corpus to secure release of petitioner from custody upon a commitment for violating an order of the State Railroad Commission.

Writ discharged, and the petitioner remanded to custody.

John F. Groene, of Los Angeles, for petitioner.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

SHENK, Justice.

The petitioner was found guilty by the railroad commission of a violation of an order of the commission and was ordered punished by a fine of $500 and by five days' imprisonment in the county jail of Los Angeles county. It was further ordered that in case of default in payment of the fine the petitioner be committed to said county jail until the fine be paid or satisfied in the proportion of one day's imprisonment for each $5 of the fine. The order became final. The petitioner served the five days in jail and was thereupon released from custody. Thereafter, the commission issued a supplemental order of attachment of the body of the petitioner and his commitment to said county jail until the fine be paid or satisfied, such imprisonment not to exceed one day for each $5 of the fine. Pursuant to this order the petitioner was again taken into custody. In this proceeding he contends that the portion of the original order of the commission requiring imprisonment in default of the payment of the fine and the supplemental order to the same effect were beyond the power of the commission and void.

The Constitution provides in section 22 of article 12 that the commission shall have power to punish for contempt "in the same manner and to the same extent as courts of record." Section 81 of the Public Utilities Act is to the same effect (St. 1915, p. 168). Section 1218 of the Code of Civil Procedure provides that the court or judge must determine whether the person proceeded against is guilty of the contempt charged, "and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both."

It is established in this state that a superior court in imposing a fine for contempt has the power to make and enforce a judgment providing that in default of payment the party in contempt be imprisoned until the fine be satisfied (Ex parte Abbott, 94 Cal. 333, 29 P. 622), notwithstanding such term of imprisonment may exceed five days. Ex parte Karlson, 160 Cal. 378, 117 P. 447, Ann. Cas. 1912D, 1334.

It seems to be the position of the petitioner that since the commission imposed a term of imprisonment, it divested itself of the power, in also imposing the fine, to require imprisonment in case of default in payment of the fine. Assuming that the rule contended for is applicable to judgments in criminal cases (see 8 Cal. Jur. p. 471, and cases cited), it is not the rule in contempt proceedings. Decisive precedent and authority for the order of the commission, contrary to the petitioner's contention, is found in Re Jorgensen, 19 Cal. App. 217, 124 P. 1055, and in Re Mason, 69 Cal. App. 598, 232 P. 157.

The writ is discharged, and the petitioner is remanded.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

220 Cal. 757

HOUSSELS et al. v. GLASGOW et al.

L. A. 14129.

Supreme Court of California.
May 15, 1934.

Mines and minerals ⚿79(1).

Where lessees' assignee of oil and gas lease made declaration of trust subject to interest of owners of overriding royalties, beneficiaries of trust *held* bound thereby.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by R. S. Houssels and others as trustees of the Atlantic Petroleum Syndicate, an unincorporated association, against Sid Glasgow, Edwin Jones, Harriett Jones, and others. From a judgment in favor of defendants second and third named, plaintiffs appeal.

Affirmed.

C. Douglass Smith, of Long Beach, for appellants.

Freston, Mulroney, Nilsson & Files and George W. Nilsson, all of Los Angeles, and Harry L. Cohn, of Long Beach (Monta W. Shirley, of Los Angeles, of counsel), for respondents.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment in favor of the defendants Edwin and Harriett Jones.

The action was brought to quiet the title of the plaintiffs in and to the right to a 1 per cent. of the production under an oil lease executed by the owners of lots 12 and 13 in block A of Mountain Meadows tract in the county of Los Angeles. The plaintiffs sued in their representative capacity as trustees of Atlantic Petroleum Syndicate, an unincorporated association.

On July 29, 1922, subject to a 20 per cent. owners' royalty reserved, the owners executed an oil and gas lease covering said lots to Taylor, Hjorth, and Looney, who in turn assigned the lease to Gordon, who assigned to C. S. Summar, who assigned to Joseph Maltby as trustee, who, according to the record, agreed to hold 20 per cent. of the production from both lots as an overriding royalty in favor of C. S. Summar, N. H. Stearn, and others. The issue tendered and tried in this action was the claim of Edwin and Harriett Jones to a 1 per cent. of the production as a portion of the 20 per cent. overriding royalty. The court found in accordance with their claim. The evidence showed that as part of the consideration for the assignment from C. S. Summar to Maltby, trustee, the latter agreed to issue overriding royalties to the extent of 20 per cent. to Summar and others. Acting as attorney in fact for Summar, Maltby transferred a 1 per cent. interest to G. C. Summar, a brother of C. S. Summar. This 1 per cent. was subjected to many assignments and was finally purchased by the defendants Jones. Thereafter Maltby, as trustor, executed a declaration of trust for the Atlantic Petroleum Syndicate in which he declared that he held and controlled the right to 60 per cent. of the production. The remaining percentages were made up of the 20 per cent. owners' royalty and the 20 per cent. overriding royalty. The court found on sufficient evidence that the interest of the defendants Jones was a part of the overriding royalties and not a part of the 60 per cent., and concluded that the plaintiffs, as successor-trustees of Maltby, were bound to such interest. The findings and conclusions of the court are supported by the record. The subsequent declaration of trust was made subject to the interest of the owners of the overriding royalties and the beneficiaries of said trust were also bound thereby.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

220 Cal. 735

MAILHES v. INVESTORS' SYNDICATE et al.

INVESTORS' SYNDICATE v. MAILHES.

L. A. 14540.

Supreme Court of California.

May 14, 1934.

1. Appeal and error ⚷684(3).

Claim that court erred in dissolving temporary restraining order and denying temporary injunction because complaint was sufficient as against denials on information and belief cannot be considered on appeal on judgment roll not containing copies of orders or showing proceedings resulting in order complained of.

2. Appeal and error ⚷843(2).

Propriety of order dissolving temporary restraining order and denying temporary injunction *held* moot question on appeal after trial on merits and judgment denying permanent injunction.

3. Election of remedies ⚷3(4).

Corporation's unlawful detainer action against tenant's wife did not estop it from defending and quieting its title to realty as against husband suing for declaration of his right to possession thereof (Code Civ. Proc. § 1161a).

4. Election of remedies ⚷1.

Doctrine of "election of remedies" is application or extension of law of estoppel and founded on theory that party should not be allowed to occupy inconsistent positions.

[Ed. Note.—For other definitions of "Election of Remedies," see Words & Phrases.]

5. Election of remedies ⚷3(1).

There is no inconsistency between different remedies, all of which are based on either claim of title to property in plaintiff or affirmance of title in defendant.

6. Appeal and error ⚷907(3).

It will be assumed on judgment roll appeal that evidence was sufficient to support trial court's findings.

7. Quieting title ⚷14.

Trustor's subtenant, contesting right to property of corporate grantee of purchaser thereof at foreclosure sale under trust deed, waived such corporation's failure to serve notice to quit on trustor as required to warrant termination of tenancy by its cross-complaint to quiet title in subtenant's action to declare his right to possession of property (Code Civ. Proc. § 1161a).

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Oliver Mailhes against the Investors' Syndicate, a corporation, and others, in which named defendant filed a cross-complaint. Judgment for defendants, and plaintiff appeals. On motion to dismiss the appeal or affirm the judgment.

Judgment affirmed.

C. M. Johnson, of Los Angeles, for appellant.

Daniel E. Farr and W. Torrence Stockman, both of Los Angeles, for respondents Investors' Syndicate.

Everett W. Mattoon, County Counsel, of Los Angeles, for respondents Charles R. Thomas et al.

PRESTON, Justice.

This judgment roll appeal by plaintiff from judgment for defendants, in an action to declare the right to possession of certain real property occupied by plaintiff and his wife, has been submitted on motion to dismiss the appeal or affirm the judgment. The several contentions of appellant appear to be entirely without merit. The word "defendant" will be used to refer to defendant and cross-complainant, Investors' Syndicate, a corporation.

The premises in question were conveyed to defendant by a grantor who had purchased them at a sale of foreclosure under a deed of trust and defendant, prior to commencement of this action, had successfully prosecuted to final judgment an unlawful detainer action against plaintiff's wife. In his complaint herein plaintiff alleged that he was in possession of the property and occupied it by virtue of an unterminated lease from the former owner, who was trustor under the above-mentioned deed of trust. He prayed for and was granted a preliminary restraining order preventing defendants from occupying the property under writ of possession issued in said unlawful detainer action against his wife. He further prayed for a permanent injunction and for a declaration of his rights and duties in the premises. Defendant answered setting up its ownership of the property and also cross-complained to quiet title thereto. Later, upon hearing, the preliminary restraining order was discharged and a temporary injunction was denied plaintiff. The cause then proceeded to trial and the court thereafter rendered its findings that defendant was in fact the owner of the premises;

that the sale under the deed of trust was duly and regularly made; that the tenancy of plaintiff had terminated; that he had no interest in said premises and was not entitled to possession thereof. Judgment followed for defendant, quieting its title to the property, and plaintiff appealed on the judgment roll alone.

[1, 2] Appellant's first contention is that the court erred in dissolving the temporary restraining order and in denying his request for a temporary injunction, because the allegations of his complaint were sufficient, against the denials of defendant on information and belief, to show that he was rightfully in possession and entitled to quiet enjoyment of the property. This claim has no virtue, not only because the appeal has been prosecuted upon the judgment roll alone, which does not contain a copy of said temporary restraining order, or the order dissolving it and denying an injunction pendente lite, or show the proceedings which resulted in the latter order, but also because any question of the propriety of said action of the court below has become moot by reason of the trial of the cause on its merits and entry of judgment denying a permanent injunction. People's Ditch Co. v. Foothill Irr. Dist., 103 Cal. App. 321, 284 P. 514.

[3] Secondly, appellant states that the findings of fact do not sustain the judgment. This assertion is apparently founded upon the theory that actions of unlawful detainer and actions to quiet title may be concurrent; that defendant had an election of remedies and by securing judgment in the unlawful detainer action against plaintiff's wife, it elected to pursue that remedy, and consider her as the party holding over under section 1161a of the Code of Civil Procedure, being thereby precluded in this cause from interposing a defense or cross-complaining to quiet title. This claim scarcely warrants discussion. The fact that defendant brought an unlawful detainer action against one person certainly did not estop it from defending and quieting its title against the claims of another person, despite the relationship of these two persons.

[4, 5] The doctrine of election of remedies is regarded as an application or extension of the law of estoppel and it is founded upon the theory that a party should not be allowed to occupy inconsistent positions. 10 Cal. Jur. § 1, p. 3. As stated in 20 C. J., p. 12, § 9, B: "Where title to property is involved. All actions which proceed upon the theory that the title to property is in plaintiff are inconsistent with those which proceed upon the theory that title is in defendant. But there is no inconsistency between different remedies, all of which are based upon claim of title to property in plaintiff, or all of which are based upon the affirmance of title in defendant." Here the action of defendant was not inconsistent, being directed in both causes toward affirmance of its title and right to possession of the property. A review of the findings reveals that they fully support the judgment in every particular.

[6] Appellant's third contention is that an action to quiet title will not lie against a tenant whose tenancy has not been terminated previous to the bringing of the action. Such a doctrine, whether or not appellant has properly stated it, can have no application here. The court specifically found that appellant's tenancy had terminated and it will be assumed, on a judgment roll appeal, that sufficient evidence was adduced to support the findings.

[7] Lastly, appellant contends that neither the pleadings nor findings show sufficient notice to warrant termination of his tenancy by cross-complaint. In this behalf appellant states that although said section 1161a requires a three-day notice to be served upon both the person holding over and the subtenant in possession (being said trustor and appellant, his subtenant), there is no showing of service upon the trustor. But there appears to have been a sufficient compliance with the statutory requirements. The court found that the three-day notice to quit was served upon appellant. It is he, and not the trustor, who has steadfastly contested defendant's right to the property; hence the failure, if any, to serve notice upon the trustor may be regarded as having been waived by him. Calhoma Oil Corp. v. Conniff, 207 Cal. 648, 651, 279 P. 771; Williams v. Edge, 192 Cal. 254, 255, 219 P. 747; see, also, Hanes v. Coffee, 212 Cal. 777, 300 P. 963.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

220 Cal. 739

LA SALLE v. PETERSON et al.

L. A. 13984.

Supreme Court of California.

May 14, 1934.

1. Judgment ⚷443(1).

Judgment may be set aside for extrinsic or collateral fraud, but not for intrinsic fraud.

2. Judgment ⚷460(4).

Complaint alleging that, pursuant to a conspiracy and perjury, judgment was procured against plaintiff in action for services never rendered and by person never employed by plaintiff, and asking that judgment be set aside because of proof subsequently obtained by plaintiff *held* demurrable as attack on judgment for "intrinsic fraud" and not for "extrinsic or collateral fraud."

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud" and "Intrinsic Fraud," see Words & Phrases.]

3. Judgment ⚷444.

Rule that judgment will not be vacated because obtained by false or perjured testimony is not changed because perjured testimony resulted from conspiracy, since fraud complained of is "intrinsic fraud," as distinguished from "extrinsic or collateral fraud."

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Frank LaSalle against Ole Peterson and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

See, also, 123 Cal. App. 639, 11 P.(2d) 645.

John C. Kleber, of Los Angeles, and Chas. M. Delemeter, for appellant.

Earl Curtis Peck and Abraham Richmond, both of Los Angeles, for respondents.

PRESTON, Justice.

Appeal by plaintiff from judgment for defendants entered on order sustaining, without leave to amend, their demurrer to plaintiff's amended complaint.

[1] The action is one to set aside a judgment on grounds of fraud and conspiracy. Although the amended complaint is voluminous in detail, a brief statement should suffice to show that the ruling of the court below was entirely correct, as the matters alleged do not pertain to extrinsic or collateral fraud, but purely to intrinsic fraud, which is not ground for setting aside a judgment.

[2] Plaintiff sets forth the history of a controversy of years between these parties and alleges that as an outgrowth thereof defendants, motivated by hatred and revenge, conspired to prosecute against him a wholly false and fictitious action, to wit: Cause No. 300042 in the Los Angeles county superior court, wherein the above-named defendant Ole Peterson was plaintiff and this plaintiff was one of the defendants and said Peterson had judgment against plaintiff for $2,700 and costs. It is further alleged that said judgment was procured on the false and fraudulent testimony of said Peterson that he was employed by plaintiff to work in a packing plant and worked there for about two years without receiving any wages; that, as defendants well knew, during practically that entire period the packing plant was closed and said Peterson was employed by another company; that defendants, by their false and fraudulent acts, prevented plaintiff from learning the true facts to present them to the court and from having a fair trial but, if granted the opportunity of a new trial, plaintiff will be able to show conclusively that he is in no way liable to said Peterson and that said judgment resulted solely from said conspiracy and perjured testimony. As above stated, it is unnecessary to set forth the averments of said pleading with greater particularity as it is clear they are but allegations of intrinsic fraud, affording no basis for the relief here sought.

[3] It has long been the rule that a judgment will not be vacated because it was obtained by false or perjured testimony (Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159) and the fact that the bringing of the action and the introduction of the perjured evidence may have resulted from conspiracy does not change it from intrinsic to extrinsic fraud. (Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am. St. Rep. 117). The pleading before us contains no distinguishing feature sufficient to remove the cause from operation of this rule. The language of the Pico Case is directly in point and the doctrine as there stated has been followed on almost numberless occasions. 15 Cal. Jur., § 124, pp. 18 et seq., and cases cited in notes.

"That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." Pico v. Cohn, supra, page 133 of 91 Cal., 25 P. 970, 971, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. After citing some instances of extrinsic or collateral fraud, such as keeping the unsuccessful party away from court by a false promise of compromise, or purposely keeping him in ignorance of the suit, the court continues (page 134 of 91 Cal., 25 P. 970, 971, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159): "In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy."

Thus, in this cause, plaintiff had his opportunity for making the truth appear, upon trial of the cause, when the conflicting testimony was heard and passed on by the jury, upon ruling by the judge on motion for new trial and upon consideration of the cause on appeal. Peterson v. La Salle, 123 Cal. App. 639, 11 P.(2d) 645. If he was overborne by perjured testimony, by his inability to present the true facts, or to locate and secure the testimony of defendant Monroe, or by any other acts of the defendants, he is unfortunately without remedy here. "The wrong, in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice. * * *" Pico v. Cohn, supra, page 134 of 91 Cal., 25 P. 970, 971, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

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220 Cal. 669

HOBART ESTATE CO. et al. v. WATERS, County Tax Collector.

Sac. 4802.

Supreme Court of California.

April 30, 1934.

1. Taxation 🔑367.

Property scheduled as operative property in public utility's report to board of equalization must be regarded as operative property for particular year involved, where no protest is made within time provided by law (Pol. Code, § 3667c).

2. Taxation 🔑446.

Decision of board of equalization as to what is operative and nonoperative property and respective proportions thereof is binding upon all parties concerned, until set aside by court of competent jurisdiction (Pol. Code, § 3667c).

3. Taxation 🔑367.

Board of equalization has power to extend time for filing of report by public utility as to operative and nonoperative property situated in county (Pol. Code § 3667c).

4. Taxation 🔑196.

Constitutional provision that property or severable portion thereof must be exclusively used by public utility to exempt it from local taxation *held* to require no construction (Const. art. 13, § 14).

5. Constitutional law 🔑283.

Holding that public utility's property having dual use is subject to local taxation presents no question of violation of Fourteenth Amendment (Const. U. S. Amend. 14; Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

6. Constitutional law 🔑283.
Taxation 🔑200.

That board of equalization, upon public utility's report including proceeds derived from "dual use" of property, erroneously levied tax thereon, and that taxpayer voluntarily paid it, presents no question of due process, and does not bar local tax upon same property (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

7. Constitutional law 🔑35.

In case of conflict between taxation provisions of Political Code and those of Constitution, latter controls (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

8. Taxation 🔑200.

Where public utility's report shows that property was not used exclusively for operative purposes and that no tender of taxes thereon had been made, property was subject to local taxation, and assessor's failure to file protest was immaterial (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

9. Taxation 🔑374.

Only where property of public utility is claimed to be operative, and assessor asserts that it is nonoperative, is filing of protest by assessor necessary (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

In Bank.

Application by the Hobart Estate Company and Emma Rose, doing business under the names and styles of Utica Mining Company and Angels Electric Light & Power Company, for a writ of mandate to be directed to Julia Waters, as tax collector of the county of Calaveras.

Writ denied.

Prior opinion, 18 P.(2d) 768.

Warren Olney, Jr., Allan P. Matthew, J. Richard Townsend and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioners.

Robert Brennan and M. W. Reed, both of Los Angeles, amici curiæ for Atchison, T. & S. F. Ry. Co.

Frank Karr and R. E. Wedekind, both of Los Angeles, amici curiæ for Pacific Electric Ry. Co.

LeRoy M. Edwards and Paul Overton, both of Los Angeles, amici curiæ for Los Angeles Gas & Electric Corporation.

Thomas J. Straub, of San Francisco, amicus curiæ for Pacific Gas & Eectric Co.

Guy V. Shoup, of San Francisco, amicus curiæ for Southern Pacific Co.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, amici curiæ for Southern California Edison Co.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

C. Stanley Wood, City Atty., and John W. Collier, Deputy City Atty., both of Oakland, amici curiæ.

W. Coburn Cook, of Turlock, special counsel for Alpine County.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. Upon a full consideration of the cause, we are satisfied that the opinion of Mr. Justice Plummer properly disposes of the issues, and we hereby adopt it as the opinion of this court. It reads as follows:

In this proceeding the petitioners seek a writ of mandate from this court directing the respondent to accept the sum of $229.83 in full payment of taxes levied and assessed against property belonging to said petitioners situate in the county of Calaveras, and upon the assessment rolls of said county indorse the word "Paid," indicating a full discharge and release of all taxes assessed against said petitioners.

Omitting a number of the preliminary allegations of the petition not necessary to be considered herein, the petition states that on the 1st day of April, 1932, the petitioners filed with the state board of equalization of the state of California a report, as required by law, of its operative and nonoperative property situate in the county of Calaveras; that the time for filing said petition was extended from the 15th day of March, 1932, to and including the 1st day of April, 1932, by the state board of equalization pursuant to section 3667c of the Political Code; that at the time of filing the operative report by the petitioners herein, petitioners furnished a duplicate report to the assessor of Calaveras county, that no protest was filed against said operative report by the assessor of Calaveras county, within the time allowed by law; that after the time allowed by law for the filing of a protest by the assessor of any county where such operative property is situate, the assessor of Calaveras county did file a protest; that upon motion of the petitioners, the protest of the assessor of Calaveras county, so filed after the time allowed by law, was dismissed. The report further sets forth that during the year 1932 the assessor of Calaveras county assessed property shown in said report as operative property, property shown as used in a "dual" capacity both in the carrying on of an operative and nonoperative business by the petitioners herein, and also upon property listed in said report as nonoperative.

Alleging that the assessment placed upon the petitioners' property in Calaveras county is illegal, save and except as it was levied upon property listed as nonoperative property in said report, petitioners estimated the amount of taxes claimed to be legally chargeable against said property, and tendered the same to the tax collector of said county in the sum hereinbefore named. This amount was refused by the respondent as tax collector, who claimed that the total sum of $2,618.59 was the legal amount of taxes chargeable against the property of the petitioners herein.

Upon this hearing it is contended by the petitioners that the failure of the assessor of Calaveras county to protest within the time allowed by law against the listing of property as set forth in the operative report made by the petitioners herein to the state board of equalization, precludes the assessing and levying of any tax upon property belonging to the petitioners, save and except that listed as nonoperative.

On the part of the respondent it is contended that the operative report filed by the petitioners is invalid, in that it was filed after the time allowed by law, and also that the property used by the petitioners both in their operative and nonoperative enterprises (called by the parties to this action "dual use property") is subject only to taxes payable to Calaveras county. The petitioners maintain that "dual use property" is taxable according to the percentage of uses made thereof; that is, if the properties used to the extent of 50 per cent. in its operative enterprises and 50 per cent. in nonoperative activities, then and in that case the percentage of taxes payable to the state and payable to the county would be 50 per cent. each.

In making its tender of payment to the respondent there appears to be no segregation between the amount of taxes admitted to be due upon the nonoperative property and the estimated percentage of taxes due upon the property listed as "dual use property."

[1] With this summary before us, and without setting forth a description of the property, and without attempting any definition of operative and nonoperative property or "dual use property," only one vital question is presented for our consideration. Before attempting to review the authorities upon what we consider the vital issue herein, it may be stated that the cases called to our attention we think definitely settle the law that property scheduled as operative property in a report to the state board of equalization, where no protest is made within the time allowed by law, must be held for the particular year involved as operative property. To this effect are the following cases: Great Western Power Co. v. City of Oakland, 189 Cal. 649, 209 P. 553, and Great Western Power Co. v. City of Oakland, 196 Cal. 131, 236 P. 307.

[2] We may also add that even where a protest is filed, by the last paragraph of section 3666 of the Political Code, the decision of the state board of equalization as to what is operative and nonoperative property, and in what proportion operative and in what proportion nonoperative, is binding upon all parties, the state, the county, city and county, municipality or district, unless set aside by a court of competent jurisdiction.

[3] Without entering into a discussion of the power of the board of equalization to extend the time to file an operative report, we are of the opinion that section 3667c of the Political Code authorized the board of equalization to grant the extension allowed in this case. While the language of the section is somewhat ambiguous, a reading of the sections preceding leads to the conclusion that all reports required by the board upon which it must base its actions and conclusions are included within the meaning of section 3667c of the Political Code.

Other technical objections are made by the respondent; but as other issues involved in this case are determinative, we do not deem it necessary to enter into any discussion of technical objections.

As we have stated, the report filed by the petitioners with the state board of equalization lists operative property, nonoperative property, and what is called "dual used property," and it only remains for the court to determine whether, under the Constitution and the various sections of the Political Code, the assessor of Calaveras county could legally levy an assessment upon the property coming within the last classification. No tender of payment of taxes covering such property is alleged to have been made.

Section 14 of article 13 of the Constitution, after setting forth the various kinds of property subject to taxation, including the properties operated in the sale of gas and electricity, uses the following language: "And other property, or any part thereof used exclusively in the operation of their business in this State."

Subdivision 1 (a) of section 3665b of the Political Code, after specifying what shall be taxed by the state, contains the following language: "Used exclusively in the operation of the railroad business," etc. Following this, subdivision 2 of section 3665c of the Political Code, defining under the head of "operative property," uses the following words: "Each of the companies mentioned in said section shall report in such detail as the state board of equalization shall prescribe, all of its property in this state which comes under the definition of operative property in section three thousand six hundred sixty-five b of the code." It may be here stated that the report does not set forth any severable portion of the property belonging to the petitioners as used in an operative capacity, as distinct from the extent to which such property is used in a nonoperative capacity. In other words, the "dual use property" appears to be a unit so far as the report is concerned. There is no severable portion which can be said to be used exclusively for operative purposes, and no severable portion thereof which can be said to be used for nonoperative purposes. The property which we have herein designated for convenience as a "unit" is simply used in a double capacity.

While the petitioners rely upon the cases of Great Western Power Co. v. City of Oakland, 189 Cal. 649, 209 P. 553, and a case bearing the same title reported in 196 Cal. 131, 236 P. 307, and the case of San Francisco-Oakland Terminal Rys. v. Johnson, 210 Cal. 138, 291 P. 197, a careful reading of the two cases wherein the Great Western Power Company was the plaintiff, shows that they deal only with the conclusive effect of the decision of the state board of equalization as to what constitutes operative property, when set forth as such in the operative report, where no protest is made by the county assessor.

In the case of San Francisco-Oakland Terminal Rys. v. Johnson, supra, an action was brought to recover taxes paid under protest based on the theory that the property was subject only to local taxation; the facts set forth in the opinion show that the uses made of the property, other than as operative, were so negligible as not to be legally considered in the classification of the property, and that the uses made of the property were really in furtherance of the business carried on by the plaintiff in its operative capacity. In the instant case the circumstances are readily distinguishable from the Oakland Cases. Here a separate and distinct business is conducted in which the property belonging to the plaintiffs and assessed by the assessor of Calaveras county is used, and that the portion of property not used in its local capacity for distribution purposes is used in the generation of electricity in a public utility capacity.

The cases are numerous to the effect that, to remove the property from local taxation and place it under the jurisdiction of the board of equalization for taxation purposes, the property must be used exclusively in the operation of a public utility, or of such a business as comes under the classification found in section 14 of article 13 of the Constitution.

In San Diego & Arizona Ry. Co. v. State Board of Equalization, 165 Cal. 560, 132 P. 1044, 1047, the language of the court, after stating the facts involved therein, and referring to the act of the Legislature as it then read, is as follows: "By that subdivision it is provided that the part of the new road which is in actual use by any company is 'deemed to be in operation,' so as to justify its classification as operative property, 'as soon as it offers and renders service to the public for compensation.' * * * The property also comes within the description of railroad property taxable only for state purposes, as given in the Constitution. The provision is that all the specified companies shall annually pay a tax upon the property enumerated or any part thereof, 'used exclusively in the operation of their business in this state.'"

In Lake Tahoe Ry. etc., Co. v. Roberts, 168 Cal. 551, 143 P. 786, 787, Ann. Cas. 1916E, 1196, the question involved was whether a steamer plying upon Lake Tahoe was subject to state or local taxation. It was there held that while the steamer, in connection with its agreement with the Southern Pacific Company, transported passengers, yet it was not engaged exclusively in such business. The court held that the property was subject only to local taxation. The language in the opinion is applicable here. We quote therefrom: "The question thus presented is an extremely simple one, resting as it does solely upon the meaning of the language of section 14, art. 13, of the Constitution, which declares that, based upon gross revenue, railroad companies shall pay a tax to the state upon certain enumerated properties 'and other property, or any part thereof used exclusively in the operation of their business in this state.' The brief statement of facts above set forth shows conclusively that the steamboats of the plaintiff were not used exclusively in their railroad business, and with equal conclusiveness it shows that no severable part of the steamers is used exclusively in the operation of the business, for manifestly a steamer in operation being a single, indivisible fabric, while it may be said that it is partly used for a given purpose, it cannot be said, as the Constitution declares, that 'any part thereof' is so used."

As we have stated, no severable part of the unit fabric which is being used in this case in a "dual" capacity is used exclusively in the generation of electricity, or in contributing in any way to the uses and purposes of a public utility. And, as further said in the opinion, as if in answer to the petitioners' contention herein as to a percentage assessment: "To illustrate, if this substituted percentage tax based on revenue is to apply to a single piece of property partly used for railroad purposes, that indivisible portion of it not so partly used must be subject to local taxation by local assessors under the strict ad valorem tax, or it escapes taxation altogether. How shall a local assessor assess a portion of a steamboat? What portion shall he assess and what shall be the ad valorem value placed upon the portion which he does assess? All these would be practical questions under appellant's contention and would require answer at the hands of the law. The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the Constitution meant what they said, namely, that only property used exclusively, or only a severable part of property used exclusively in the operation of the business of the company, should be included in the list of property whose sole and only tax is covered by the gross revenue percentage, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax."

In San Bernardino County v. State Board of Equalization, 172 Cal. 76, 155 P. 458, the opinion in the Lake Tahoe Case is reviewed and the view expressed that the words of the Constitution and the Political Code relieving public service corporations from local taxation must be given a fair and reasonable interpretation, yet there is nothing in the opinion in the San Bernardino Case limiting, qualifying, or in anywise restricting the scope of the opinion in the Lake Tahoe Case. In the San Bernardino Case it appears that the property in question (an icing plant) was used exclusively in icing cars used in the transportation of perishable products, which brings it within the definition of "other property exclusively used" in connection with the public service business carried on by the corporation. Thus it is not the kind of property, but the use of the property, which determines its classification.

In Southern Pacific Co. v. Richardson, 181 Cal. 280, 184 P. 3, the right of the state or the local authorities to levy a tax on ferryboats operated between San Francisco and Oakland on what is known as the "Creek Route" was involved. The contention of the state was that as the boats were operated by a railroad company, the taxes should be levied by the state board of equalization. The court, however, held to the contrary, and points out distinctly that the other property used in the business of a public utility must be exclusively used for that purpose. It is further pointed out in the opinion that to hold such property exempt from local taxation would be to read into section 14 of article 13 of the Constitution words which are not there. It is also held that such a construction would limit the scope of section 1 of said article, wherein it is provided that all property shall be subject to local taxation according to its value.

The opinion in the Richardson Case, supra, is well summarized in the syllabus, from which we quote the following: "The fact that subdivision (a) of section 14 of article XIII of the Constitution, which declares the duty to pay the taxes provided for in the opening paragraph, begins with the phrase 'all railroad companies,' and, in describing the kinds of property to be so taxed, closes with the phrase, 'and other property, or any part thereof, used exclusively in the operation of their business in this state,' is not to be taken as meaning that persons or corporations carrying on any business of a kind mentioned in the opening paragraph must be taxed in the same manner and for state purposes exclusively, upon property which they may have and use exclusively in the operation of a separate public utility business in this state which otherwise would not be so taxable, but the only reasonable interpretation is, that the phrase refers only to the kinds of business which are declared to be so taxable in the opening paragraph, and includes only the property which is used exclusively in the operation of such business."

In Pullman Co. v. Richardson, 185 Cal. 484, 197 P. 346, 348, the case of Lake Tahoe Ry. etc., Co. v. Roberts is approved, and in deciding the Pullman Case the court quotes from the Tahoe Case as follows: "The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the Constitution meant what they said, namely: That *only property* used *exclusively*, or only a *severable* part of property *used exclusively* in the operation of the business of the company, should be included in the list of property whose sole and only tax is covered by the gross revenue percentage, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax." The court in the Pullman Case takes occasion to italicize the salient portions found in this quotation.

In the case of San Francisco-Oakland Terminal Rys. v. Johnson, supra, the Supreme Court reviews the cases which we have cited, but we find nothing therein which limits the language of the Tahoe Case where a substantial use is made of the property for purposes which give it a distinctly local character. It is pointed out in the Johnson Case that the steamers on Lake Tahoe derived at least 45 per cent. of their revenue from purely local business. In the Johnson Case it appears that the local business transacted by the property involved was less than one-half of one per cent. In other words, the local business was purely negligible, and did not justify the classification of the property as not being used exclusively in connection with the business of the public utility operating the same. The restaurants and news stands referred to in the Johnson Case were used for the convenience of passengers who theretofore had been carried upon the railroads, and were necessarily connected with, and a part of the business of, transporting the passengers carried by the railroad company. The facts in the Johnson Case are readily distinguishable from the case at bar. Here the report, as we understand it, shows that a substantial use of the "dual use property" is in the conduct of a purely local enterprise.

In the case of People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25, it was the use of the property, and not the ownership thereof, that determined its classification. The property involved in that case was railroad property, and property used exclusively in the conduct of such business. We find nothing in this case which limits the holding in any of the cases heretofore cited relative to the classification of property.

In the recent case of Southern California Telephone Co. v. County of Los Angeles, 212 Cal. 121, 298 P. 9, 11, the question of whether the property involved was or was not operative property or property used exclusively in the operation of a public utility was again before the court. The opinion in this case reviews all the cases which we have heretofore cited, and approves the following language found in the Tahoe Case, to wit: "In Lake Tahoe Ry. etc., Co. v. Roberts, supra, the court discusses the method of interpreting these provisions, and points out that the words 'used exclusively in the operation of their business' have a plain and obvious meaning. It was therefore held that property used only partially in the business was subject to local taxation." The right of the county to tax property not used exclusively in the conduct of a public utility was upheld, as likewise, where the property has a "dual use," in order for it to be subject to state taxation, the public utility use must relate to a severable portion of the property having such "dual use."

[4-7] The holding of all of the cases which we have cited is to the effect that the language of the Constitution, specifying that the property or a severable portion thereof must be exclusively used by the public utility in order to exempt it from local taxation, is plain, definite, and certain, and requires no construction as contended for by the petitioners, but only on application to the circumstances presented for consideration and determination of whether the property is so exclusively used. To hold that the property having such "dual use" is subject to local taxation presents no question of violation of the Fourteenth Amendment of the United States Constitution, as contended for by the petitioners. The fact that the state board of equalization, upon a report showing such "dual use" of property, levies a tax thereon, and the petitioners voluntarily pay such tax which should not have been levied, in nowise presents the question of taking property without due process of law, nor does it bar the constitutional right of local authorities to levy and collect a tax upon the same property. The petitioners making such a report were under no legal obligations to pay any tax illegally levied. Some of the cases which we have cited and relied upon by the petitioners show that the remedies were afforded by paying the tax under protest and suing for the recovery thereafter. The failure of the petitioners to pay the state tax under protest does not relieve them from the obligation to pay any county tax warranted by the Constitution. If there is a difference between the wording of the Constitution and some of the sections of the Political Code to which our attention has been called, the language of the Constitution must prevail.

[8, 9] As we read the operative report, it shows upon its face property not used exclusively for operative purposes, upon which no tender of taxes was made, which renders it subject under the Constitution to local taxation, and it is therefore immaterial whether the assessor did or did not file a protest as to such property. It is only where property claimed to be operative which the assessor asserts to be nonoperative, that circumstances are presented which render it necessary for the assessor to file a protest. If any of the property, or any severable portion thereof, exclusively used in an operative capacity by the petitioners as specified in the Constitution, or held as such under the sections of the Political Code referred to for the fiscal year of 1932-33, by reason of the failure of the assessor to file a protest against the petitioners' operative report, is included in the assessment, petitioners have their remedy by paying the tax under protest, and then bringing an action to recover the excess over and above the amount which they are legally obligated to pay. No protest being needed as to that part of the property listed by the petitioners in their report to the state board of equalization showing, as we have said, the legal right of the county to levy and collect a tax, it follows that the demurrer of the respondent should be sustained, and it is so ordered.

The writ is denied.

220 Cal. 746

FRICK et al. v. CALMIN MORTGAGE CORPORATION, Limited, et al.

L. A. 13965.

Supreme Court of California.
May 14, 1934.

1. **Receivers** ⚷58.

Court which appointed receiver without authority properly vacated order of appointment on its own motion without notice, though more than a year had elapsed.

2. **Receivers** ⚷58.

Where complaint asking for appointment of receiver failed to state cause of action in that it asked for no affirmative relief to which receivership might be incidental, order appointing receiver was invalid.

3. **Receivers** ⚷58.

Where appointment of receiver for corporation was invalid because complaint failed to state cause of action, fact that corporation consented to appointment was immaterial.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by C. P. Frick and others against the Calmin Mortgage Corporation, Limited, and others. From an order vacating and annulling an order appointing a receiver, plaintiff Alu M. G. Saewert appeals.

Affirmed.

Prior opinion, 30 P.(2d) 994.

G. M. Cuthbertson, of Los Angeles, for appellant.

Harmel L. Pratt, of Los Angeles, for respondents.

PRESTON, Justice.

Plaintiffs, a judgment creditor and two stockholders of defendant corporation, filed herein their complaint, in the nature of a general creditors' bill, setting forth a résumé of the financial condition of said corporation, alleging that, while its assets exceeded its known liabilities, said assets were not marketable and the liabilities were subject to increase; that current liabilities far exceeded current assets and the corporation was insolvent; that it was being pressed by creditors who threatened attachment suits; and that attempts by plaintiff Frick to enforce collection of his judgment by execution would precipitate general action on the part of other creditors and lead to wasteful strife and controversy, all of which could be avoided and the properties and assets of the corporation preserved for equitable distribution among those entitled thereto by intervention of the court in the appointment of a receiver of said assets and properties; wherefore plaintiffs prayed that the court take cognizance of the matters so stated and of disputed rights and obligations of the parties, and that, in order to preserve intact and protect from waste the assets and properties of defendant corporation, a receiver be appointed to take charge of, collect, and hold all of said assets and properties, subject to the order of the court, and to exercise such other powers and authorities as might from time to time be deemed necessary.

On the same day in which the complaint was filed, defendant corporation, through its president and secretary, entered a voluntary appearance in the cause and filed a written consent to appointment of a receiver as prayed. Thereafter, and on August 10, 1931, the court made its order appointing such receiver, and he duly complied with the conditions of the order by filing a good and sufficient bond, and entered upon the performance of his duties. About a year later, on September 12, 1932, the court, of its own motion, vacated and annulled the order of August 10th, and ordered a petition to appoint another receiver off calendar. From this order plaintiff Saewert appealed. On October 19, 1932, a supplemental nunc pro tunc order was filed, amending the minute order of September 12th to show that it was based upon the court's finding that the first order of appointment was in excess of its jurisdiction.

[1-3] Appellant, of course, contends that the court had jurisdiction to appoint the receiver and that it erred in vacating said order of appointment on its own motion, without notice, and after more than a year had elapsed. With this we cannot agree. The complaint failed to state a cause of action in that it asked for no affirmative relief to which a receivership might be incidental; hence the order appointing the receiver had no validity. Furthermore, the fact that the corporation consented to the appointment is immaterial.

As authority for this pronouncement, see the recent case of McCutcheon v. Superior Court (Cal. App.) 24 P.(2d) 911, decided August 22, 1933, and cases therein cited. No additional citation of authority need be made to effectually dispose of this appeal. That case is similar in fact to the instant case;

it is directly in point, and contains a full discussion of the issues raised by appellant.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

220 Cal. 720

HAMER et al. v. MacCLATCHIE et al.

L. A. 14356.

Supreme Court of California.
May 9, 1934.

1. Appeal and error ⇨1050(1).

In inventor's action to recover royalties from manufacturer, excluding letter from inventor's patent solicitor to manufacturer allegedly canceling contract for royalties *held* not prejudicial error where writer of letter was not an attorney and had no authority to make statements regarding cancellation, and letter was merely intended in nature of threat to induce further payment of royalties.

2. Patents ⇨218(1).

Manufacturer could not claim failure of consideration for agreement to pay royalties to inventor on ground that manufacturer contracted solely on representations that if manufacturer's device infringed inventor's claims, inventor would institute infringement suit, and that claims were not supported by letters patent subsequently issued, where parties contracted to "pool" their inventive ideas and to create improvements for benefit of both parties, and hence patent issued to manufacturer was held in trust for benefit of both.

3. Patents ⇨218(1).

Where manufacturer agreed to pay royalties to inventor who filed application for patent, inventor's failure to secure patent *held* not breach of warranty so as to preclude inventor from recovering royalties, where manufacturer and inventor agreed to "pool" their inventive ideas, thereby making it immaterial who obtained patent.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Leland S. Hamer and another against J. Warren MacClatchie and J. Warren MacClatchie doing business under the fictitious name of the MacClatchie Manufacturing Company. From a judgment for plaintiffs, defendants appeal, and plaintiffs move to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Lyon & Lyon, Henry S. Richmond, Irwin L. Fuller, Euler & Subith, and Fred E. Subith, all of Los Angeles, for appellants.

Evans, Pearce & Campbell, William H. Campbell, and Wilbur, Bassett, all of Los Angeles, for respondents.

PRESTON, Justice.

This cause, submitted upon motion of plaintiffs to dismiss defendants' appeal or to affirm the judgment, may be disposed of by a brief discussion leading to adoption of the latter course. The word "plaintiff" will refer to plaintiff Hamer, the coplaintiff being his assignee of a part interest in the cause. The word "defendant" will refer to the defendant J. Warren MacClatchie.

About July 9, 1923, plaintiff, an inventor of oil well tools and machinery, filed a patent application No. 650,289, for a mechanical device known as a tong puller to break joints in well-drilling drill pipe, the full assembly thereof comprising a cam and cathead, together with a bar, bearing slide, and a pulling line. He exhibited his plans to defendant and conferred with him relative to possible manufacture and marketing of the device. These negotiations bore no fruit. Later, about November 18, 1925, defendant filed an application for letters patent, No. 69,731, on a similar apparatus. In January, 1926, plaintiff told defendant that claims had been allowed on his patent application of such breadth and scope that defendant's device would infringe them and he permitted defendant to inspect his patent file. After examining the patent papers, defendant concurred in plaintiff's view. Soon thereafter, and on January 16, 1926, these parties executed the written contract which forms the basis of this action.

Said contract recited that plaintiff had made application for a patent as aforesaid and that defendant was engaged in the manufacture of various mechanical devices and oil well appliances and was desirous of securing the sole right to manufacture and sell plaintiff's device under the patent throughout the United States; that, therefore, plaintiff granted to defendant the sole right to manufacture and sell said invention covered by said patent application during the term of patent and defendant agreed, in consideration of said right, to use every reasonable endeavor to introduce the device into general use and promote its manufacture and sale and to pay plaintiff, for each device or part thereof sold, a royalty of 10 per cent. of the gross selling price. The contract then provided: "Whereas, the party of the second part (plaintiff) agrees to cooperate with and render whatever assistance is necessary respecting the mode and use of said device, and that they further agree to turn over any and all improvements of said inventions, invented or devised by any either or all of them collectively or individually, such improvements to be for the benefit of all the parties herein mentioned, and it is also agreed between the parties hereto that there will be no additional royalties paid for any improvements or additions to said Hamer Tong Pulling device, such royalty to remain as herein before mentioned. * * *"

Letters patent were subsequently issued on the respective applications, to defendant on June 28, 1927, and to plaintiff on August 22, 1932. At the time plaintiff's application finally ripened into a patent, it appeared that a number of the claims theretofore allowed him had been withdrawn, leaving grave doubt as to whether the claims finally embodied in the patent were broad enough to cover defendant's invention. Defendant, however, continued to pay royalties to plaintiff under the contract until July 9, 1928, after which date he refused to make further payments.

Plaintiff thereafter brought this action for an accounting and recovery of unpaid royalties, praying also that said contract be decreed in full force and effect, with defendant's patent held in trust for both parties. Defendant answered setting up claims of mutual rescission, failure of consideration, and breach of warranty. The cause was tried before the court sitting without a jury. Voluminous evidence was received and the court made findings and gave judgment for plaintiff substantially as prayed, including an award of $11,987.45 on the accounting. Defendant appealed. He has filed an opening brief and a longer supplemental brief, urging numerous grounds for reversal of the judgment. We will pause to discuss only those contentions deemed most important.

[1] Appellant's first contention is that the contract was terminated and canceled upon his receipt of a letter, dated October 4, 1928, from Mr. William H. Maxwell, demanding, on behalf of plaintiff, that appellant continue the royalty payments and concluding with the statement: "Unless the royalties * * * are forthcoming immediately, the Agreement will, of course, terminate in which event suitable action will be taken to recover all amounts due." Appellant testified that after receiving this letter he had a telephone conversation with plaintiff, at which time he advised plaintiff that he considered the contract ended and would confirm the cancellation by letter, which letter he wrote on May 13, 1929.

The Maxwell letter is not in evidence. It was marked for identification only and objection to its admission was sustained. We find no prejudicial error on the part of the court below in making this ruling. The evidence showed that the writer was not an attorney, but a patent solicitor for plaintiff and that he had no authority whatsoever to make the statement above quoted. Moreover, it can scarcely be construed as a notice of cancellation or rescission, being clearly intended in the nature of a threat to induce further payment of royalties. It will be noted that appellant's so-called confirmatory letter was not written until more than seven months had elapsed from the date of the Maxwell letter. Plaintiff denied cancellation or rescission of the contract by telephone conversation, letter, or in any other manner and the trial court found for him on this issue. Such finding is supported by persuasive evidence. And we may here add that there is in the record abundant support also for all of the other findings of the trial court.

Secondly, appellant contends that there was a failure of consideration because he was induced to enter into the contract solely upon the representations of plaintiff that if his device infringed plaintiff's claims and patent, said claims would be made the basis of an infringement suit; but that the claims were not supported by the letters patent subsequently issued and hence there was a failure of consideration. And it is further urged that the court erred in refusing to admit testimony, covered by appellant's offer of proof, showing a marked distinction between plaintiff's invention and the device being manufactured by appellant. Appellant testified that he was not manufacturing the device which he saw in 1923, or any device sufficiently similar thereto to charge him with payment of royalties to plaintiff. Plaintiff's evidence was in direct contradiction of this statement.

[2, 3] The above contentions are untenable. We agree with the court below that the language of the contract is clear and not ambiguous. It sets forth the mutual agreement of these parties to co-operate and work together in an endeavor to perfect the device

and improvements thereto and to manufacture, market, and introduce it into general use. In other words, it is clear that the parties were contracting to "pool" their inventive ideas with respect to the device and it therefore became immaterial, after execution of the contract, whether the desired claims were allowed under the one patent or the other, or in which name the patent stood, or how far the finished product varied from the original invention. What other import could the language above quoted have: "That they further agree to turn over any and all improvements of said inventions, invented or devised by any either or all of them collectively or individually, such improvements to be for the benefit of all the parties * * *?" There is no special meaning of the word "improvements" in patent law which would compel a construction of said provision as uncertain or ambiguous. Furthermore, the evidence shows that the plans and ideas of these parties were freely exchanged for their mutual benefit. It fully justifies the finding that, under the terms of the agreement, the patent issued to defendant was held in trust by him for the benefit of both parties.

Prior to execution of the contract, appellant had full opportunity to make a thorough study of plaintiff's application and allowed claims. This examination led him to believe that his device might infringe the patent granted to plaintiff. He could have pushed his own invention on the chance that plaintiff's claims would be withdrawn, but he chose the safe course of contracting for a license under the claims then allowed plaintiff and any patent subsequently issued thereon. Appellant received the protection for which he contracted. The final action of the patent office on plaintiff's application therefore had no bearing on the issue of consideration. It might well have been that plaintiff ceased to act in the interest of any or all of his own claims in order to leave appellant free in furthering his application, in view of the contract which united the inventions and ideas of either one of them for the benefit of both.

The above remarks dispose of appellant's further specification that the failure of plaintiff to secure a patent allowing him his said broad claims constituted a breach of warranty. The contract contained no such warranty and the court properly found there was none. Appellant's further contentions relating to alleged errors on the part of the court in the rejection of evidence, in interpretation and construction of said contract, etc., have also been sufficiently disposed of by the above discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.

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220 Cal. 548

AMERICAN CO. v. CITY OF LAKEPORT et al.

Sac. 4623.

Supreme Court of California.

April 23, 1934.

1. Municipal corporations 🔑73.

Statute requiring city purchasing property at sale for delinquent assessments to levy and collect taxes to pay amount of assessments into redemption fund does not violate constitutional provision prohibiting Legislature's imposing taxes on municipal corporations or inhabitants thereof (Gen. Laws 1931, Act 8209, § 12; Const. art. 11, § 12).

2. Municipal corporations 🔑957(2).

Constitutional provision prohibiting delegation of power to levy taxes or assessments *held* inapplicable to municipal corporations (Const. art. 11, § 13).

3. Municipal corporations 🔑871.

Statute requiring city to transfer into redemption fund amount of delinquent street improvement assessment where city purchases property does not violate constitutional provision prohibiting gift or loan of public money (Gen. Laws 1931, Act 8209, § 12; Const. art. 4, § 31).

4. Municipal corporations 🔑871.

Funds directed toward public purpose are not within constitutional prohibition against gift or loan merely because of incidental benefit to individual (Const. art. 4, § 31).

5. Municipal corporations 🔑864(1).

Constitutional provision limiting city's indebtedness does not apply to liability imposed by law, as distinguished from one incurred voluntarily (Const. art. 11, § 18).

6. Municipal corporations 🔑864(1).

Constitutional debt limit *held* inapplicable to contingent obligation arising under statute requiring city purchasing land at delinquent assessment sale to pay amount of assessment into redemption fund (Const. art. 11, § 18; Gen. Laws 1931, Act 8209, § 12).

7. Municipal corporations 🔑865(2).

Happening of contingency of assessment becoming delinquent, whereupon city purchasing at delinquent sale was required to pay amount of delinquent assessment into redemption fund, *held* not "incurring of debt" within constitutional provision limiting indebtedness (Gen. Laws 1931, Act 8209, § 12; Const. art. 11, § 18).

[Ed. Note.—For other definitions of "Debt" and "Incur," see Words & Phrases.]

8. Municipal corporations 🔑864(1).

City's obligation to pay money into bond redemption fund on purchasing land at delinquent street improvement assessment sale was not voluntary, but was imposed by statute, so that constitutional debt limit did not apply (Gen. Laws 1931, Act 8209, §§ 11, 12, 16; Const. art. 11, § 18).

9. Taxation 🔑1.

Where tax is imposed upon all property without regard to benefit received, it is "tax" and not "special assessment."

[Ed. Note.—For other definitions of "Special Assessment" and "Tax; Taxation," see Words & Phrases.]

10. Constitutional law 🔑284(2).
Municipal corporations 🔑968(½).

Where general tax is levied to meet delinquencies in assessments for local improvements, notice and hearing are unnecessary (Gen. Laws 1931, Act 8209, §§ 12, 16(a); Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

11. Constitutional law 🔑284(2).
Municipal corporations 🔑968(½).

Where street improvements could be made by use of ordinary funds derived from general taxation without notice and hearing as to individual benefits, deficiency in fund raised by local assessment could be met by general taxation without notice and hearing (Gen. Laws 1931, Act 8209, §§ 12, 16(a); Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

12. Constitutional law 🔑283.
Municipal corporations 🔑957(1).

Statutes requiring city purchasing lands at delinquent street improvement assessment sale to pay amount thereof into redemption fund, and, if necessary, to levy tax therefor, do not deny due process (Gen. Laws 1931, Act 8209, §§ 12, 16(a); Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

13. Municipal corporations 🔑956(1).

Commencement of foreclosure proceeding could not, under statute, be deemed excuse for nonperformance of city's duty, after purchasing at delinquent assessment sale, to levy taxes to pay into redemption fund amount of delinquent assessment (Gen. Laws 1931, Act 8209, §§ 11, 12, 16(a).

14. Municipal corporations 🔑956(1).

City purchasing property at delinquent assessment sale has mandatory duty to levy taxes to pay amount of assessment into redemption fund, where city has no funds with which to do so (Gen. Laws 1931, Act 8209, §§ 11, 12).

15. Municipal corporations 🔑956(2).

Statute requiring city purchasing property at sale for delinquent assessments to levy special tax for payment of land purchased, on demand by tax collector, *held* to limit amount of tax levy to ten cents on each $100 of assessable property (Gen. Laws 1931, Act 8209, §§ 12, 16 (a).

16. Statutes 🔑245.

Tax must be based upon express statutory authority, not upon inference or implication, and doubts will be resolved against taxing power.

◆

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Mandamus proceeding by the American Company against the City of Lakeport and others. From a judgment sustaining a demurrer to the petition, petitioner appeals.

Reversed, with directions.

For prior opinion, see 26 P.(2d) 490.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

E. C. Pyle, of Los Angeles, and H. A. Postlethwaite, of San Francisco (Samuel W. Gardiner, of San Francisco, of counsel), amici curiæ appearing as friend of the court and on behalf of Paul B. Hammond, Theodore E. Hammond, Henry H. Duryee, Maud C. Smith and Franklin Booth.

Nutter & Rutherford and A. P. Hayne, all of Stockton, and O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, amici curiæ.

Bowersock, Fizzell & Rhodes, of Kansas City, Mo., amici curiæ for nonresident bondholders.

William H. Hazell, of Lakeport, Norman E. Malcolm, of Palo Alto, and Leon Thomas David, of Los Angeles, for respondents.

Jesse W. Carter, of Redding, amicus curiæ for Town of Mt. Shasta City.

Everett W. Mattoon, Co. Counsel, R. C. McAllaster, Deputy Co. Counsel, Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy Dist. Atty., all of Los Angeles, Martinelli & Gardiner and Jordan L. Martinelli, all of San Rafael, Samuel W. Gardiner, of San Francisco, Ralph W. Swagler and James H. Mitchell, City Attys., both of Burbank, A. L. Sebile, City Atty., of Brawley, H. F. Orr, City Atty., of Ventura, Hugh B. Bradford, City Atty., of Sacramento, Albert Mansfield, City Atty., of Redwood City, Norman E. Malcolm, City Atty., of Palo Alto, Harold P. Huls, City Atty., of Pasadena, Guy Lewis, City Atty., of Hawthorne, Richard C. Waltz, City Atty., of Beverly Hills, J. Leroy Johnson, City Atty., of Stockton, Thomas M. Carlson, City Atty., of Richmond, James M. Allen, City Atty., of Yreka, E. L. Randall, City Atty., of Corning, Fred C. Hutchinson, City Atty., of Berkeley, C. A. Raker, City Atty., of Alturas, Albert Launer, City Atty., of Fullerton, George L. Wing, City Atty., of Beaumont, George R. Kirk, City Atty., of Calexico, R. K. Pierson, City Atty., of Compton, A. F. Bray, City Atty., of Martinez, William S. Emmons, City Atty., of Culver City, Waldo Willhoft, City Atty., of Colton, Arthur Frame, City Atty., of Clovis, J. E. Greene, City Atty., of Dinuba, Eugene Best, City Atty., of Elsinore, A. R. Honnold, City Atty., of Escondido, Bernard Brennan, City Atty., of Glendale, Roy H. Overacker, City Atty., of Huntington Beach, Clyde Woodworth, City Atty., of Inglewood, J. A. Isaacson, City Atty., of San Diego, Milburn G. Harvey, City Atty., of Santa Ana, C. B. Hubbard, City Atty., of West Los Angeles, Frank L. Perry, City Atty., of Redondo Beach, J. Harold Cragin and Louis H. Burke, City Attys., both of Los Angeles, Jesse W. Carter, City Atty., of Redding, E. L. Maxwell, City Atty., of Mountain View, Roland Thompson, City Atty., of Santa Ana, W. G. McKeen, City Atty., of San Francisco, E. H. Jolliffe, City Atty., of Ontario, Raymond E. Hodge, City Atty., of San Bernardino, Robert W. Harrison, City Atty., of San Francisco, R. A. Rapsey, City Atty., of San Bruno, D. M. Acres, City Atty., of San Clemente, Clyde Downing, City Atty., of Santa Ana, J. F. Goux, City Atty., of Santa Barbara, A. H. Blanchard, City Atty., of Santa Paula, T. M. Wilzinski, City Atty., of Sonora, and Loyd E. Hewitt, City Atty., of Yuba City, amici curiæ for respondents.

PER CURIAM.

A rehearing was granted in this case in order to give fuller consideration to the difficult questions of constitutionality and statutory construction involved. Upon such consideration, we adhere to and adopt the following part of our former opinion:

This is an appeal from a judgment of the superior court of Sonoma county, sustaining, without leave to amend, respondents' demurrer to petitioner's application for a writ of mandate. The case involves the construction and constitutionality of certain sections of the Improvement Bond Act of 1915.

In 1925 the city of Lakeport commenced proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730, as amended; Deering's Gen. Laws 1931, Act 8199) to improve Main street in said city. Its resolution of intention declared that the work would be paid for by special assessments levied upon an improvement district described therein. The contractors performed the required work, but the property owners failed to pay the assessments. Thereupon the contractors procured the issuance of bonds to them, evidencing the unpaid assessments, under the Improvement Bond Act of 1915 (Stats. 1915, p. 1441, as amended; Deering's Gen. Laws 1931, Act 8209). Assessments which became due in 1927, 1928, and 1929 were not paid, and, in accordance with section 12 of said act, a sale of the properties was held. No purchaser appeared, and the tax collector made an entry reciting a sale to the state. Petitioner became the assignee and holder of delinquent bonds in the principal amount of $9,755.33, and sought to compel the city to levy taxes to provide funds for the payment thereof. The petition alleges that the city and city treasurer have failed and refused to transfer money from the city treasury into the bond redemption fund, and that the tax collector has failed to demand and the city has failed to levy or collect any tax to pay the delinquent assessments. Respondents demurred to the petition on three chief grounds: First, that the statute imposes no mandatory duty on the city to provide such funds by taxation; second, that, if such a mandatory duty does exist, the statute imposing it is unconstitutional; and, third, that, if any such valid obligation exists, it is limited in amount to 10 cents on each $100 of assessable property. The lower court in an elaborate opinion considered these issues, and held that sections 12 and 16 of the act were unconstitutional solely on the ground that they constituted a denial of due process of law. We are unable to agree with this conclusion, and are of the opinion that the statute is valid.

It is first necessary to state the important provisions of the statute. The Improvement Bond Act of 1915 provides a method of issuing bonds to represent assessments, the assessments being levied under some other statute such as the Vrooman Act of 1885 (Deering's Gen. Laws 1931, Act 8194), the Street Opening Act of 1903 (Deering's Gen. Laws 1931, Act 8198), or the Improvement Act of 1911. Improvement Bond Act of 1915 (Deering's Gen. Laws 1931, Act 8209) §§ 1, 2. These other statutes provide for the levy of assessments, and the Improvement Act of 1911 also permits bonds to be issued; but the assessments or bonds under said act are in specific sums on particular parcels of property, usually in odd denominations, and payable on varying dates. The Improvement Bond Act of 1915 provides for a more marketable type of security, bonds issued serially in even denominations, secured by assessments payable at the same time and in the same manner as general taxes. Sections 6, 8. The unpaid assessments constitute a trust fund for the payment of principal and interest of the bonds. Section 11(a). When an assessment becomes due and is unpaid, the methods of enforcement indicated in sections 11, 12, and 16 become applicable.

Section 12, which is the provision invoked by petitioner, reads in part as follows: "Upon default in payment, the lands securing such installments and assessments *shall be sold* in the same manner in which real property in such city is sold, for the nonpayment of general municipal taxes, and be *subject to redemption within one year* from date of sale in the same manner as such real property is redeemed from such delinquent sale, and upon failure of such redemption shall in like manner pass to the purchaser. The *city may be the purchaser* at any delinquent sale in like manner in which it becomes or may become the purchaser of property sold for nonpayment of the general municipal property tax, and in the event of its so becoming the purchaser *shall pay and transfer into said redemption fund the amount of the delinquent assessment and of the delinquent interest* thereon upon which said sale is made. In cases where the municipal property tax is collected by county or city and county officials and sales for nonpayment of such taxes are made to the state, the state shall be the purchaser at any such sale hereunder, but shall hold the title acquired at such sale upon behalf of the city and shall account to the city for any moneys received upon redemption or from the sale of such property, *the city* for the purposes of this act *being deemed the real purchaser*." This last provision applies to respondent city, the taxes of which are collected by the county tax collector. The section further provides: "In the event of there being *no available funds* in the treasury with which to make such payment, the tax collector shall delay the entry of the certificate of sale until such funds are available, *making demand in the meantime upon the city council that a suitable amount be included in the next tax levy for* the purpose of providing funds with which to make such payment; provided, however, that the period of redemption from such tax sale shall not be extended thereby nor the rights or privileges of the property owner be thereby in anywise affected."

Section 11, subdivision (c), provides that for nonpayment of any assessment or installment, upon order of the city council, the same may be collected by a foreclosure suit in the superior court. This is declared to be "a *cumulative* remedy."

Section 16, subdivision (a), provides: "The city council *may*, and in the event of demand by the tax collector therefore as provided in section twelve hereof *must*, at the time of fixing the annual tax rate and levying the taxes to be collected for general municipal purposes, levy a *special tax* upon the taxable property in the city for the purpose of paying for the lands *purchased or to be purchased* at such tax sales, but not to exceed for each local improvement *ten cents on each one hundred dollars of assessable property*."

These are the relevant provisions of the statute which is under dispute. The attack which respondents make upon it relates to its constitutionality, and also to its interpretation. Numerous amici curiæ have appeared on both sides of the controversy, and these are not wholly in agreement upon the grounds for their respective positions. However, as to the constitutional questions, there is no dearth of authority in point, and we therefore proceed first to their solution.

[1] Article 11, § 12, of the California Constitution, reads as follows: "The *Legislature* shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other *municipal purposes*, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." The contention of respondent is that the statute violates this section, in that the Legislature has imposed a tax upon the property within the city for a purely municipal purpose. But it is clear that the Legislature has not, by sections 12 and 16, levied a tax. It has merely fixed the liability of the city to pay for property purchased, and has required the city to levy and collect taxes in an amount suitable for this purpose. In several cases arising under statutes having similar provisions, it has been held that there was no interference with the powers of the municipality. Macmillan Company v. Clarke, 184 Cal. 491, 194 P. 1030; People v. Lodi High School District, 124 Cal. 694, 57 P. 660; Hallahan v City of Port Angeles, 161 Wash. 353, 297 P. 149. In the last-named case the court said (297 P. 149, 150): "Nowhere in the act is there any imposition of a tax upon the city, or the inhabitants thereof, but the act makes it a condition precedent to the ordering of a local improvement, and the payment thereof by local assessments, that the guaranty fund shall be created. The city may or may not order a local improvement, but, if it does, the assessment for the benefit of the guaranty fund must be made, and this is imposed by the city and not by the act of the Legislature. Since the tax is imposed by the city and not by the Legislature, the act is not in conflict with * * * the Constitution. * * *"

[2] Section 13 of the same article of the Constitution is also invoked by respondents. It provides that the Legislature "shall not del-

egate to any special commission, private corporation, company, association or individual" the power to levy taxes or assessments. This section is inapplicable to a municipal corporation, and hence constitutes no objection to the statute. Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433.

[3, 4] Article 4, § 31, of the Constitution, prohibits any gift or loan of public moneys; and it is argued that, if the city is compelled to pay the delinquent assessments, it will thereby make a gift of public funds to private bondholders. This precise question was considered by us in Stege v. City of Richmond, 194 Cal. 305, and we there said at page 318, 228 P. 461, 466: "The argument assumes that in the improvement of streets the work is a private matter. On the contrary, such work is for a public purpose. The city might have expended its general funds for that purpose." It is well settled that funds directed toward a public purpose are not within the constitutional prohibition merely because of incidental benefits to individuals. Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A. L. R. 1515. In a similar case, Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, the court said at page 138, 70 A. L. R. 166: "But the laying out and improvement of streets, alleys, sewers, and the like is essentially a public purpose benefiting the entire community, although the work is done in but a portion of the city, and, in the absence of any legislative restriction, each portion of the city might be thus improved at the general public expense, and no taxpayer could be heard to complain thereof. In other words, in order to erect any public improvement by the creation of special improvement districts, both general benefits to the municipality and special benefits to particular property must be conferred. * * * When, therefore, the Legislature provided that, as to special improvement districts created in the future, a fund shall be created to insure the prompt payment of bonds and warrants issued in payment of such improvements, it but modified the special improvement district law to impose upon the general public, within the municipality, a conditional obligation to pay a small portion of the cost of erecting the public improvement, whereas it might have, lawfully, imposed a much greater burden upon the municipality. * * * That the purchasers of bonds or warrants shall, in the future, have greater security for the payment thereof than they have had in the past, is but incidental to the public purpose of the act before us, and does not militate against its validity." See, also, Imboden v. City of Bristol, 132 Tenn. 562, 179 S. W. 147.

[5, 6] Article 11, § 18, of the Constitution, prohibits a city from incurring "any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors. * * *" It is contended that the liability imposed by sections 12 and 16 of the act is violative of this provision. The answer to this objection has already been given in several prior decisions in this state, and it is briefly, first, that the constitutional provision does not apply to an obligation or liability imposed by law as distinguished from one incurred voluntarily by the municipality; and second, that the liability under the act is not direct, but dependent upon several contingencies, namely, that the assessment become delinquent; that no person appear at the sale to purchase the property; and that the owner fail to redeem it after sale.

The rule that the inhibitions of the constitutional debt limit do not apply to contingent obligations has long been settled in this state. In Doland v. Clark, 143 Cal. 176, 76 P. 958, 960, where a city by certain contracts agreed to pay for certain services for five years at a monthly rate, it was held that there was no violation of article 11, § 18, the court saying: "It is evident that they [the contracts] did not create any liability at the time they were executed, except a contingent future liability. * * * The amounts to become due on completion of the contracts by appellant might never become a liability upon the city. A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens. * * * There may be ample funds to pay the rental when it accrues, as provided in the contracts, if it ever should accrue." See, also, McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191.

[7] It is contended, however, that the obligation, contingent at the time the bonds were issued, became fixed and certain upon the happening of the contingency—the occurrence of the delinquencies—and that the unconstitutionality thereof is now established. It is readily apparent that the happening of the contingency does not constitute the "incurring" of a "debt" within the meaning of the constitutional provision. The validity of the obligation must be determined as of the time it was incurred. Otherwise, the whole doctrine of contingent liability is repudiated, since upon the happening of the contingency an obligation validly assumed becomes illegal. Cases from other jurisdictions, involving the contingent obligation of a municipality to meet delinquencies in a bond redemption fund, have uniformly held that no violation of constitutional debt limitations resulted. See Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929; Kelly v. City of Sunnyside, 168 Wash. 95, 11 P.(2d) 230; Corey v. City of Fort Dodge, 133 Iowa, 666, 111 N. W. 6.

[8] A more conclusive answer to the objection is found in the rule that the constitutional debt limit applies only to obligations voluntarily assumed by the city, and not to those imposed by law. The general principle is well settled. In Lewis v. Widber, 99 Cal. 412, 33 P. 1128, the constitutional provision was held inapplicable to salaries of public officers fixed by statute. In City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198, it was held inapplicable to a liability resulting from a judgment against the city for a tort. See, also, Mills v. Houck, 124 Cal. App. 1, 12 P.(2d) 101.

That the present obligation to feed the bond redemption fund by taxes is not voluntary, but imposed by statute, seems too clear for dispute. It is true that the city might have accomplished its street work by a general tax levy, or left it undone altogether. But the statute under which the city acted was intended to provide a reasonable method of doing street work, and no penalty should be imposed upon it for availing itself of the procedure. By doing so, it did not voluntarily incur an obligation. At the time it commenced the work, the liability was contingent only. Later, when the contingencies occurred, a liability was imposed upon the city by the statute, and not by any voluntary act on its part. This point has already been considered and determined by the decisions in three prior California cases, each dealing with the statute now before us. In the first of these, Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 P. 340, the court observed that the liability under the Improvement Bond Act of 1915 was contingent and hence not within the constitutional restriction. The opinion also states (30 Cal. App. 361, 158 P. 340, 341): "* * * It has been held that this section of the Constitution only refers to the acts or contracts of a municipality, and not to liabilities which the law places upon municipalities. Lewis v. Widber, 99 Cal. 412, 33 P. 1128; Welch v. Strother, 74 Cal. 413, 16 P. 22; Cashin v. Dunn, 58 Cal. 581." In the second case, Stege v. City of Richmond, 194 Cal. 305, 318, 228 P. 461, 466, we said: "The city might have expended its general funds for that purpose. It was not compelled to do so, and when it elected to proceed under the general street improvement laws it simply adopted the means provided by law whereby it might in accordance therewith exercise a public function without incurring a contractual liability such as is contemplated under section 18 of article 11 of the Constitution and the bond act of 1901. When the city elects to proceed under said act, it assumes the burden of discharging its duties thereunder to the end that the assessment may be enforced. See Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 P. 340."

The third case, City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873, is cited to us by both petitioner and respondents. In it this court gave full consideration to the particular question now before us, and declared the principle hereinbefore stated. The facts were peculiar in that certain land *owned by the city* had been included in an assessment district. It was held that the liability to meet the assessments on such land was *direct* and not contingent. This determination was carefully limited to municipally owned property, for as to such property the municipality assumed a primary liability to pay the full amount of the assessment, just as any other landowner, instead of a contingent liability to feed a bond redemption fund in the event of delinquencies. In distinguishing Stege v. City of Richmond, supra, and approving Federal Construction Co. v. Wold, supra, we said (204 Cal. 277, 267 P. 873, 876): "In the Federal Construction Company Case it was held that the obligation of the municipality to purchase all property offered at delinquent sales for the nonpayment of street assessments, in the absence of other purchasers, pursuant to the Improvement Act of 1911 (St. 1911, p. 730) and the Improvement Bond Act of 1915 (St. 1915, p. 1441), was an obligation imposed on the city by law and was not a liability prohibited by the constitutional provision. In such a case the payment out of the public treasury is for the purchase of a *loan or advancement* to facilitate and make effectual the proceedings under the act *and which the city later may recover.*" (Italics ours.)

The foregoing decisions, in our opinion, have established the validity of the bonds as against this ground of attack.

[9, 10] It is finally urged by respondent, and the lower court held, that sections 12 and 16 of the statute constitute a denial of due process of law in violation of both the California and United States Constitutions (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14). The theory is that, if all the property owners in the city are to be taxed to meet the delinquent assessments, those outside the district are, in effect, being subjected to an *assessment* in the guise of a *tax;* and that such an assessment is invalid where they have had no notice or hearing as to any benefits which they are to derive from the particular improvement. The conclusion of the lower court that the tax was, in fact, an assessment, is unwarranted. The overwhelming weight of authority supports such a tax on two chief grounds: First, where a tax is imposed upon all property without regard to benefits received, it is a tax and not a special assessment, regardless of its purpose; and, second, where a general tax is levied to meet delinquencies in assessments for local improvements, there is no necessity for notice and hearing. The basic principle was clearly stated in a decision of this court: "Where

* * * the burden is imposed upon all of the property in the district, real and personal, according to its value and not upon the basis of special benefit, it is clear that the Legislature regarded the burden as a general tax, and not as a special assessment. This is so, even though the tax be imposed for the purpose of constructing a public improvement which may confer greater benefits on one class of persons or property than on another." Anaheim Sugar Company v. County of Orange, 181 Cal. 212, 216, 183 P. 809, 811. In People v. Whyler, 41 Cal. 351, 354, the court said: "The funds to pay for the grading of a street, may be raised by taxes levied upon all the property of a town, should the law so direct; but the tax does not become an assessment, because the latter is the mode usually adopted to raise the funds for that purpose. There is no sufficient reason for holding that the charge is not, what the Legislature declared it to be—a tax." See, also, Williams v. Corcoran, 46 Cal. 553; Sinton v. Ashbury, 41 Cal. 525; Cowart v. Union Paving Co., 216 Cal. 375, 14 P.(2d) 764, 83 A. L. R. 1185.

[11, 12] In other jurisdictions the precise question has been presented, namely, whether a municipality may constitutionally levy a general tax to meet delinquencies in special assessments for local improvements; and it has been uniformly decided in the affirmative. In Wicks v. Salt Lake City, 60 Utah, 265, 208 P. 538, the statute provided for improvement bonds payable out of special assessments against the property benefited, but provided also for a general tax to create a *guaranty fund*, to meet bond payments whenever the money derived from assessments proved insufficient. It was objected that the general taxing power could not be used to guarantee special improvement bonds without submitting the question to a vote. The court upheld the statute, saying (208 P. 538, 540): "The city had the undoubted right, if it chose so to do, to provide for the lighting of the street in question and cast the burden thereof on the taxpayers of the entire municipality. It was not under the necessity of creating a special improvement district at all. It was not incumbent upon the city to impose the burden exclusively upon the owners of the abutting property. How then can it be consistently contended that the city is without power, especially when authorized by the Legislature, to provide a special guaranty fund for the payment of the bonds in question, and interest, in the remote contingency that the necessary funds cannot be obtained from assessments made upon the abutting property?" The same question and the same answer are found in Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929, 930: "It is next urged that to tax appellants' property, which receives no special benefit, to guarantee a payment of bonds issued against other property, is contrary to law, because the whole theory of local assessments is one of special benefits to the property assessed. But this is not a special assessment. The city has the right to initiate local improvements and to pay the whole cost thereof out of general taxes. This tax is imposed on all alike, and is general in its application." To the same effect are numerous other decisions. See State v. Board of Commissioners, 124 Ohio St. 174, 177 N. E. 271; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A. L. R. 166; Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 70 A. L. R. 156; and cases collected in note, 70 A. L. R. 176. These decisions establish the principle that, where public improvements of the character under consideration could be made by the use of ordinary funds derived from general taxation, without notice and hearing as to individual benefits resulting therefrom, deficiencies in any fund raised by local assessments may likewise be met by general taxation. It should be noted, also, that the method employed by our statute is in effect an *advancement* of funds, which the city may normally be expected to recover upon resale of the lands secured at the delinquent sales. See Pasadena v. McAllaster, supra; Municipal Improvement Company v. Thompson, 201 Cal. 629, 258 P. 955.

[13, 14] We come now to the final problem, that of interpretation of sections 11, 12 and 16 of the statute, and the relation each bears to the others. It is first contended by respondents that there is no mandatory duty to levy taxes under sections 12 and 16, since the city may, at its election, proceed to foreclose under section 11 (c). The answer to this is found in the statute itself, which expressly declares the provision for foreclosure to be a cumulative remedy. It is different in character and procedure, and is slower, more expensive, and less efficient than the tax sale. While it may perhaps be resorted to either before or after a tax sale, the commencement of foreclosure proceedings cannot, under the act, be deemed an excuse for nonperformance of any duty under sections 12 and 16, to levy taxes to pay for property purchased. Under section 12, the city, through the agency of the state, becomes the real purchaser of the property at the sale. It thereupon becomes the duty of the city, as such purchaser, to pay the amount of the assessment into the redemption fund; and, if it has no funds with which to do so, then the taxing provisions are applicable. We find no merit in this point.

[15, 16] The other point, in our opinion, presents the most difficult question in this case. Section 12 (Deering's Gen. Laws 1931, Act 8209) provides that when there are no

available funds in the city treasury with which to pay for property purchased at the delinquent sale, the tax collector shall make demand upon the city council that a "suitable amount" be included in the next tax levy to provide funds with which to make such payment. Section 16, subdivision (a), states that the city council must, upon demand by the tax collector as provided in section 12, levy a "special tax" for the purpose of paying for lands "purchased or to be purchased" at such tax sales, but "not to exceed for each local improvement ten cents on each one hundred dollars of assessable property." The question is whether section 16(a) operates as a limitation on the amount of tax, so that the maximum which might be levied each year for the purposes stated would be 10 cents on each $100 of assessable property. This issue has been briefed and argued several times by able counsel for the parties and amici curiæ, and it may be reasonably concluded that the various possible interpretations of these sections have been fully explored. Notwithstanding this thorough consideration, there remains the gravest doubt as to the intention of the legislature to provide an unlimited tax, and we have finally come to the conclusion that this doubt must, in accordance with settled principles, be resolved against the taxing power and in favor of the taxpayer.

The argument of counsel for the bondholders in favor of an unlimited tax proceeds by pointing out that the city must, under section 12, purchase the property at the sale, and pay the delinquent assessments; that in order to do so, it must transfer available funds from its treasury into the bond redemption fund; and that the tax collector must then make demand for a tax levy in a "suitable amount" to provide funds with which to make such payment. From these provisions of the statute they draw the conclusion that there is a mandatory duty on the part of the city to meet by a sufficient tax levy the obligation assumed by the purchase of the lands. Under this theory, section 16(a) is explained chiefly as a means of collecting limited sums in anticipation of the *future* purchase of lands.

The objection to this construction is that it gives too much effect to section 12, and not enough effect to section 16(a). Section 12 provides that when there are no available funds in the treasury, the tax collector shall delay the entry of the certificate of sale until such funds are available, "making *demand* in the meantime upon the city council that a suitable amount be included in the next tax levy for the purpose of providing funds with which to make such payment." It will be observed that this section provides for a *demand* for a tax levy, but not for a tax. The section gives no authority to the city council to levy any tax. It may be argued that it would be absurd to require the city to purchase the property, and then provide for no means of payment; and that from the obligation to purchase and the duty of the tax collector to make a demand for a tax levy, the municipal power to levy the tax may be *inferred*. But the imposition of a tax by inference or implication, no matter how logical or reasonable it may seem, is universally condemned by the authorities, which lay down the rule that the tax must be based upon an express statutory authority, and that doubts will be resolved against the taxing power. See Merced County v. Helm, 102 Cal. 165, 36 P. 399; Connelly v. San Francisco, 164 Cal. 101, 127 P. 834; In re Estate of Potter, 188 Cal. 55, 204 P. 826; Whitmore v. Brown, 207 Cal. 473, 279 P. 447. In any event, the supposed necessity for the inference of the power to tax from the provisions of section 12 arises from a failure to give adequate consideration to section 16(a).

Section 16(a) does expressly authorize the levy of a tax. It provides that the city council "may" levy "a special tax" to pay for lands "purchased or to be purchased." The authority thus given is within the discretion of the council to exercise, and there is little doubt that, under that authority, the city may build up a fund in anticipation of the *future* purchase of lands. But this is not the whole effect of section 16(a). It provides that the city council "may, *and in the event of demand by the tax collector* therefor *as provided in section twelve* hereof *must*" levy the tax. Here we have a mandatory requirement. It directly refers to section 12; it expressly covers the subject upon which section 12 is silent, the power to levy a tax; and to remove any doubt as to the interdependence of the two sections, it conditions the levy of the tax under section 16(a) on the demand of the tax collector under section 12.

Under this analysis, which gives to both sections the meaning apparent therefrom, and does not extend nor diminish the effect of either by implication, we have a construction which is not unreasonable, and which violates no rule of statutory construction. Such an interpretation, moreover, avoids the cardinal error of imposing a tax by inference from language which does not clearly authorize it. There are, perhaps, as contended by petitioner, certain practical difficulties which may follow from this conclusion. Thus, where there are ample funds in the treasury, previously raised by taxation, the whole of the delinquent assessment must be paid out of such funds, section 12 providing that the city "shall pay and transfer into said redemption fund the amount of the delinquent assessment and of the delinquent interest thereon"; but if the treasury is depleted, only the 10-cent levy under section 16(a) can be made; with the result that the immediate payment in full of the delinquent assessments, a duty resting upon the city under section 12, is dependent upon the fortuitous circumstance that money is in the treasury and available at the time of purchase. But upon reflection, this is not wholly unreasonable. It may well be that the city should be required to meet its obligation under the statute in full with available funds, if they are sufficient in amount, but that it should not be forced to meet it, when sufficient funds are not available, by a ruinous tax. Such a distinction could well have been within the contemplation of the legislature, and the alleged inconsistency constitutes no fundamental objection to the construction we have adopted.

It follows that the statute under consideration is constitutional, and that if the allegations of the petition are true, a mandatory duty rested upon respondents to levy and collect a tax to meet the delinquent assessments, such tax, however, being limited to 10 cents on each $100 of assessable property, as provided in section 16(a) of the act.

The judgment is therefore reversed, with directions to the lower court to permit petitioner, if it desires, to amend its petition in accordance with the conclusions reached herein, and thereafter to proceed to a trial of the issues, if any, raised by the answer thereto.

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220 Cal. 765

HUMPHREY v. HARRY H. CULVER & CO. et al.

L. A. 14021.

Supreme Court of California.

May 17, 1934.

Vendor and purchaser 🔑30.

Purchaser *held* entitled to rescind contract for sale of realty on ground of fraudulent representations by vendors' agent, notwithstanding contract stipulated that vendors should be bound by written representations only, where purchaser was prevented from reading or was induced by agent not to read contract.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Action by Carrie L. Humphrey against Harry H. Culver & Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ben S. Hunter, of Los Angeles, for appellants.

Edward H. Gaylord, of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff in an action to rescind and cancel a contract entered into between the parties in October, 1929, for the purchase by the plaintiff of a certain lot in the city of Los Angeles for the sum of $5,700. The claim for cancellation was based on alleged fraudulent representations of the defendant. A copy of the contract is annexed to the complaint as an exhibit. The complaint also alleged that at the time the plaintiff signed the agreement the defendant Rose, acting for and in behalf of the other defendants, would not allow the plaintiff to read the agreement, but falsely and fraudulently represented to her that each and all of the clauses of the agreement were favorable to the plaintiff. The plaintiff also sought judgment for payments made under the contract amounting to $1,425.

A demurrer to the complaint was overruled, and a trial was had on the issues joined by the answer of the corporate defendants. The court found certain false and fraudulent representations to have been made to the plaintiff by the agent of the answering defendants, by reason whereof the plaintiff was entitled to the relief sought. The court also found that at the time the plaintiff signed the agreement the defendant Rose, acting on behalf of the other defendants, would not allow the plaintiff to read the agreement, but falsely and fraudulently represented to the plaintiff that each and all of the clauses of the agreement were favorable to her.

The defendants rely on certain language in Gridley v. Tilson, 202 Cal. 748, 262 P. 322, to support their contention that the court erred in overruling the demurrer to the complaint made on the ground that no cause of action was stated, and in support of their argument contend that on the facts disclosed the defendants as principals cannot be bound except by the representations contained within the written agreement. This is the only ground relied upon for a reversal. The agreement provided that the principals would not be bound except by the written representations and provisions contained therein and that the agent had no authority to make any other or different representations. However, as noted, the complaint alleged and the court found in effect that the plaintiff was prevented from reading, or was induced by the agent not to read, the contract. No contention is made that the evidence is insufficient to support the finding on this phase of the plaintiff's case, nor is any contention made that the evidence does not support the findings as to other fraudulent representations made by the agent Rose. In such circumstances the case of Gridley v. Tilson, supra, does not apply. Further, it was therein expressly recognized that the rule contended for is inapplicable when the purchaser's failure to read the contract is due to the fraud or trickery of the seller or his agent. Simmons v Ratterree Land Company, 217 Cal. 201, 17 P.(2d) 727.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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1 Cal.(2d) 11

SALOMON v. MEYER.

L. A. 14519.

Supreme Court of California.

May 17, 1934.

1. Appeal and error 🔑1064(2).
Trial 🔑194(16).

Instruction that pedestrian crossing street had continuing duty to look in direction from which danger should be anticipated and that such duty was not met by looking only once, and that verdict must be for motorist if pedestrian failed to exercise ordinary care and such failure proximately contributed to injury, though motorist was negligent, *held* prejudicially erroneous, under evidence.

2. Appeal and error 🔑996.
Automobiles 🔑245(72).

Whenever there is room for honest difference of opinion between men of average intelligence, question of whether pedestrian was negligent in failing to look again in direction from which defendant's automobile was approaching is question for jury, whose finding is conclusive.

3. Automobiles 🔑217(6).

Whether pedestrian who concluded that automobile was far away and so proceeded to cross street, in not again observing approach of defendant's automobile, exercised ordinary care, is to be determined from consideration of all facts and circumstances of time, place, and conditions of traffic.

4. Automobiles 🔑206.

Pedestrian crossing street on pedestrian lane, in absence of reasonable ground for thinking otherwise, had right to assume that pedestrian would not be exposed to danger through violation of ordinance making it unlawful for motorist to drive into crosswalk outside of central traffic district while there is in crosswalk upon half of roadway upon which vehicle is traveling pedestrian engaged in crossing roadway until pedestrian shall have passed beyond path of vehicle.

5. Automobiles 🔑245(72).

Whether pedestrian crossing street on pedestrian lane had reason to believe that motorist would not obey law and stop *held* for jury.

6. Trial 🔑194(16).

Instruction that pedestrian crossing street likely to be dangerous must first look in direction from which danger was to be anticipated, that it was continuing duty and was not met by looking once, and, having put one's self in position of peril, there is duty to look to right and to left, *held* error as taking contributory negligence from jury although instruction left to jury determination whether pedestrian voluntarily placed herself in position of peril and whether she attempted to cross without exercising ordinary care.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Agnes Salomon against Albert F. Meyer. From a judgment for defendant, plaintiff appeals.

Reversed and remanded.

Prior opinion, 24 P.(2d) 861.

Fred W. Morrison, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, Paul Barksdale D'Orr, Thos. A. Reynolds, and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondent.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, amici curiæ.

PER CURIAM.

This appeal is prosecuted from a judgment rendered upon a verdict in favor of the defendant in an action for damages on account of injuries sustained in an automobile accident. The defendant pleaded contributory negligence on the part of the plaintiff, and the only error specified is an instruction on that phase of the case. The accident occurred while plaintiff was crossing Jefferson street at Gramercy place, in the city of Los Angeles, between 5:30 and 6 o'clock on the evening of December 4, 1928. The plaintiff was crossing

Jefferson street from north to south, using the pedestrian lane, which was marked out with white lines. She was a woman of about 72 at the time of the accident. She testified that she was wearing her glasses and could see quite well, that she stood on the curb before attempting to cross and looked both east and west and saw a car in each direction but both were "far away," so that she thought she was safe and started across the street at a fast walk, looking straight ahead and walking on the white line, and had reached the car tracks (which one of the tracks she did not know) when a car struck ner from behind. She did not see the car which hit her, and does not know by what part of it she was struck. She admits that she did not look either up or down Jefferson street after leaving the curb. As a result of the collision, plaintiff was very badly hurt.

Defendant testified that he was driving west on Jefferson, the wheels of his car straddling the north rail of the north car track; that he was traveling between 22 and 25 miles an hour; that he first saw the plaintiff when she was about 6 or 8 feet away and about halfway between his car and the north curb of Jefferson street; and that he put on the brakes and swerved sharply to the left in an attempt to avoid her, but that she kept on and walked into the right rear fender of his car. The testimony of defendant, and of bystanders as well, shows that Mrs. Salomon fell in the pedestrian zone, which would indicate that she did in fact walk into the car, although two witnesses said that she was struck by the right front fender.

[1] It was stipulated that by a Los Angeles city ordinance it was "unlawful for the operator of any vehicle to drive into any cross walk outside of the central traffic district which is marked as provided * * * while there is in such cross walk upon the half of the roadway upon which such vehicle is traveling any pedestrian engaged in crossing the roadway, until such pedestrian shall have passed beyond the path of said vehicle." This was not in the central traffic district. On the question of the plaintiff's contributory negligence, the following instruction was given, and it constitutes the sole error complained of by the appellant:

"I instruct you that it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated. This is a continuing duty, and is not met by looking once and then looking away. In the exercise of ordinary care it is the duty of the pedestrian to look to the right and to the left whenever he or she has voluntarily put himself or herself into a position which may be one of peril coming from either direction.

"If you believe from the evidence in this case that the plaintiff, in attempting to cross the street, did so without exercising that degree of care which would have been exercised by a person of ordinary prudence, under the instructions that I have just given you, and if you find that such failure upon her part proximately contributed to her injury, then the plaintiff cannot recover, and your verdict must be in favor of the defendant; and this is true even though you may believe that the driver of the automobile was also negligent."

It is the appellant's contention that the trial court invaded the province of the jury and committed prejudicial error by giving the charge that it was plaintiff's duty to continue to look both ways after she had testified that she looked in both directions before she started to cross, saw two cars each at a distance, concluded it was safe to cross, and so did not look again. This contention must be sustained. It is true, as pointed out in the opposing briefs, that similar instructions laying on the pedestrian the duty of looking in both directions before proceeding into a position of probable danger were given in the cases of Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 P. 185, and Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493, and that the instruction complained of was probably modeled on language employed by this court in the case last cited and in Davis v. John Breuner Co., 167 Cal. 683, 140 P. 586. These instructions, however, have been limited in their application to the particular facts involved in each case. Burgesser v. Bullock's, 190 Cal. 673, 676, 214 P. 649. In the Niosi and Davis Cases the plaintiff had failed to look in both directions before starting across a busy city thoroughfare. In Sheldon v. James, supra, the plaintiff was crossing the street in a long diagonal in the middle of the block and was struck by a car backing into a vacant parking space on the opposite side of the street when he had almost completed the crossing. The court there said, at page 479 of 175 Cal., 166 P. 8, 10: "The observation of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. The observance of that care is imperative upon him during all of the time that he is crossing. Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 P. 677.

Here it is in evidence from plaintiff's own witnesses that the automobile in backing up the grade made an extremely loud and raucous noise sufficient to attract the attention of people upon the opposite side of the street and such as should have attracted the attention of the plaintiff before he put himself in a place of danger. If, then, under these circumstances, he did not look, the jury was justified in concluding that he was negligent in not having looked. We do not construe the instruction given as meaning that it is the duty of a pedestrian to look backward, nor yet as an effort to standardize the law by declaring that a pedestrian must constantly and continuously be looking from right to left. We construe it to be no more than a declaration that in the exercise of ordinary care it is the duty of such a pedestrian to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction, and in particular where he has received adequate warning of the likelihood of peril." In Sheldon v. James the instruction was as follows: "Ordinary care, or its opposite, neglect, are not absolute terms, but they have reference to times, places, and circumstances, and where a plaintiff is a foot passenger, crossing a street where vehicles are numerous, it is his duty to look both ways. * * *" and substantially the same language was used in Niosi v. Empire Steam Laundry, supra. In neither was the duty described as "continuing."

[2-5] The vice of the instruction here complained of lies in the unqualified statement that "this is a continuing duty, and is not met by looking once and then looking away." Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive. McQuigg v. Childs, 213 Cal. 661, 3 P.(2d) 309. Counsel for appellant have made calculations based upon the speed with which the plaintiff walked and the speed at which the defendant testified he was driving, the accuracy of which is not challenged by the respondent, and by which it is claimed to have been shown that the car was at least 132 feet away when the plaintiff saw it as she stood on the curb. Whether plaintiff's conduct thereafter in proceeding across the street in the crosswalk without again observing the approach of the defendant was consistent with ordinary care is a question to be determined from a consideration of all the facts and circumstances of time, place and conditions of traffic. McQuigg v. Childs, supra; Pinello v. Taylor, 128 Cal. App. 508, 17 P.(2d) 1039; Long v. Barbieri, 120 Cal. App. 207, 7 P.(2d) 1082. In the last two cited cases the plaintiff was not only using a clearly marked crosswalk, but was crossing in accordance with the traffic signals. Respondent has attempted to make a distinction upon that basis. Such a distinction is unsound, as the existence or nonexistence of traffic signals is only a further circumstance to be considered in determining the reasonableness of the plaintiff's conduct. In view of the stipulated ordinance, the plaintiff, in the absence of any reasonable ground for thinking otherwise, had a right to assume that she would not, while walking in the pedestrian lane, be exposed to danger through a violation of the traffic laws. McQuigg v. Childs and Pinello v. Taylor, both supra. Whether she had reason to believe the defendant would not obey the law and stop is a question for the jury also.

[6] It is argued that this instruction is not assailable on the ground that it took away from the jury the right to determine whether the plaintiff was contributorily negligent, because it left to the jury the determination of the questions of whether she had voluntarily placed herself in a position of possible peril and whether she had attempted to cross the street without exercising the degree of care which would have been exercised by a person of ordinary prudence, and that, under the instruction, the jury had first to find that she had knowingly placed herself in a place of probable peril. Respondent points to the second paragraph of the instruction in support of this contention. Although it was by this paragraph left to the jury to find whether plaintiff had attempted to cross the street without using the degree of care which would have been exercised by an ordinarily prudent person, they were told to do so "under the instructions I have just given you," which set up continued observance as a definite and absolute standard of duty, upon the basis of an assumption that she had voluntarily placed herself in a position of probable danger, thus fixing for the jury a measure of ordinary care without requiring them to first find, as a condition of its application, that the plaintiff had exposed herself to a continuing danger. Under the holding of Long v. Barbieri, supra, this should have been made an express condition of a finding of contributory negligence under the instruction given.

Having determined that the trial court fell into error in giving this instruction, we cannot escape the conclusion that it was prejudicial. The negligence with which the plaintiff was charged began and ended with her failure to look for approaching cars after she had left the curb. She admitted she did not look thereafter. The jury was told that one attempting to cross a street likely to be dangerous must first look in the direction from which danger was to be anticipated, that it was a continuing duty and was not met by looking once, and that, having put one's self in a position which may be one of peril, there is a duty to look to the right and to the left. Applying this inflexible measure of ordinary care to the admitted facts, the jury could not have found otherwise than that the plaintiff had failed to exercise it.

Judgment reversed, and case remanded.

220 Cal. 726

FULTON v. FULTON.

Sac. 4769.

Supreme Court of California.

May 9, 1934.

1. Divorce 🔑127(1).

In divorce action, circumstances of separation and continuance thereof as disclosed by testimony of defendant wife may be considered for purposes of corroboration of husband's evidence on question of desertion.

2. Divorce 🔑184(10).

In divorce action, trial court's finding on contradictory evidence cannot be disturbed.

3. Divorce 🔑156.

Where defendant wife testified that she received her personal effects and some furniture and evidence did not show how much was received and what remained, it must be assumed such property had been divided satisfactorily or was negligible, so that failure to refer to household furniture in interlocutory divorce decree was not error.

4. Divorce 🔑184(1).

Where, after filing of notice of appeal from interlocutory divorce decree and award of property, defendant wife moved for allowance of attorney's fees and costs on appeal, denial of motion *held* not reviewable on such appeal, since separately appealable as "special order after final judgment" (Code Civ. Proc. §§ 956, 963).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action for divorce by William Fulton against Louisa J. Fulton, in which defendant filed a cross-complaint for separate maintenance. From an interlocutory decree, defendant appeals.

Affirmed.

T. B. Scott, of Modesto, for appellant.

Alfred Aram, of San Jose, and L. L. Dennett, of Modesto, for respondent.

SHENK, Justice.

The plaintiff sued the defendant for a divorce on the ground of desertion. The complaint alleged that the community property consisted of furniture of the value of about $100 and shares of stock in the Cities Service Company of about $250 in value. The defendant answered denying the desertion, putting in issue the question of the extent of the community property, and filed a cross-complaint for separate maintenance. The trial court granted an interlocutory decree of divorce to the plaintiff; awarded to the defendant said shares of stock; awarded to her a one-half interest in 80 acres of land in Denair Land & Development Company's Colony No. 2, and denied to her other relief. She appealed from the interlocutory decree and challenges the findings of the court both on the issue of desertion and on the division of property. The plaintiff moved to dismiss the appeal for noncompliance with section 2 of rule VIII of the rules of court, and to affirm the judgment under section 3 of rule V. Thereafter the defendant filed a supplemental brief and the respondent's brief has been filed. The appeal has been submitted on its merits.

[1, 2] It is unnecessary to recount the evidence at length. On both of the major issues it was conflicting. The trial court resolved the conflict in favor of the plaintiff. It is insisted that the evidence of the plaintiff on the question of desertion is not corroborated. The circumstances of the separation and the continuance thereof as disclosed by the defendant's testimony may be taken into consideration for purposes of corroboration. Percy v. Percy, 188 Cal. 765, 207 P. 369; Jansen v. Jan-

sen, 127 Cal. App. 294, 15 P.(2d) 777. It is not disputed that the defendant left the plaintiff's house in Stanislaus county in September, 1928, and went to Arizona. She returned to this state in 1929, but did not return to her former home. According to the testimony of her sister, she lived with the sister in Turlock until the trial of the action in January, 1932. The defendant contended that she was compelled to leave the plaintiff because of the latter's alleged misconduct toward her. On this question there was contradictory evidence and much dispute, and the trial court's finding thereon cannot be disturbed.

[3] The question of the extent of the community property in existence at the time of the trial required an extensive examination into the amount and character of property owned by the plaintiff at the time of the marriage of the parties. The plaintiff owned property of considerable value at that time. After the marriage it had undergone transmutation and it was necessary for the court to trace the original investments and the income thereof through the years of married life in an endeavor to segregate the community property and divide it equally as provided in section 146 of the Civil Code. Evidence in detail was taken on this subject. On this record it cannot be said that the findings of the court are without support. The point is made that the decree made no division of the household furniture. While it is true that no specific reference is made in the decree to the household furniture, the defendant testified that after her return from Arizona she went to the home and took away her personal effects and at other times received articles of furniture from the plaintiff. The extent or value of what was received and what remained is not disclosed by the evidence, and it must be assumed that it had theretofore been divided in a manner satisfactory to the parties or was so negligible as not to require special order.

No prejudice is shown to have resulted to the defendant by reason of the court's requirement that she first proceed with proof of the allegations of her cross-complaint.

[4] After the entry of the interlocutory decree and after the filing of the notice of appeal, the defendant moved the court for an allowance of attorney fees and costs on appeal. The record does not show that the motion was acted upon. Assuming its denial, no appeal was taken from the order. As a special order after final judgment (see Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582), it was appealable (section 963, Code Civ. Proc.), and, as such, is not subject to review on an appeal from the judgment (sec. 956, Code Civ. Proc.).

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

1 Cal.(2d) 37

PEOPLE v. MURPHY.

Cr. 3706.

Supreme Court of California.
May 17, 1934.

1. Criminal law 🔑53.

Voluntary intoxication is no excuse for crime, but may be considered in determining whether required purpose, motive, or intent actuated accused (Pen. Code, § 22).

2. Homicide 🔑270.

Weight to be accorded evidence of intoxication, and whether intoxication precluded accused from forming specific intention to kill and murder are for trier of facts.

3. Homicide 🔑9.

Specific intention to kill and murder is necessary element of first degree murder (Pen. Code, § 189).

4. Homicide 🔑347.

Evidence that accused was not so disordered mentally by intoxication at time of attack on decedent as to preclude resultant killing from being willful, deliberate, and premeditated, justified Supreme Court's refusal to modify conviction for first degree murder (Pen. Code, § 189, and § 1181, as amended by St. 1927, p. 1037).

5. Homicide 🔑22(1).

Severe beating of wife by defendant causing her death *held* "torture" within statute; conclusively designating resulting homicide as murder in the first degree (Pen. Code, § 189).

[Ed. Note.—For other definitions of "Torture," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Lee Dwight Murphy was convicted of murder in the first degree, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and Ellery E. Cuff, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Defendant was indicted for the murder of his wife in Los Angeles county. The cause was tried by the court sitting without a jury, a jury having been waived. At the conclusion of the evidence defendant was found guilty of murder in the first degree and sentenced to suffer the extreme penalty. He appeals from the judgment.

The evidence is conclusive that the decedent died as the result of injuries inflicted upon her by the defendant while administering to her a severe and apparently unprovoked beating. Defendant concedes the sufficiency of the evidence connecting him with the homicide. He states in his opening brief that "the deceased died on December 11th (1926), as a result of the injuries inflicted by appellant." The details of the cruel treatment imposed upon the decedent, who at the time had been married to the defendant for approximately two weeks, need not be set forth at any great length. Suffice it to say that the defendant, by the use of a belt, belt buckle, and his fists had bruised and battered his victim's entire body and had broken her jaws. Other treatment of a sordid and shocking nature need not be described. The injuries were inflicted on the evening of November 30, 1926, while the parties were in their apartment in Long Beach. They proved fatal eleven days later. Defendant was not apprehended until July, 1933, approximately six and one-half years after the commission of the homicide. He was arrested in Pittsburgh, Pa., and returned to this state for trial.

At the conclusion of the prosecution's case, the defendant took the stand in his own defense. He testified that during the day on which the homicide was committed he had purchased and consumed approximately three bottles of "bitters" possessing an alcoholic content in excess of 50 per cent. by volume; that he remembered being in the apartment with his wife, the decedent, during the early part of the fatal evening; that the next thing he remembered was that he found himself wandering aimlessly along an ocean pier; that he concluded he "must have hurt" the decedent; that he returned home and found his wife suffering from the effects of the beating imposed; that he begged her forgiveness and undertook to make her comfortable during the remainder of the night; that he left the next morning when the owner of the apartment informed him the police were seeking him; that subsequently upon learning of his wife's death he left the city and state. As already indicated, he successfully avoided apprehension for several years. Defendant called no other witnesses.

Upon this appeal he raises no objection to the sufficiency of the evidence to establish the homicide or his connection therewith. Nor does he charge any error in the admission or rejection of evidence. He urges but one point, namely, the insufficiency of the evidence to establish the degree of the murder as that of the first. In support thereof, defendant urges that he "was in such a disordered state of mind from the (voluntary) use of intoxicating liquor at the time he inflicted the injuries upon the deceased, from which she subsequently died, that he was not capable mentally of forming a clear, wilful, deliberate and premeditated intent to kill her which would make the crime murder in the first degree." He insists that he inflicted the injuries on the decedent "while he was in a drunken and sexual frenzy and as the result of a sudden heat and passion." From this he concludes that "the proper and justifiable verdict under the evidence would have been a verdict finding (him) guilty of murder in the second degree." He therefore requests this court to accordingly modify the judgment under the power conferred upon it by the 1927 amendment to section 1181 of the Penal Code (St. 1927, p. 1037), by which amendment appellate courts are authorized to modify a judgment when the evidence indicates that the defendant is "not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof." He refers to the case of People v. Kelley, 208 Cal. 387, 391, 281 P. 609, wherein the court reduced the gravity of the crime of which the defendant stood convicted. The facts of the Kelley Case, supra, are wholly dissimilar to those of the case at bar. In the Kelley Case the evidence merely indicated that the victim of the homicide had died as the result of injuries incurred while engaged in a voluntary sexual debauch with the defendant. It nowhere appeared therein that the defendant had deliberately and intentionally inflicted the fatal injuries. They appeared to be the natural result of the orgy engaged in by the parties. In other words, the decedent in the Kelley Case was killed under circumstances tending to show an accidental or unpremeditated killing. For that reason this court felt constrained, under the law, to declare the offense to be that of manslaughter.

[1-4] Such is not the present case. Here the fatal injuries were deliberately and intentionally inflicted while the defendant was engaged in subjecting the decedent to a severe and unprovoked beating. The fact that he had previously imbibed intoxicants does not serve to exonerate him from the consequences flowing from his unlawful acts. Voluntary intoxication is never an excuse for crime. Section 22, Pen. Code; People v. Burkhart, 211 Cal. 726, 730, 731, 297 P. 11. Of course, whenever the existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the trier of the facts, in determining whether such purpose, motive, or intent actuated the accused in the perpetration of the offense, may properly take into consideration the fact that he was intoxicated at the time. Authorities supra. However, the weight to be accorded to evidence of intoxication, and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder of the first degree, are matters essentially for the determination of the trier of the facts. People v. Yeager, 194 Cal. 452, 474, 229 P. 40; People v. Sainz, 162 Cal. 242, 245, 121 P. 922. From an examination of the entire record we cannot say that defendant, by reason of the use of intoxicants, was so disordered mentally at the time of the attack on the decedent as to preclude the resultant killing from being of that "wilful, deliberate and premeditated" character designated in section 189 of the Penal Code as murder in the first degree. It is significant that defendant when on the stand testified in detail as to what transpired immediately before and immediately subsequent to the wrongful assault on the decedent. As to these events his recollection was reasonably vivid. His memory was faulty only as to the period during which the fatal injuries were being inflicted. In view of this, the trial court might very properly discount or reject defendant's testimony as to the extent of his intoxication and conclude that defendant was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts.

Moreover, as indicative of defendant's state of mind at the time of the attack, the father of the decedent testified to a conversation in which the decedent stated to the witness that the defendant while beating her declared: "I once killed a girl in Fresno, and I don't know if I will kill you or not." The evidence of this conversation was admitted on the theory that it constituted a dying declaration. From this evidence the trier of the facts might reasonably conclude that defendant fully appreciated the gravity and wrongful character of his acts.

[5] However, we need not rest an affirmance of the judgment solely on the foregoing reasoning. There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the Legislature has enumerated in the statute (section 189, Pen. Code), and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder in the first degree. These cases are of two classes. When the killing is perpetrated by means of poison, lying in wait, or torture, the means used is held to be conclusive evidence of premeditation. When the killing is done in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, the occasion is made conclusive evidence of premeditation. People v. Sanchez, 24 Cal. 17, 29, 30; People v. Milton, 145 Cal. 169, 170, 78 P. 549. If a case falls within either of these classes the statute determines that the killing is willful, deliberate, and premeditated and the trier of the facts has no alternative but to find the offender guilty of murder in the first degree.

In our opinion the brutal and shocking treatment to which the decedent was subjected, and as a result of which she died, constituted torture of an aggravated character within the meaning of the statute. The statute therefore conclusively designates the resulting homicide as murder in the first degree.

The judgment is affirmed.

We concur: PRESTON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

220 Cal. 742

DE VALLY v. KENDALL DE VALLY OPERALOGUE CO., Limited, et al.

L. A. 14333.

Supreme Court of California.
May 14, 1934.

1. Corporations 🔑448(1).

Contract to form corporation and enter into contract to perform services therefor until its dissolution by all parties' consent *held* unenforceable as preliminary and executory and not binding on corporation nor contract of employment.

2. Judgment 🔑203.

Law contemplates but one final judgment in cause; such judgment being one which, in effect, ends suit and finally determines parties' rights respecting matter in controversy.

3. Appeal and error 🔑78(3).

Judgment entered on order sustaining defendants' demurrer to first and third causes of action stated in complaint was premature, and appeal therefrom must be dismissed.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Antoine V. K. De Vally against the Kendall de Vally Operalogue Company, Limited, and others. From a judgment entered on an order sustaining defendants' demurrer to the first and third causes of action stated in plaintiff's amended complaint, without leave to amend, plaintiff appeals.

Appeal dismissed.

Don Marlin, of Los Angeles, for appellant.

Sparling & Teel and Courtney A. Teel, both of Los Angeles, for respondents.

PRESTON, Justice.

Appeal by plaintiff from judgment entered upon order sustaining, without leave to amend, demurrer of defendants to the first and third causes of action stated in plaintiff's amended complaint for declaratory relief, for an accounting, for salary, damages, and other and further relief.

The complaint is predicated upon, and pleads in hæc verba, a written agreement executed September 16, 1931, by plaintiff as first party, and by defendants Henry E. Kendall and his son, Gerald H. S. Kendall, as second parties. It was thereby agreed that these parties would form a California corporation (later incorporated as Kendall de Vally Operalogue Company, Limited, defendant herein), to which Henry E. Kendall would loan not exceeding $25,000 to finance a sample operalogue made, from condensation of an opera by plaintiff, into a sound motion picture. One share of stock was to be issued to each of the parties, who were to be the officers of the corporation. Plaintiff agreed to transfer to said corporation all his right and title to all operalogues or condensations of operas theretofore or thereafter made by him, as long as he should be a stockholder of the corporation. He further covenanted as follows: "Party of the first part agrees to enter into a contract with said corporation for the natural life of said corporation or until its dissolution by the unanimous consent of all parties, to give his full time services to the corporation commencing October 1, 1931, at a Salary of * * * $250 per week until January 1, 1932, payable weekly, and thereafter * * * $500 per week, payable weekly."

The amended complaint herein, by the first count, alleges that on September 17, 1931, the corporation was duly organized; that it accepted plaintiff's services until January 24, 1933, when he was discharged without just cause and requested to resign immediately as an officer and director thereof; that plaintiff relies upon the whole of said written instrument and has at all times held himself in readiness to render his services to defendants thereunder; that $25,500 became due him from the time of his discharge to the time of filing this action; that the corporation was entirely dominated by and was the business conduit and alter ego of defendant Henry E. Kendall, used by him as a dummy and instrumentality for the transaction of business; that Henry E. Kendall was and is the real party in interest; and that he secured all the assets and property of the corporation and mingled them with his own property so that a judgment against the corporation would be worthless.

The second count of said amended pleading alleges a cause of action for damages in the sum of $444 by reason of damage by defendants to certain office furniture and other property belonging to plaintiff.

The third count alleges that an actual controversy has arisen between the parties in relation to their respective rights and duties under said agreement, pursuant to which plaintiff condensed, produced and adapted five operalogues into motion pictures, which defendants delivered to Educational Film Exchange, Inc., for distribution; that said agreement required plaintiff to serve the corporation for its natural life; that defendants breached said agreement, in that the corporation was not dissolved and yet defendants discharged plaintiff and requested his resignation.

A fourth count alleges plaintiff's right to an accounting with respect to his share of the money received by defendants from release and distribution of said five operalogues.

The prayer of the complaint is for an adjudication of the rights of the parties under said agreement, for an accounting and payment of such moneys as may be found to be due plaintiff from defendants, for $444 damages, for $25,500 unpaid salary, plus further amounts becoming due subsequent to filing of complaint and for other and further relief.

The court sustained defendants' demurrer to the first and third causes of action; judgment followed accordingly and, as above stated, plaintiff appealed.

[1] Apparently the action of the court below in sustaining the demurrer was based upon two main grounds: (1) That the contract, particularly as to term and expiration date of plaintiff's employment, was too uncertain to be enforceable; and (2) that the theory of alter ego could not be applied to the facts pleaded. Appellant, citing established rules governing the interpretation of contracts, contends that the agreement is capable of enforcement and that it should be given effect and construed in favor of validity rather than invalidity. We fail to see how this could be done. It is apparent that the agreement was preliminary and executory and did not bind the later formed corporation upon the alter ego or any other theory; neither did it become a contract of employment.

The above-quoted provision, relied upon by plaintiff, was but a unilateral promise on his part. This is the plain purport of the language used. The agreement provided that the parties of the second part would advance certain money and do other specified acts and plaintiff, on his part, agreed that he would enter into a contract of employment with the corporation. The second parties largely performed their covenants, but never accepted the benefit of plaintiff's promise to execute a contract of employment with the corporation Furthermore, it is also true that the covenant is indefinite and uncertain as to term of service; in the event of plaintiff's refusal to make unanimous the consent to dissolution of the corporation his employment would be without termination or specified term. Thus it appears that the trial court properly sustained the demurrer without leave to amend.

[2, 3] Although the matter is not mentioned by counsel for either side, it appears that the court should not have given a judgment herein until the final disposition of the entire cause. The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361, 70 P. 166, quoting from Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. 577, 33 P. 633: "There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy. (Citing authorities.)" See, also, Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938, and Potvin v. Pacific Greyhound Lines, Inc., 130 Cal. App. 510, 512, 20 P.(2d) 129.

The judgment being premature, the appeal must be dismissed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

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138 Cal.App. 523

WRIGHT v. HARRIS et ux.

Civ. 5078.

District Court of Appeal, Third District, California.
May 14, 1934.

1. Mortgages 🔑504.

To entitle trustor under trust deed to benefits of Mortgage Moratorium Law, it must appear from record that property in question was in one of classes described in the act (St. 1933, p. 307).

To entitle trustor to benefits of St. 1933, p. 307, it must appear from record that sale complained of was of dwelling house in which owner resided, or of any of necessary outbuildings, or of land upon which such dwelling or outbuildings were situated and necessary for convenient use thereof, or of land used by owner in farming or ranch operations conducted by him or under his immediate supervision, or of any interest therein.

2. Mortgages ⇨504.

Where sale under trust deed was held after expiration of moratorium, that notice of sale was given and posting and publication thereof made while moratorium on sales was in effect *held* not to invalidate the notice, since word "sale" in the act means transfer of property to purchaser for consideration and does not include preliminary steps leading up to transfer (St. 1933, p. 307; Civ. Code, § 1721).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

◆

Appeal from Superior Court, Siskiyou County, C. J. Luttrell, Judge.

Action in ejectment by Winifred C. Wright against M. E. Harris and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

William V. Cowan, of Yreka, and L. N. Lorenzen, of Mt. Shasta, for appellants.

Allen & McNamara, of Yreka, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

As propounded by appellants, "the sole point of this appeal concerns the interpretation of the first California Moratorium Law (Stats. 1933, c. 30, p. 307), which went into effect March 10, 1933, for 60 days, to May 10, 1933; appellants contend that said law was meant to stop the advertising of a contemplated sale as well as the actual sale itself under a deed of trust."

From the agreed statement of facts it appears that on June 29, 1931, defendants, as trustors, conveyed to Title Insurance & Guaranty Company, a corporation, as trustee for Winifred C. Wright, certain lands as security for the repayment of a promissory note. Subsequent to the execution of the deed of trust, defendants paid no interest on the note nor the taxes levied and assessed against the property, and on January 13, 1933, plaintiff caused to be recorded in the proper office a notice of breach and election to sell under said deed of trust. Ninety days after the recording of such notice of default and election to sell, that is, on April 20, 1933, plaintiff commenced publication of notice of sale of said property under the deed of trust, setting the date of sale for May 13, 1933.

It was further stipulated that notice of the sale was posted and published as required by law, and the giving of said notice was in all respects in conformity with the law, except that defendants claim said notice was invalid by reason of the fact that said notice was given and the posting and publication thereof done while the moratorium referred to was still in effect. The property was sold by the trustee, and, defendants refusing to surrender possession, this action was brought, and from the judgment of eviction they appealed.

Plaintiff alleges that defendants have not pleaded facts which bring them within the provisions of the moratorium statute in that it does not appear that the property sold was of the dwelling house in which the owner resided, nor of any of the necessary outbuildings or of land upon which the same were situated, and necessary for the convenient use thereof nor of lands used by the owner for farming or ranch operations conducted by him or under his immediate supervision or of any interest therein. They further claim that the sale itself was not held during the period of the moratorium, and was therefore not prohibited by the statute.

[1] We are of the opinion that respondent is correct in both contentions. Undoubtedly appellants must bring themselves within the provisions of the act in order to claim the benefits thereof, and to do so it must appear from the record that the sale complained of was of the dwelling house in which the trustor resided or of any necessary outbuildings or the land upon which it was situated or of lands used by the trustor in farming or ranch operations conducted by him or under his immediate supervision. These facts do not appear from the record.

[2] It is also apparent from the language of the act that the word "sale" is there used in its ordinarily accepted understanding, that is, a transfer of property or goods to the buyer for a consideration (section 1721, Civ. Code), and does not, as claimed by defendant, include the preliminary steps leading up to the actual transfer. The statute was enacted to prevent owners of the particular types of property as therein described from being deprived of ownership during the period prescribed. Defendants were not deprived of any rights in their property until after the expiration of the period prescribed by the act.

The judgment must be, and is, therefore, affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

PETERSEN v. LEWIS.*

Civ. 1272.

District Court of Appeal, Fourth District, California.
April 26, 1934.

Hearing Granted by Supreme Court June 25, 1934.

1. **Automobiles** 🔑171(9).

Motorist who passed to left of center of intersection, and who failed to give proper arm signal over required space before commencing left turn, was guilty of negligence per se (St. 1925, p. 413, § 130; St. 1929, p. 541, § 129).

2. **Negligence** 🔑136(25).

When it has been proved or admitted that defendant has been guilty of negligence per se, it is usually province of jury to determine whether such negligence was proximate cause of injury of plaintiff.

3. **Automobiles** 🔑245(64).

In action for injuries to passenger in automobile struck by speeding motorist who attempted to avoid defendant's automobile and trailer making an improper left turn, defendant *held* not entitled to directed verdict on ground that negligence of speeding motorist was sole proximate cause of passenger's injury, since passenger could recover even if defendant's negligence was not sole cause of injury.

4. **Automobiles** 🔑245(65).

Whether negligence of defendant motorist, who made improper left turn, was proximate cause of injuries of passenger in another automobile colliding with speeding automobile which attempted to avoid defendant's automobile, *held* for jury (St. 1925, p. 413, § 130; St. 1929, p. 541, § 129).

◆

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Leonard J. Petersen against J. P. Lewis. Judgment for defendant, and plaintiff appeals.

Reversed.

Ray W. Hays and Walter Sorensen, both of Fresno, for appellant.

W. M. Conley, Philip Conley, Matthew Conley and Conley, Conley & Conley, all of Fresno, for respondent.

MARKS, Justice.

The plaintiff was very seriously injured in an automobile collision in or near the intersection of McCall avenue and Gaither street in the city of Selma. The accident occurred at about 5 o'clock on the afternoon of July 29, 1931. On motion of the defendant the trial court instructed the jury to return a verdict in his favor. Judgment was entered upon this verdict, and this appeal followed.

McCall avenue, which has a pavement twenty feet in width in its center and is forty feet between curbs, runs north and south, and Gaither street intersects it at right angles. In both directions from the intersection, McCall avenue runs through a "residence district." Section 28½, Cal. Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 510). The intersection was an obstructed one where the driver of a vehicle approaching it did not have a clear and uninterrupted view of the traffic for a distance of two hundred feet on the intersecting street for the last one hundred feet of his approach to it. Section 113, Cal. Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120). There were no "turning markers" at the intersection.

Just prior to the accident the defendant was driving his automobile, a coach with a two-wheel trailer attached, northerly on his right-hand side of McCall avenue at a lawful rate of speed. The coach was sixteen feet in length and the trailer ten and one-half feet long. About twenty feet south of the intersection he gave the arm signal for a left turn onto Gaither street. He started his left turn as soon as he reached the south line of Gaither street and completed it without passing to the right of the center of the intersection, and then parked his vehicles on the north side of Gaither street just west of McCall avenue.

The defendant testified that when he was about forty feet south of the intersection he saw a car about three hundred feet north of Gaither street, approaching on McCall avenue. When he reached the intersection, and about the time he started his left turn, he saw that it was about one hundred fifty feet from the intersection and was being driven at a speed of forty-five or more miles an hour. This car was being driven by Melvin Pelletier. The defendant proceeded with his turn at a speed of about ten miles an hour, and heard, but did not see, the collision between the Pelletier automobile and the one in which the plaintiff was riding. The defendant did not know a car was following him.

The plaintiff was riding as a guest in an automobile driven by Sidney Jensen which was following the defendant's car north on McCall avenue. Jensen was driving at a

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*For subsequent opinion see 42 P.2d 311.

lawful rate of speed and on his own right-hand side of the street. The plaintiff was so seriously injured in the accident that he had no recollection of it. Pelletier died the next morning. The plaintiff relied upon the testimony of Jensen for a description of the accident.

Jensen testified that, with the plaintiff riding as his guest, he was following the Lewis car at a distance of about seventy-five feet in traveling north on McCall avenue; that Lewis reduced his speed before entering the intersection and that the Jensen car was about forty feet back of the Lewis trailer when Lewis started his left turn; that Jensen's view of the west half of McCall avenue was cut off by the body of the Lewis coach; that when Lewis had made sufficient of his left turn so that the coach body had crossed the center line of McCall avenue, Jensen saw the Pelletier automobile for the first time; that it was then on the west half of McCall avenue about twenty feet north of the north line of the intersection; that at that time the rear of the Lewis trailer had not crossed to the west side of the center line of McCall avenue; that such line passed under the trailer; that Pelletier was driving "fast" and swerved his car sharply onto the east side of McCall avenue and then swerved it sharply towards the center; that Jensen swerved his car to his right until his right wheels were off the pavement; that the Pelletier automobile struck the Jensen car on its right front and the injuries to plaintiff followed.

[1] It affirmatively appears that Pelletier drove his automobile at a rate of speed in excess of that permitted by section 113 of the California Vehicle Act as in effect at the time of the accident. It also affirmatively appears that the defendant violated the provisions of section 129 of the California Vehicle Act (as amended by St. 1929, p. 541) in passing to the left of the center of the intersection, and of section 130 of the same act (as amended by St. 1925, p. 413) in failing to give the proper arm signal over the required space, before commencing his left turn. It therefore must be admitted that both of these drivers were guilty of negligence per se.

Subdivision (a) of section 130 of the California Vehicle Act (1925) contains the following: "The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety."

From Lewis' own testimony it might be urged with some degree of sincerity that he should have realized his left turn could not be made in safety under the conditions confronting him. When he was forty feet south of the intersection he saw Pelletier about three hundred feet north of it. When he reached this intersection he again saw Pelletier about one hundred fifty feet north of it approaching at a speed of forty-five or more miles an hour. While he traveled forty feet, Pelletier had traveled about one hundred fifty feet, and was still rushing down upon the course Lewis was taking. Lewis had reduced his speed from fifteen miles to about ten miles per hour at that time. He pursued a curving course to his left and the front of his vehicles traveled about fifteen feet before leaving the pavement. The vehicles had an over-all length of twenty-six and one-half feet. This would make the rear of his trailer travel about forty-one and one-half feet before it cleared the pavement and left the west half clear to approaching traffic. This left the margin of safety very narrow, if it existed at all.

The evidence of Jensen was less favorable to the defendant. He testified that when Pelletier was twenty feet north of the intersection the rear of the trailer was astride the center line of McCall avenue at a place about opposite the north line of the sidewalk on the south side of Gaither street. If this be accepted as true the entire west half of McCall avenue was blocked by the coach and trailer.

Respondent cites the case of Kienlen v. Holt, 106 Cal. App. 135, 288 P. 866, 870, as holding that he was free from negligence in assuming that he could make his left turn in safety with the Pelletier car one hundred fifty feet away when he entered the intersection. He cites the following quotation from that case: "While the right to assume that appellant would exercise due care in the operation of his automobile would not excuse contributory negligence on the part of respondents, it furnishes a ground for a reasonable inference by the trial court, which supports the finding that neither of the respondents was guilty of any negligence which contributed to the accident in question, or to their injury. As was said in the case of Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203, 204: 'Any one, the most careful, about to cross a highway and observing another vehicle approaching at a distance of from 100 to 150 feet, would not deem it necessary to stop or to do any particular thing to avoid a collision. He would properly assume and have a right to assume that the other car was not violating all rules of prudence by excessive speed; that he had plenty of time to cross and act accordingly. This would be the attitude of any reasonable man under the circumstances, and therefore the plaintiff was not guilty of a want of ordinary care in pursuing his journey.'"

Two important differences between that and the instant case exist which make the quotation not controlling here. The Kienlen Case was tried, submitted, and findings made which absolved the plaintiffs from contributory negligence. Under such circumstances the appellate court must resolve all conflicts of evidence, presumptions, and reasonable inferences in favor of the judgment. In the instant case the trial judge withdrew the case from the jury. In Burgesser v. Bullock's, 190 Cal. 673, at page 683, 214 P. 649, 653, it was said: " 'If there was any substantial evidence tending to show that the collision was caused by negligence on the part of defendant's driver, the action of the court in directing a verdict was, of course, erroneous. The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury. On the other hand, the court may withdraw the case from the jury and direct a verdict where the evidence is undisputed, "or is of such conclusive character, that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." ' "

The second distinction is found in the quotation from Robinson v. Clemons, supra, where it appears that the plaintiff did not know that the defendant was traveling at an excessive rate of speed. Lewis admitted that he knew when he commenced his turn that Pelletier was approaching the intersection at forty-five or more miles an hour, an excessive speed under the circumstances.

Respondent urges that in Robbiano v. Bovet (Morgan v. Ragno) 24 P.(2d) 466, 471, the Supreme Court announced the correct rule in cases of this kind by approving the following remark of the trial judge in that case. " ' "If the case went to the jury on the present testimony and the jury found against Ragno I would be compelled on motion for a new trial to grant it as to him." ' " An examination of that case shows there was no evidence upon which a judgment for Miss Morgan could be supported. The language used by a court must be read and construed in connection with the facts of the case. The action of the trial judge withdrawing the case from the jury under the circumstances there disclosed was proper and his remarks were appropriate to the facts of the case before him. We do not conclude that the holding in that case conflicts with or modifies the rule announced in Burgesser v. Bullock's, supra, and the many recent decisions supporting it.

In Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, at page 295, 97 P. 520, 524, it was said: "It is claimed that the court should have instructed the jury on the motion of defendant to return a verdict in its favor upon the ground that the evidence showed that the deceased was guilty of contributory negligence. The right of a defendant to have a jury so instructed can only obtain where the evidence conclusively establishes such negligence. It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury."

[2] When it has been proved or admitted that a defendant has been guilty of negligence per se, it is usually the province of the jury to determine whether or not such negligence was the proximate cause of the injury of the plaintiff. Rosella v. Paxinos, 110 Cal. App. 299, 294 P. 39; Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765; Huber v. Scott, 122 Cal. App. 334, 10 P.(2d) 150.

[3, 4] Respondent suggests that as his automobile and trailer did not strike, and was not struck by either of the other cars, the negligence of Pelletier must be held to be the sole proximate cause of plaintiff's injury. In Hill v. Peres (Cal. App.) 28 P.(2d) 946, 949, it was said: "The law does not require that the negligence of a defendant must be the sole cause of the injury in order to entitle the plaintiff to recover therefor. All that is required is that the negligence in question shall be a proximate cause of the injury. Griffith v. Oak Ridge Oil Company, 190 Cal. 389, 212 P. 913; Dewees v. Kuntz, 130 Cal. App. 620, 20 P.(2d) 733. * * * The rule is stated in Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280, 281, and approved in Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 P. 544, that 'where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the

intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.' Whether the negligence of the two appellants here was independent or concurrent was largely a question for the jury whose finding is conclusive on appeal if there be evidence to support it. Jordan v. Great Western Motorways, 213 Cal. 606, 2 P.(2d) 786."

Under the facts of this case, and the authorities cited, we are of the opinion that the trial judge erred in withdrawing the case from the jury and instructing it to return a verdict for the defendant.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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138 Cal.App. 396

DURRELL v. BACON et al.

Civ. 9340.

District Court of Appeal, First District, Division 2, California.

May 1, 1934.

Hearing Denied by Supreme Court June 29, 1934.

1. Evidence 🔑390(4).

In husband's action to quiet title to realty of deceased wife, parol evidence that realty was community property *held* properly admitted as against contention that realty was conclusively presumed to be wife's separate property, where husband never knew that deed recited that realty was wife's separate property, and wife told husband that property belonged to community, and realty was purchased with separate and community funds of husband and wife (Civ. Code, § 164).

2. Quieting title 🔑29.

Husband *held* not barred by laches from maintaining action to quiet title to realty which was conveyed to his wife long before her death, where husband did not know that deed recited that realty was to be wife's separate property, and wife did not claim realty as her separate property until shortly before she died.

3. Witnesses 🔑188(1).

In husband's action to quiet title to realty conveyed to wife, conversations between husband and wife to effect that property was community *held* properly admitted as against contention that conversations were privileged communications (Code Civ. Proc. § 1881, subd. 1).

4. Quieting title 🔑3.

Husband *held* entitled to judgment quieting title to realty conveyed to wife under facts showing that realty was purchased with separate and community funds of husband and wife under agreement that realty should be community property and that title was taken in name of wife's mother and in name of wife as matter of convenience.

◆

Appeal from Superior Court, Los Angeles County; May D. Lahey, Judge.

Action by E. J. Durrell against Leonard Lewis Bacon, as administrator of the estate of Anna E. Durrell, deceased, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

See, also, 119 Cal. App. 31, 5 P.(2d) 961.

Lucius K. Chase and Chase, Barnes & Chase, all of Los Angeles, for appellants.

William L. Waters, of Fullerton, for respondent.

BURROUGHS, Justice pro tem.

The plaintiff and Anna E. Bacon were married on March 16, 1876, and lived together as husband and wife until the death of the latter on March 11, 1925. The plaintiff was a day laborer. His wife graduated from the public schools of New York and became a school teacher. During their married life the wife received all of the money of the community, banking and disbursing it, and this continued throughout their married life. Shortly before May 25, 1891, they had a talk about buying a home. They had lived in rented houses theretofore. The plaintiff testified that he told his wife that they had no money for such purposes; she replied that they had, and called to his attention that her brother Will had left her a thousand dollars in his will; that her mother Mrs. Betsy Bacon had $800. Mrs. Bacon had been living with them between three and four years and expected to stay with them the rest of her life; that she would put her money in with theirs, and that they would take care of her as long as she lived; that he replied to his wife that he had nothing to do with that money, and that his wife replied, " 'Now,' she said, 'Jimmy, look here; there is nothing of that kind; what is mine is yours and what is yours is mine,' and she said, 'this money will go into a home for us; it is just as much yours as mine.' She said, 'that will make us a start at buying a home and then we can go on, whatever the balance is we can pay that as rent in buying the property.' I told her 'all right, if you want to do that, I will guarantee to it and go ahead.' " Shortly after this first conversation, and before the property was purchased, another conversation was held between the spouses and Mrs. Bacon (the mother of Mrs. Durrell) about the purchase price of the land. Mrs. Bacon said she would put in the $800 "and live with us as long as she lived." The evidence further discloses that at the time of the last conversation Mrs. Bacon had lived with the spouses and that she continued to live with them until the time of her death, a total of ten years, without any compensation other than the $800. Some time later after the above talks, another conversation was had by the plaintiff, his wife, and a Mr. Elwood, a real estate agent, about buying the property for the sum of $2,000. This property was subsequently deeded to Mrs. Bacon, and concerning this conveyance the plaintiff said: "I said to my wife like this, 'Mrs. Durrell, now, here, in making out these deeds, make them out to Ma, Mrs. Betsy Bacon,' * * * 'if anything should happen to you and I, and they were in your name,' I said, 'put the deeds in Mrs. Bacon's name,' and she acquiesced and said, 'I think it is a good idea to put them in,' and that was done." The plaintiff further testified that there was a balance of $200 due on the purchase price of the lot which was paid for out of his earnings at the rate of $15 per month; also that he expended over $2,500 of community funds, including labor, in placing improvements on the place. The witness further testified that Will Bacon, his wife's brother, lived with them for a year without paying for any board and lodging. Plaintiff further testified that he bought lots 6 and 7 of the Hardin tract and paid for them out of a judgment for $4,200 which he had obtained in a lawsuit, and the money belonged to him.

Now, regarding lot 2. The title to this lot was conveyed from Mrs. Mary S. King, a sister of the plaintiff, to Mrs. Betsy Bacon. The plaintiff testified that Mr. Scott, who owned the lot, wanted $3,000 for it, but that that was too much, and he finally got a price on it of $2,800. A day or so before they completed the purchase of this lot 2, they had a further conversation with Mrs. King in which she (Mrs. King) said that she was leaving a thousand dollars to plaintiff, her brother, and that she would give the thousand dollars toward purchasing the lot. It was further testified that the husband and wife had $600 in the bank from the earnings of the plaintiff, and that a mortgage on the property of $1,200 was assumed by them, and this constituted the purchase price of the lot.

Miss Hickman, a real estate agent, through whom they purchased the property, was told by plaintiff, in the presence of his wife and Mrs. King, to put the title in the name of Mrs. Betsy Bacon, and "we received the one thousand dollars at once." Mrs. King was very ill and died shortly after the execution of the deed. Shortly before the death of Mrs. Durrell, the plaintiff testified that she told him "she had been a bad girl. For twenty years she had made her will and never told me about it. I told her that was all right. 'Now,' I said, 'Anna tell me how you made it?' and she told me, she said, 'You have the use of the property as long as you live, then it goes to Edward and then to his children.' Then I asked her if she would want me to use her that way. I said, 'This property was ours. You know you told me when we first bought this property, when we entered into this that this property was to be community property. It is ours, not yours. It is ours. Now,' I said, 'do you think that is using me right?' She burst out crying, and I hugged her up and I said, 'We will not talk no more about it,' and we didn't. We had another talk about ten days before she died, she said, 'Jimmy, I want to talk with you,' she said, 'everything is all right and I don't want you to feel hard toward me.' I said, 'No, I don't.' She said, 'Now, everything is all right;' she said, 'This property has been all fixed up, everything has been settled and everything is yours,' and she says 'Edward will turn everything over to you as quick as I am gone.' " In this same conversation he tried to prevail upon his wife to transfer title to him, but she said, "No, he will turn everything over to you as quick as I am gone." In another conversation with his wife, in the presence of Mrs. Goodwin, who was a sister of the plaintiff, the plaintiff testified: "She told me, 'Jimmy, everything is yours. Now everything is all right,' and she said, '* * * you don't believe me, but Edward has promised faithfully that he will turn everything over to you as quick as I am gone. Now,' she said, 'everything is all right.' I turned then and went out of the room." The above conversation took place in the room where Mrs. Durrell was lying sick. Mr. Bacon, the brother of Mrs. Durrell, went into the sick room, and, when he came out, he slapped plaintiff on the shoulder and said: " 'Jimmy, don't bother her * * * as quick as she is gone I will turn everything over to you * * *.' I said, 'Come here, I want to talk to you. * * *' Just as we got into the other room the doorbell rang and I went to the door and I never had any more conversation. In the conversation when we were figuring how to obtain money to buy the place and we were talking of the thousand dollars coming from Will Bacon, Mrs. Durrell said, 'Now, this thousand dollars coming from Will,' Will lived with us for a year or more and she said, 'Now, we took care of him and done the very best we could. No,' she said, 'Jimmy that is community property. It goes to buy this home.' My wife always spoke of this property as ours." There was also a further conversation between the plaintiff and his wife in the presence of a Mr. Patterson, a builder, in which conversation Mrs. Durrell said that she was very sick and that "when she was gone it would all belong to Jimmy." She repeated that two or three times. The subject under discussion at that time was putting a building on this lot. There was also a conversation between a Mrs. Daisy Howard, a niece of Mr. Durrell, and also another conversation with a Mrs. Warboin, in which Mrs. Durrell said in effect that all of the property would belong to Jimmy when she was gone.

We have set forth at considerable length the evidence, including several conversations, so that we may pass upon the objections made by the appellants.

[1] Appellants contend that the parol testimory above set forth varies the terms of the written instrument by which Anna Durrell received title to the land, and that under section 164 of the Civil Code the presumption arises that the property conveyed to Anna was her separate property, and such presumption is conclusive. Appellant has cited a number of cases in support of this claim; the principal one being Donze v. Donze, 88 Cal. App. 769, 264 P. 294, which involved the division of property in a divorce action. The husband contended that a certain piece of property consisting of a lot of land was community property. The evidence disclosed that it had been conveyed to his wife by a third person, under the specific direction of the husband; it was conveyed to her as her separate property, and he had a clause inserted in the deed for that particular purpose, and he stated that it was a gift to his wife. Under such circumstances, the court held that the property was, under section 164 of the Civil Code, conclusively presumed to be her separate property as a gift because of the intent of the husband that it should be her separate property.

In the case at bar there is substantial evidence that the plaintiff never knew that the deeds conveying the real estate to his wife contained a recital that it was her separate property, until he was so informed during the progress of the first trial of this action. In each conversation the plaintiff had with his wife on the subject, the latter told him that the property belonged to the community. The evidence above cited also shows that the property was paid for partly with the separate funds of the husband, partly with the separate funds of the wife, and the larger part from the community funds of both, and that it was intended and agreed by the husband and wife that it should be community property. We think the case of Fanning v. Green, 156 Cal. 279, 104 P. 308, 310, is in point. It is there said: "It is clear that there can be no executed gift in the absence of any intention to give on the part of the donor. It is true that the facts and circumstances of a transaction may be such as to practically compel the conclusion that a gift was intended, and to render worthless any subsequent statement to the contrary on the part of the donor. But no such effect, we are satisfied, must necessarily be given to the mere fact that, in the case of the purchase of real property with community funds, the husband has directed that the deed shall run to the wife as grantee. There is nothing in the nature of such a fact that renders it consistent only with the theory of gift, and other facts and circumstances may so tend to show another reason than the desire and intent to make a gift as to furnish ample warrant for a conclusion that no gift was intended, and therefore that there has been no 'executed gift.'" It is further said on page 283 of 156 Cal., 104 P. 308, 311, of the case last cited that: "The well-settled rule is, as stated in Nilson v. Sarment, 153 Cal. 524, 530, 96 P. 315, 317, 126 Am. St. Rep. 91, 'where a husband purchases property with community funds, and directs the conveyance to be made to his wife, with the intent to make it her separate property, the deed will operate to vest the property in her as her separate estate.' The 'intent' to make it hers, her separate property, is a material factor in such a case, and while such intent may, and possibly must, be inferred where there is no other evidence than that showing the mere direction by the husband, it may also be shown not to have existed by any competent evidence." The further citation from Fanning v. Green, supra, applies in the instant case: "In the case at bar there is, in our opinion, other evidence that fairly and reasonably warrants an inference on the part of the trial court to the effect that no gift was intended. The indirect evidence by which the presumption of separate property may be controverted may consist in part of inferences (Code Civ. Proc., § 1957), deductions 'which the reason of the jury' (or trial judge) 'makes from the facts proved' (Code Civ. Proc. § 1958)." See, also, Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838; Durrell v. Bacon, 119 Cal. App. 31, 5 P.(2d) 961; In re Estate of Cronvall (Cal. Sup.) 31 P.(2d) 372. In each one of the foregoing cases, parol evidence was admitted for the purpose of disputing the presumption of section 164 of the Civil Code that, where the instrument contains a provision that the property is conveyed to a married woman as her separate property, it is in fact property of the community. Under the rule established by the foregoing cases, we are of the opinion that the parol evidence here admitted was properly admitted for the purpose of proving that it was community property."

[2] Appellants' claim of laches on the part of the plaintiff does not appeal to us as being sound because his wife did not claim the property as her separate estate until shortly before she died. Further, it was not called to the attention of the plaintiff and he did not know that there was inserted in the deed to his wife from Mrs. Bacon a clause stating that it was her separate property.

[3] Appellants also complain that the conversations between Mr. and Mrs. Durrell were privileged communications under the provisions of subdivision 1 of section 1881 of the Code of Civil Procedure. Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P. 67, we believe, is analogous in this behalf to the present case, and is authority for the admission of the evidence objected to in this case.

The evidence admitted being competent to prove the source from which the purchase price of the property was derived, and also that it was not the separate property of the wife, such evidence was competent in an ordinary action to quiet title.

[4] The parol evidence having been properly admitted, the record discloses the following state of facts: That the property was purchased with both the separate and community funds of both husband and wife, and under an agreement between them that it should be community property, and title was taken both in the name of Mrs. Bacon and in the name of the wife as a matter of convenience. Under such circumstances, the judgment must be affirmed, and it is so ordered.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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138 Cal.App. 461

LAUTRUP v. LOS ANGELES LIME CO.

Civ. 9494.

District Court of Appeal, Second District,
Division 2, California.
May 8, 1934.

1. Appeal and error 🔑782.

Since there is no right to appeal from order denying new trial, attempted appeal therefrom was dismissed.

2. Appeal and error 🔑1011(1).

In intersectional automobile collision case, where evidence conflicted greatly as to alleged negligence of both parties, reviewing court was required to accept conclusions of trial court.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Nels Lautrup against the Los Angeles Lime Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Gerald Willis Myers, of Los Angeles, for appellant.

Knight & Reynolds, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

[1] This cause concerns an action for damages resulting from an automobile collision within a street intersection. At the trial and on motion for a new trial, the defendant below prevailed and plaintiff below has appealed from the judgment and from the order denying the motion for a new trial. As there is no appeal from the order denying a new trial, the attempted appeal therefrom is dismissed.

Appellant's (plaintiff below) opening brief is on file and we are now considering a motion to dismiss the appeal or affirm the judgment on the ground that the questions raised have no substantial support in the evidence or the law.

[2] There is on file an affidavit of newly discovered evidence. The claimed discovery is cumulative only of evidence adduced at the trial and not substantially disputed. There is great conflict in the evidence as to the alleged negligence of both parties to the action and we must, therefore, accept the conclusions of the trial court.

Judgment affirmed.

We concur: CRAIG, J.; SCOTT, Justice pro tem.

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138 Cal.App. 108

Ex parte FARUQI.

Cr. 2532.

District Court of Appeal, Second District, Division 2, California.

May 5, 1934.

Habeas corpus 🔑30(1).

Alleged error in receiving defendant's admissions *held* not reviewable on habeas corpus, where facts did not support contention that such admissions were only evidence of corpus delicti.

◆

Application by Jamal Effel Faruqi for a writ of habeas corpus prayed to be directed to the sheriff of Los Angeles county to secure release of petitioner on ground of improper receipt of evidence.

Writ discharged, and petitioner remanded.

Modifying opinion 31 P.(2d) 1092.

Henry L. Knight, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM.

The opinion heretofore filed herein is modified by striking the last paragraph and inserting in lieu thereof the following:

The facts do not support the contention that the admissions of petitioner were the only evidence of the corpus delicti, and therefore the point made is not before us.

The writ is discharged, and petitioner remanded.

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138 Cal.App. 502

PEOPLE v. CUVAS.

Cr. 264.

District Court of Appeal, Fourth District, California.

May 11, 1934.

Criminal law 🔑1182.

Conviction would be affirmed where no appearance was made for accused and no brief was filed in his behalf (Pen. Code, § 1253).

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Pedro Cuvas, also known as Pedro Cuevas, was convicted of a criminal charge, and he appeals.

Affirmed.

A. Fairchild, Fred Wallace, and E. G. Langford, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, Justice.

The clerk's and reporter's transcripts were filed in the office of the clerk of this court on March 8, 1934. The case was placed on the calendar, called April 10, 1934, and was continued to May 8, 1934. No appearance was made for appellant and no brief has been filed in his behalf. The Attorney General moved to affirm the judgment under the provisions of section 1253 of the Penal Code. The motion is granted.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

138 Cal.App. 487

BRIGGS v. KOYER.

Civ. 9304.

District Court of Appeal, First District, Division 2, California.

May 10, 1934.

Hearing Denied by Supreme Court July 9, 1934.

1. Automobiles 🔑208.

Motorist first entering intersection at lawful speed had right of way over automobile approaching from right (Deering's Gen. Laws Supp. 1925–1927, Act 5128, §§ 113, 131).

2. Automobiles 🔑208.

Motorist seeing automobile 200 feet away approaching at 30 to 50 miles an hour *held* not bound to keep such automobile within view while crossing intersection (Deering's Gen. Laws Supp. 1925–1927, Act 5128, §§ 113, 131).

3. Automobiles 🔑206.

Rule that nonanticipation of danger arising only from another's violation of duty is not negligence is peculiarly applicable to vehicles crossing each other's path in intersection.

4. Automobiles 🔑245(80).

Negligence of motorist seeing automobile approaching 200 feet away and proceeding across intersection without again observing automobile *held* for jury (Deering's Gen. Laws Supp. 1925–1927, Act 5128, §§ 113, 131).

◆

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Stanley H. Briggs against A. S. Koyer. Judgment for plaintiff, and defendant appeals.

Affirmed.

John T. Gose and Leo F. Falder, both of Los Angeles, for appellant.

Rosecrans & Emme, of Los Angeles, for respondent.

STURTEVANT, Justice.

This is an action to recover damages for injuries suffered in an automobile collision. The trial court made findings in favor of the plaintiff, and, from the judgment entered thereon, the defendant, Koyer, has appealed.

Third street in Los Angeles runs east and west. Gramercy place runs north and south and intersects Third street at right angles. On the east side of Gramercy, Third street has considerable grade up toward St. Andrews. The southeast corner of Gramercy and Third consists of elevated ground on which the trees and buildings are so located that the view of the drivers of vehicles is decidedly limited looking from one street into the other.

[1-4] At about 5 o'clock in the afternoon on Saturday, the 18th day of May, 1929, the plaintiff was driving northerly along Gramercy place. He so continued until he was near Third street. He had been traveling 15 to 20 miles an hour. When he had approached to within 5 feet of the southerly line of Third street, looking across the corner, he saw the defendant's car, a Marmon sedan. He then slowed down not quite to a stop. At that time the defendant's car was 200 feet east of Gramercy place. The plaintiff estimated that he had time to get across the intersection, and he started. When the front wheels of his car were about 5 feet south of the north boundary of West Third street, the impact occurred. After he entered the intersection, he did not apply his brakes, but drove forward. When plaintiff saw the defendant's car, it was at the top of the incline and 200 feet east of the intersection. The plaintiff did not again observe the defendant's car until the time of the crash. At the time he noticed the defendant's car, the witness could not state whether it was going 50 miles or 20 miles. His final statement in that regard was that he estimated it was going between 30 and 50 miles an hour. After the plaintiff estimated that he had plenty of time to cross the intersection, he then disregarded the defendant's car. At the time he estimated the defendant's speed, the plaintiff did not know a collision was imminent.

The defendant states that the doctrine of comparative negligence is not recognized in California in a case of this nature, and, if the negligence of the plaintiff directly contributed to the injury, he is barred from recovery. Both propositions will be conceded for all of the purposes of this case. The defendant next asserts that, when the plaintiff saw the defendant's car 200 feet away, coming down hill at a rate of speed the closest estimate of which he could make was from 30 to 50 miles per hour, and plaintiff crossed to the other side of the street without taking another look in the direction from which danger was to be anticipated, under those circumstances plaintiff was guilty of negligence that continued down to the time of the accident and directly contributed to the injury. In other words, the defendant claims that the plaintiff was guilty of contributory negligence as a matter of law. His last point is closely allied to the one just stated. He asserts that, where one voluntarily fails to do that which the law commands him, he is guilty of contributory negligence as a matter of law and a judgment in his favor cannot stand. We think the vice in the defendant's contention rests in the assumption that the rules of law on which he relies are applicable to the facts of this case. The provisions of the California Vehicle Act, as they were worded at the time this accident occurred, are set forth in Deering's Consolidated Supplement, 1925–1927, p. 1508, Act 5128. Section 113 provides: "*Restrictions as to speed.* * * * (b) * * * 2. Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection." Section 131 provides as follows: "*Right of way.* (a) When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed."

From what we have said in the statement of facts, it is clear the plaintiff had the right of way. It is also clear that at the same time the plaintiff was obeying the law in every respect. As the defendant approached the intersection described above, it became his duty to slow down and not to traverse the intersection at a speed in excess of fifteen miles per hour. "The evidence showing that the plaintiff's vehicle was being operated at a lawful speed and on the right side of the street a recovery is sustainable on a showing that, * * * being on the left, his car entered the intersection of the ways of travel in advance of the defendant's vehicle. The plaintiff is said under these conditions to have the right of way." Cal. Jur. 1928 Supp. pp. 157–158. Before the plaintiff started to enter the intersection, he looked up the hill and saw the defendant approaching. Thereafter he proceeded to cross the intersection. The defendant complains because the plaintiff did not constantly keep the defendant within his vision. He was not bound to do so. In Crabbe v. Rhoades, 101 Cal. App. 503, at page 519, 282 P. 10, 16, the court quoted with approval as follows: "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another." That rule is peculiarly applicable to vehicles crossing each other's path in intersections. Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203; Carbaugh v. White Bus Line, 51 Cal. App. 1, 195 P. 1066; Swartz v. Feddershon, 92 Cal. App. 285, 268 P. 430; Olsen v. J. J. Jacobs Motor Co., 99 Cal. App. 423, 278 P. 1051; Keyes v. Hawley, 100 Cal. App. 53, 279 P. 674; Kienlen v. Holt, 106 Cal. App. 135, 288 P. 866; Jacobsen v. Vaughn, 131 Cal. App. 277, 21 P.(2d) 141. Similar facts were involved in Page v. Mazzei (Cal. App.) 299 P. 119. After decision by the District Court of Appeal, that case was transferred to the Supreme Court, and its decision in the same litigation is reported Page v. Mazzei, 213 Cal. 644, 3 P.(2d) 11. Each of the foregoing cases is to the effect that the question as to the negligence of the plaintiff under the facts stated by us is one of fact and that the determination by the trier of the facts is conclusive on appeal.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

McALLISTER v. UNION INDEMNITY CO.*

Civ. 5097.

District Court of Appeal, Third District, California.

May 8, 1934.

Hearing Granted by Supreme Court July 5, 1934.

1. Judgment 🔑253(1).

In action for breach of employment contract, where court found that parties entered into agreement canceling employment contract, but that defendant did not pay plaintiff sum specified in cancellation agreement, judgment for plaintiff for sum due under cancellation agreement was unauthorized, since plaintiff was required to recover on cause of action alleged.

2. Pleading 🔑244.

In action for breach of employment contract, notwithstanding special defense that contract sued upon was canceled was deemed controverted under statute, plaintiff could

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*For subsequent opinion see 42 P.2d 305.

not recover sum owing him under cancellation agreement without amendment of complaint (Code Civ. Proc. § 462).

◆

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by A. Hall McAllister against the Union Indemnity Company. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Kidd, Schell & Delamer, of Los Angeles, for appellant,

W. I. Gilbert, of Los Angeles, for respondent.

RANKIN, Justice pro tem.

As stated in respondent's brief, this action was instituted by plaintiff to recover from defendant the sum of $7,766.33, together with interest, as the measure of his damage arising out of an alleged breach of contract for his employment for a period of one year at an annual salary of $11,000, payable in equal semimonthly installments.

The amended complaint sets out the making of such contract about the 16th day of August, 1928, the performance of the contract for a period of one month by both parties thereto, and alleges a breach of the contract by plaintiff's employer on September 15, 1928. Material allegations of the complaint are denied in the answer, and defendant pleads as a second and separate defense that a recovery by plaintiff is barred by the provisions of subdivision 1 of section 1624 of the Civil Code. Defendant also as a third defense alleges that said contract was mutually canceled and rescinded on or about the 15th day of September, 1928.

The grounds for the motion for nonsuit were not so specifically stated as to justify a discussion of the motion in view of the fact that the judgment must be reversed upon a consideration of the entire record.

[1] The court found that the parties entered into the contract of employment and that the terms thereof were as hereinabove stated, and further found as follows:

"VI. That thereafter and on or about the 15th. day of September, 1928, the plaintiff and the defendant entered into an oral contract whereby and by the terms of which said contract of employment was mutually cancelled, rescinded and terminated as of said date and of said time, and that thereafter the plaintiff ceased to be an employee of the defendant and ceased to render any services to the defendant.

"VII. That under and by virtue of the terms of said contract so cancelling and terminating said contract of employment, the defendant agreed to pay to the plaintiff the sum of $500.00, representing the removal expenses of the plaintiff from said Los Angeles to said San Francisco, and further agreed to pay to the plaintiff an amount equal to six weeks' salary at the rate of $11,000.00 a year, and that the plaintiff agreed to accept said $500.00 and said six weeks' salary.

"VIII. That the defendant did pay to the plaintiff and the plaintiff did accept the said sum of $500.00, but that the defendant has not paid to the plaintiff the said sum equal to said six weeks' salary or any part thereof.

"IX. That it is not true that the defendant at any time wrongfully discharged the plaintiff."

Evidence offered by plaintiff, and the findings of the court to the effect that the cancellation agreement was entered into and that defendant did not at any time discharge the plaintiff, show conclusively that plaintiff had no legal right to recover upon the alleged contract. The court finds the execution and breach of an entirely different contract. The contract alleged in the complaint is a contract of employment, while the agreement upon which the judgment is based is one entered into by the parties at a later date and after part performance of the original contract, terminating the contract of employment under certain conditions and considerations not mentioned or alleged in the pleadings. The plaintiff must recover, if at all, upon the cause of action alleged and not upon some other which may appear from the proofs. Bailey v. Brown, 4 Cal. App. 515, 517, 88 P. 518; Shenandoah M. Co. v. Morgan, 106 Cal. 409, 417, 39 P. 802; Davis v. Pac. Tel. Co., 127 Cal. 312, 321, 57 P. 764, 59 P. 698.

[2] There was not only a variance between the proof and the allegations of the pleadings, but a failure to prove the cause of action alleged. Respondent had the opportunity to amend, but failed so to do, and takes the position that, under the provisions of section 462 of the Code of Civil Procedure, the special defense that the contract sued upon was canceled and rescinded is deemed controverted by the opposite party. To that extent his position is sound, but he further contends, in effect, that the special defense, having been pleaded by defendant and denied by plaintiff, raises an issue upon which plaintiff may recover by proving his own cause of ac-

tion to be groundless. Appellant puts himself in the anomalous position of invoking the statute to deny a defense set up by respondent, and in the next breath asserting the right to affirmative relief based upon the issue raised by his own denial. It does not follow that he can upon that state of the pleadings admit the cancellation and prove the terms and conditions of the new contract and recover thereon. The fallacy of his position is apparent for the reason that the defendant in the action was deprived of his right to be informed by the plaintiff's pleadings of the matters he was called upon to defend against, and was deprived of his right to plead all the defenses he may have. Appellant was not called upon to anticipate the proof of a contract not alleged in the complaint and plead his defenses to such contract. Neither the pleadings nor the findings material to the issues support the judgment entered.

The judgment is reversed, and the trial court is directed to enter judgment for the defendant in accordance with the views herein expressed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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138 Cal.App. 473

PEOPLE v. ROSALES.

Cr. 2500.

District Court of Appeal, Second District, Division 2, California.
May 9, 1934.

1. Criminal law 🔑1170½(5).

In prosecution for violation of Narcotic Law, cross-examination of defendant regarding meeting of drug addicts in park and purchase of narcotics from named narcotic dealer, if improper, *held* not prejudicial (St. 1929, p. 380, as amended).

> Cross-examination of defendant in matters complained of was not prejudicial, in view of fact that defendant had already placed before jury practically the same matter and that the jury, upon consideration of the entire record, could not have reached a different verdict, and court was not requested to admonish or instruct jury to disregard alleged improper cross-examination on part of district attorney, or the questions asked.

2. Poisons 🔑9.

In prosecution for violation of Narcotic Law based on sale of heroin of prohibited strength, evidence supported conviction (St. 1929, p. 380, as amended).

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Edward Rosales was convicted of a violation of the State Narcotic and Drug Act, and of a prior conviction, and he appeals.

Judgments, and orders denying motion for new trial, affirmed.

A. P. Coviello, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appeal by defendant from judgments of conviction entered on verdicts of guilty on two counts charging violations of the State Narcotic and Drug Act (St. 1929, p. 380 as amended) and a prior conviction, and from orders denying his motion for a new trial.

Police officers of Los Angeles were advised by an informant that he had purchased narcotics from defendant. The officers then went to a park where such purchases were said to have been made and for several days observed defendant, there meeting several known addicts. Satisfying themselves that the informant had no narcotics in his possession, they gave him $2.50 in marked money and took him to the park rendezvous. After a few minutes the watching officers saw defendant approach such informant, talk with him, and receive from him the marked money. Following a short conversation defendant left the informant, met some other men in the park, and disappeared, reappearing about forty minutes later in an automobile. The informant and a man named Saldivar then approached the car, and the officers saw defendant hand something to each of them, whereupon the arrest was made. As defendant stepped from the car six "bindles" of heroin dropped to the running board. The officers took another "bindle" from the hand of the informant. The second man was arrested by an officer who saw him throw another "bindle" to the ground. The marked money was found in defendant's shirt pocket, and a chemical analysis of the contents of the eight packages so recovered showed it to be heroin of a prohibited strength.

In cross-examining the officer who arrested defendant, the latter's counsel brought out the fact that such officer told defendant that he (defendant) was peddling narcotics for a Mr. Rossi, that the informant had been buying narcotics from defendant, and that the officer had watched defendant meet known addicts for two days prior to the arrest. Defendant took the stand and in effect denied knowledge of the narcotics produced at the trial or of selling any, testifying that the $2.50 was given him by the informant to buy oil and gas for a truck to be used to get two barrels of wine from out of the city. On cross-examination and without objection he was asked about the rendezvous at the park and meeting addicts there, and about Rossi. He was asked if Rossi was not a narcotic dealer from whom he purchased narcotics. Objection was made to this on the ground that it was not proper cross-examination and the objection was overruled. Asked if Rossi did not hire his attorney and was not the man who told the officers defendant bought narcotics in "ten bindles" at a time, counsel for defendant urged that such question constituted misconduct on the part of the district attorney; the court overruling such objection. Later on, however, the arresting officer was asked on cross-examination if he knew Rossi and if he saw him at the preliminary hearing of defendant, to which counsel for defendant made another assignment of misconduct in asking such question. The court struck the latter questions and answers on its own motion and instructed the jury to disregard them.

[1] In view of the testimony given by the defendant on direct examination, great latitude on cross-examination was permissible. Some of the questioning of defendant objected to had a bearing on the direct testimony given and tended to contradict, weaken, or modify such testimony. Some of the questions did not, however, and in our opinion should not have been asked. In view of the fact that appellant by his own cross-examination had already placed before the jury practically the same matter, we fail to see how it could be said that he was prejudiced; and considering the entire record, including the evidence, we do not see how the jury could have reached a different verdict. The court was not requested to admonish or instruct the jury to disregard such conduct on the part of the district attorney, or the questions asked, and under the circumstances and for the same reason no prejudice resulted because the objections made were overruled.

[2] Appellant urges that there is no evidence that a sale was made. We think the evidence produced is very conclusive in that respect. It is not urged that the evidence of possession, charged in the second count, is not sufficient.

Judgments and orders affirmed.

We concur: **STEPHENS, P. J.; DESMOND, J.**

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138 Cal.App. 505

CLARK v. POLICYHOLDERS' LIFE INS. ASS'N.

Civ. 1278.

District Court of Appeal, Fourth District, California.

May 11, 1934.

1. Payment 🔑6.

In absence of agreement or stipulation to contrary, debt is payable at place where creditor resides or wherever he may be found, and debtor must seek his creditor to pay indebtedness.

2. Insurance 🔑596.

Where life policies were silent as to place where payments were to be made to beneficiary upon insured's death, general rule governing payment was applicable, and proceeds of policies were payable in county of residence of beneficiary.

3. Insurance 🔑146(3).

Any uncertainty existing in contract of insurance is to be construed most strongly in favor of insured.

4. Venue 🔑7.

Action by named beneficiary of life policies upon insurer's refusal to make payment thereunder after insured's death *held* maintainable in county of beneficiary's residence on theory that breach of contract by insurance corporation occurred in that county (Const. art. 12, § 16).

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Maude M. Clark against the Policyholders' Life Insurance Association.

From an order denying a motion for a change of venue, the defendant appeals.

Order affirmed.

Charles D. Warner and Thomas W. Hughes, both of Los Angeles, for appellant.

J. A. Chase, of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for a change of venue to Los Angeles county in an action filed by the respondent in Tulare county to recover, as beneficiary, under two policies of life insurance issued by the appellant. The appellant's principal place of business is in Los Angeles, and the policies were applied for by the respondent's husband and delivered to him in that county on May 16, 1931. At that time the insured was a resident of Los Angeles county, but, at his subsequent request, notices of premiums, assessments, and dues were sent by the appellant to him at his address in Visalia, Cal., from June, 1931, until the time of his death. While he died in Los Angeles on February 25, 1933, he then was and for many months had been a resident of the county of Tulare. The respondent has resided in Visalia since June, 1931.

It is appellant's contention that these contracts of insurance were made and were to be performed in the county of Los Angeles; that the obligation or liability, if any, arose in that county since the insured died there; and that it necessarily follows that the breach of the contracts, if any, occurred in that county.

Article 12, § 16, of the Constitution reads as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

It may be assumed that these contracts were made in Los Angeles county, Saito v. Policy Holders' Life Insurance Ass'n, 132 Cal. App. 412, 22 P.(2d) 724, and, further, that the obligation or liability arose there, this being the place where the insured died. Washington v. Policy Holders' Life Insurance Ass'n, 130 Cal. App. 43, 19 P.(2d) 516; Robinson v. Order of Ry. Employees, 53 Cal. App. 404, 200 P. 87; McKenzie v. Los Angeles Life Insurance Co., 96 Cal. App. 386, 274 P. 384. It does not follow, however, that an action based thereon must be filed in that county since the constitutional provision also permits the same to be filed where the breach occurred. The question here presented is as to whether such a breach occurred in Tulare county.

[1-4] The contracts sued on are practically identical and the only provision material here reads as follows: "The Association hereby agrees to pay to Maude M. Clark, wife, the beneficiary hereunder, the sum of Fifteen Hundred Dollars in cash following the receipt of due proof of the death of the member, or Policyholder, in good standing. * * *" The appellant relies upon the case of Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273, 277. In that case, involving the place where payments under a certain insurance policy were to be made, it was held that an express provision in the policy making the ordinary death benefit payable at a designated place sufficiently disclosed the intention of the parties that all payments coming due under the terms of the policy should be paid at the place named. The opinion in that case quotes from 6 Ruling Case Law 902, as follows: "The intention of the parties to a contract as to the place where payments are to be made usually appears by express provision, or necessary inference in the contract itself. In cases where the intention does not thus appear, the general rule is that the debtor must seek his creditor to make payment of his indebtedness. * * * While it is a rule of general acceptation that a debtor must seek his creditor to pay his indebtedness, it is always open to the parties to show by the express terms of the contract, or by fair inference therefrom, that it was the intention of the parties to pay at a particular place or within a particular state or country."

In the case now before us, the contract is entirely silent as to the place where payments are to be made and the intention of the parties in this regard does not appear in the contract by express provision or by necessary inference. In such a case we see no reason why the general rule referred to in Burr v. Western States Life Ins. Co. should not apply. As stated in the dissenting opinion in that case: "The general rule is stated in 48 Corpus Juris, at pages 592, 593, with an abundance of supporting authorities, as follows: 'As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides * * * or wherever else he may be found; and it is ordinarily the duty of the debtor to seek the creditor for the purpose of making payment, provided the creditor is within the state of his residence when the payment is due, unless otherwise provided by statute.' It is not otherwise provided by statute in this state. Moreover, section 1489 of the Civil Code specifically provides that in the absence of an express provision to the contrary an offer of performance may be made at the option of the debtor '1. At any place appointed by the creditor; or, 2. Wherever the person to whom the offer ought to be made can be found.' In this case the creditor elected to have the payment at his place of residence, known to the debtor. * * * He could be found there and that was the appropriate place for tender of payment in order to discharge the obligation of the debtor. 24 Cal. Jur. p. 521. Having failed to make tender of payment at the creditor's place of residence, a breach of the debtor's promise to pay occurred at that place, and under section 16 of article 12 of the Constitution the defendant could be sued at that place, no other place of payment being stipulated."

The same general rule was applied in Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L. R. A. 90.

That this rule should also be applied to payments due under insurance policies which are silent as to the place of payment is in accord with another general rule applying to such contracts, that any uncertainty existing therein is to be construed most strongly in favor of the insured. The very nature of a policy of insurance strongly implies that in the event of a loss within its terms, the amount coming due will be delivered to the beneficiary. The most reasonable inference is that this delivery is to take place where the beneficiary resides or is to be found. Common experience and usual custom are in accord with such a procedure. To assume that the parties to an insurance contract intended a situation directly opposite to that existing in connection with other forms of contract, in the absence of anything in or out of the policy to indicate such an intention, seems to us to be an unwarranted assumption. Such an intention should not be ascribed to the insured and if the insurer had so intended it would have been a simple matter to so provide in the contract prepared by it.

We conclude that in the absence of any agreement this debt was payable where the creditor resides and may be found, that a breach of the contract occurred in that county, and that the order made is sustained by the facts.

For the reasons given, the order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS. J.

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138 Cal.App. 476

FREDERICK SAGE & CO., Limited, v. ALEXANDER & OVIATT CORPORATION.

Civ. 8228.

District Court of Appeal, Second District, Division 2, California.
May 9, 1934.

1. Arbitration and award 🔑73.

In action for breach of warranty of store fixtures manufactured in Paris for use in California, objection that experts, who testified that checking and cracking of veneer on fixtures was caused by poor workmanship and materials, had no experience in manufacturing fixtures in Paris, could not be urged on appeal where not made at hearing before arbitrators, and where findings on which award of arbitrators was based did not involve question of familiarity with methods of manufacture in Paris.

2. Sales 🔑273(2).

Where manufacturer sold store fixtures to be manufactured in Paris for use in California, manufacturer impliedly warranted against latent defects growing out of manufacture of fixtures and that fixtures were reasonably fit for purpose intended (Civ. Code, §§ 1769, 1770).

3. Sales 🔑55.

Where action was brought in California on contract made in Paris, France, for sale of store fixtures to be used in California requiring delivery on rail at Paris, controversy would be determined according to California law, in absence of showing that different law should be applied.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Frederick Sage & Company, Limited, against the Alexander & Oviatt Corporation. From an adverse judgment, plaintiff appeals.

Affirmed.

Janeway, Beach & Hankey, of Los Angeles, for appellant.

Courtney Lacey, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Appeal by plaintiff from a judgment entered upon the findings and award of two of three members of a board of arbitration, the arbitration being agreed to by stipulation of the parties and carried out under the provisions of the Civil Code.

Appellant's contention is that the evidence does not support the award of the arbitrators, in this:

First. The evidence is insufficient to sustain the findings that the defects which developed in the fixtures were due to poor workmanship or inferior materials.

Second. That plaintiff neither warranted the fixtures, nor was there any implied warranty that the fixtures would serve any particular purpose of the buyer.

In August, 1927, plaintiff and defendant entered into a contract in Paris, France, whereby plaintiff agreed to manufacture and deliver to defendant at Paris certain store fronts, ceilings, and store fixtures, which were to be installed by defendant in its new store then being constructed in Los Angeles. Mr. Alexander, president of defendant corporation, was then in Paris, where, under the guidance of representatives of plaintiff, he was shown store fronts and fixtures manufactured by the latter. Desiring to have in his new store fixtures similar to those shown him in Paris, plaintiff's representatives were commissioned to make the necessary drawings and specifications for the equipment. By the terms of the contract defendant was to pay $106,920 in twenty-four monthly installments.

When the fixtures were received in Los Angeles and installed, no defects of any kind appeared either in the material or workmanship. Defendant for nine months after the installation made the monthly payments provided by the contract.

However, early in 1929 the veneer on some of the cases began to check, blister and crack. In some instances it came loose from the cores. Doors and drawers became warped so as to make it difficult and in some cases impossible to close them. Mouldings and other decorative parts of the fixtures became loose and large cracks developed at the joints of the mouldings. In February, 1929, defendant wrote plaintiff advising it of these defects which had developed, and stated that no further payments would be made under the contract until the defects in question had been repaired.

After attempts to adjust matters had failed, plaintiff filed suit to collect the balance unpaid on the contract. Defendant thereupon moved for an order of court requiring plaintiff to submit the disputed matters to arbitration as provided in the contract.

Arbitration proceedings under the provisions of the Civil Code were agreed to, and the three arbitrators proceeded to examine the fixtures and take evidence bearing upon the controverted matters. In due course findings and award were made, signed by two of the arbitrators, allowing defendant $44,800 as damages due to the defects claimed. Appellant makes no objection to the allowance of $8,800 of this amount, but does vigorously contest the allowances of $36,000 which the arbitrators found was damages suffered by defendant because "plaintiff failed to manufacture said articles in a good and workmanlike manner and free from latent defects growing out of the process of manufacture, and failed to comply with said contract in the following particulars, to-wit." The findings then proceed with a statement of ninety-one specified items wherein defects had developed and which were attributed to poor workmanship, or poorly seasoned material.

In due course defendant moved the court to confirm the award while plaintiff in turn moved to vacate it. Upon a hearing of both motions, the court denied the motion to vacate and ordered judgment confirming the findings and award.

Appellant argues at length that there is no substantial evidence in the record to support the findings that the defects specified were due to poor materials used, or poor workmanship, engaged in the manufacture. It may be suggested at this point that there is no contention that the defects specified did not in fact exist. Rather, appellant advances the theory that these defects were developed by the swelling caused by sea water coming in contact with the fixtures while in transit, and the subsequent drying in the summer heat of Los Angeles, or perchance by the extreme changes in the atmospheric conditions in Los Angeles from the dampness of winter to the extreme dry heat of summer.

The testimony bearing upon this phase of the case consisted in the main of opinions of experts as to the causes producing the unquestioned defects and their reasons for the conclusions stated. In addition, employees of plaintiff company testified as to the character of materials used and the method of workmanship employed in the manufacture of the fixtures. No useful purpose will be served in detailing this extended testimony. Suffice it to say that there was marked conflict in the opinions given as to what was the cause or causes of the defects. These were matters that necessarily called for opinion evidence.

[1] Appellant argues that the testimony of experts offered by respondent should be accorded little or no evidentiary value as against the testimony of its witnesses, because respondent's witnesses had never had any experience in manufacturing fixtures in Paris. If there is any merit in this contention, it is a matter that goes to the weight to be given their testimony. The arbitrators, sitting as a jury, were the sole judges of the weight to be given to this testimony. No objection was made at the time of taking testimony, nor before the trial court when hearing was had on the motion to confirm the award, that these witnesses were not competent to give expert testimony. Under these conditions appellant on appeal may not be heard to urge for the first time the lack of proper foundation for the expert testimony given without objection. On the merits of the question, however, it may be pointed out that the findings of the arbitrators that formed the basis for the award did not involve any question of familiarity with methods of manufacturing in Paris, but rather with the causes that produced the unquestioned defects.

After a careful review of the record, we are of the opinion that there is no merit in appellant's contention that the findings complained of do not find support in the evidence.

[2] Appellant's next point, that there was no implied warranty against latent defects growing out of the manufacture of the fixtures, is also without merit. Sections 1769 and 1770 of the Civil Code read as follows:

"§ 1769. Manufacturer's warranty against latent defects. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein."

"§ 1770. Thing bought for particular purpose. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

It is unquestioned that the fixtures sold were not then in existence but had to be manufactured, and that when made were to be installed and used in a high-class merchandising establishment in Los Angeles. But appellant argues "that conformity with these implied warranties is to be determined with reference to conditions existing at the place of delivery, which in the case at bar was on rail in Paris." The reason for the rule of implied warranties in the case where the seller is also a manufacturer, and a different rule where the seller is not the manufacturer, requires no amplification at this time. These reasons would apply with equal force wherever the articles are made.

[3] Plaintiff has seen fit to select California as the forum in which to press its claim. In the absence of any showing that a different rule should be applied, the controversy must be determined according to the law prevailing in this forum.

We are of the opinion that the judgment should be affirmed. It is so ordered.

We concur: STEPHENS, P. J.; CRAIG, J.

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138 Cal.App. 491

SPRAUL v. GARLIEPP & MACK et al. (FRIED, Intervener).

FRIED v. FARBSTEIN et al.

Civ. 5084.

District Court of Appeal, Third District, California.
May 10, 1934.

Hearing Denied by Supreme Court July 9, 1934.

1. Evidence 🔑413.

Oral testimony to explain bill of sale whereon by inclosure lines and caret seller indorsed that only particular property was subject to seller's use *held* not erroneously admitted as varying written instrument where on face of instrument it appeared that indorsement as to seller's use related only to particular property described in bill of sale.

2. **Evidence** ⚷448.

Oral evidence may be introduced to explain ambiguous instrument.

3. **Evidence** ⚷424.

Objection to oral testimony which varies written instrument can only be made by party to instrument or some one in privity with such party (Code Civ. Proc. § 1856).

4. **Estoppel** ⚷71.

Where assignee of claims sued in attachment and filed affidavit disclaiming lien or security, assignor could not thereafter assert that property on which claims were based was held by assignor as pledge for payment of debt to assignor.

Appeals from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Fred B. Spraul against Garliepp & Mack, a copartnership, and the partners individually, wherein Julius Fried intervened, and another action by Julius Fried against J. Farbstein and others. From judgment for intervener in the first action, plaintiff appeals, and from judgment for Julius Fried in the second action, the Standard Pipe & Supply Company appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON and TYLER, JJ., dissenting.

Raphael Dechter, of Los Angeles, for appellants.

Julius Fried, in pro. per.

Frankley & Spray, of Los Angeles, for respondent.

Mr. Justice pro tem. WEYAND delivered the opinion of the court.

By stipulation, the above actions are to be heard and determined in this court upon the record as made in the trial court in the two above cases.

Plaintiff Spraul is the credit manager of the Standard Pipe & Supply Company, and is the assignee of certain claims of the said company against defendant Garliepp & Mack, which account was for oil well and oil drilling machinery and supplies sold to Garliepp & Mack. Julius Fried was originally the holder of a mortgage upon the property involved, and on the 26th day of October, 1929, by the terms of a bill of sale executed by Garliepp and wife, said oil well and oil drilling machinery were conveyed to said Fried.

The claims of plaintiff Spraul and the Standard Pipe & Supply Company are substantially identical. The action wherein Spraul is plaintiff was an attachment suit against Garliepp & Mack, on an open account claimed to be owing by them to the company named. In this suit Garliepp defaulted, Julius Fried intervened, and in his complaint in intervention made claim to the property attached by virtue of the bill of sale of October 26, 1929.

The action of Spraul, Plaintiff, v. Fried was tried and a judgment was therein rendered in favor of Fried.

On November 4, 1929, Fried, plaintiff in the second suit, brought an action in replevin for the property involved. In this action judgment likewise went for Fried.

Appeals were taken in the two cases and, as before stated, by stipulation, the two cases were agreed to be presented together.

The principal issue to be decided in this case is the construction to be placed upon the bill of sale under which Fried claims title to the personal property in question.

This bill of sale was from Garliepp and wife to Fried. Certain of the property was in Santa Barbara county and certain of it was stored in the yards of the Standard Pipe & Supply Company, in the city of Los Angeles, reference to where parts thereof were situated being made. The bill of sale then proceeds as follows:

"Purchaser (Fried) does hereby agree with seller (Garliepp) that seller may use for a period of four months from the date hereof without any charge whatsoever, so much of said equipment as is now on that certain oil and gas lease known as the Donovan Lease, near Guadalupe, California, the same being now used by seller in the drilling of an oil well on said property."

On the side of said bill of sale, next to this above-quoted paragraph, and with inclosure lines and a caret pointing to said paragraph, there appears in the handwriting of Garliepp, this wording: "That J. F. Garliepp shall have full use of all the above mentioned property until his option expires."

Appellant seriously argues that the learned trial court committed prejudicial error in allowing oral testimony to explain the bill of sale, and further contends that the wording "That J. F. Garliepp shall have full use," etc., refers to any and all the property named in the bill of sale. The respondent claims that it refers but to the part of the property on the Donovan lease.

Mr. Garliepp was placed on the stand as a witness and was interrogated as to his purpose in making the indorsement on the side of the bill of sale. He was asked the following question:

"Mr. Garliepp when you wrote that writing on the second page of Plaintiff's Exhibit 3, what did you intend that to refer to?"

An objection was made which included that "the question tended to vary the terms of a written instrument."

This objection was overruled and the witness answered:

"The equipment referred to there was what we were using on the Donovan lease at Guadalupe."

[1] We think that appellant is wrong in this contention. In the first place, it would seem plain that on the face of the bill of sale, when Garliepp made the inclosure marks and the caret, which were directed to the paragraph relating to the property on the Donovan lease, he meant that this indorsement related only to that property. A reasonable inspection of the indorsement would lead to no other conclusion.

[2] Aside from this, if that indorsement is to be given any other interpretation, it would in some degree cause an ambiguity in the instrument. If the instrument is ambiguous, oral evidence may be given to explain the same.

[3] The objection here involved was made by Spraul and the Standard Pipe & Supply Company, and it is elementary that such an objection can only be made by a party to the instrument, or some one in privity with such party. Section 1856, Code Civ. Proc. In Greve v. Echo Oil Co., 8 Cal. App. 275, at page 279, 96 P. 904, 906, speaking of this subject, the Appellate Court approved this language: "Where the controversy is between a party to a written contract and one who is neither a party to it nor a privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict the writing does not apply. In such case neither the party nor the stranger to the contract is bound by the rule excluding parol evidence." In Gammon v. Ealey, 97 Cal. App. 452, at page 458, 275 P. 1005, point 5 of the Greve Case is approved. Many other cases to the same effect appear in the reports.

[4] Appellant further contends that the property in the yards of the Standard Pipe & Supply Company was held by them as a pledge for the bill of the company. No such defense was made by the company. Spraul, the assignee of the company, sued Garliepp in attachment, and filed the usual affidavit disclaiming any lien or security. Having waived the lien, if any it ever had, the company cannot now assert any such claim. Wingard v. Banning, 39 Cal. 543; Latta v. Tutton, 122 Cal. 282, 54 P. 844, 68 Am. St. Rep. 30; Gault v. Wiens, 32 Cal. App. 1, 161 P. 996.

The contention of appellant that the damages allowed were not only excessive, but contrary to the evidence, is wholly without merit.

We see no error in the rulings of the trial court, and the judgments of the trial court are affirmed.

We concur: **PULLEN, P. J.; R. L. THOMPSON, J.**

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138 Cal.App. 470

KLING et al. v. KIMBALL PUMP CO., Inc.

Civ. 9297.

District Court of Appeal, First District, Division 2, California.

May 9, 1934.

Rehearing Denied June 8, 1934.

Hearing Denied by Supreme Court July 5, 1934.

1. Courts 🔑121(7).

Superior court had jurisdiction to award judgment for defendant on cross-complaint, notwithstanding demand in cross-complaint was less than $2,000, where complaint, which was within court's jurisdiction, sought rescission of transaction in which note set forth in cross-complaint was given.

2. Sales 🔑53(3).

Buyers seeking to rescind conditional sale contract because of false representations *held* not entitled to verdict because evidence of representations was not contradicted, since buyers were required to prove not only making of representations, but also their falsity.

3. Appeal and error 🔑994(3).

Credibility of witness was for trial court trying case without jury.

4. Appeal and error 🔑1033(3).

Alleged error, in refusing to admit correspondence between parties during time that pump sold under conditional sale contract was in use, *held* not prejudicial to buyers seeking to rescind contract, where practically entire subject-matter in correspondence was covered by oral testimony, and correspondence had greater tendency to sustain seller's position than to sustain position of buyers.

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by D. G. Kling and another against the Kimball Pump Company, Incorporated, wherein defendant filed a cross-complaint. From a judgment denying plaintiffs relief asked in their complaint and awarding judgment for defendant on its cross-complaint, plaintiffs appeal.

Affirmed.

D. G. Kling and W. P. Hyatt, both of Los Angeles, for appellants.

Freston & Files, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiffs filed their "Complaint for rescission and damages." In the prayer of said complaint they asked for a decree declaring a certain conditional sales contract to be null and void and ordering defendant to return their promissory note for $512, together with the sum of $433 received by defendant under said contract. They also prayed for damages. Defendant answered denying practically all of the material allegations of the complaint. Defendant also filed a cross-complaint stating a cause of action upon said promissory note. The trial court entered judgment denying plaintiffs the relief asked in their complaint and awarding defendant the amount due under the terms of said promissory note. Plaintiffs appeal from the judgment so entered.

[1] Appellants first contend that the trial court erred in "rendering judgment against the plaintiffs on defendant's cross-complaint." They argue that the cause of action stated in the cross-complaint was one for less than $2,000 and that the superior court had no jurisdiction thereof. In our opinion this contention is without merit. The complaint sought rescission of the transaction in which the note set forth in the cross-complaint was given. The superior court had jurisdiction of the cause of action set forth in the complaint and therefore had jurisdiction of the cause of action set forth in the cross-complaint even though the demand in the cross-complaint was for less than $2,000. Sullivan v. California Realty Company, 142 Cal. 201, 75 P. 767.

[2, 3] Appellants also contend that the findings against plaintiffs and in favor of defendant are wholly unsupported by the evidence and that the trial court "permitted reversible error in refusing judgment for plaintiffs on their complaint." The controversy in this case arose over the sale under a conditional sale contract of a pump for use in a well on appellants' land. The pump was in use almost a year before appellants attempted to rescind. They claimed that certain representations had been made by respondent and its agent concerning said pump, which representations were false. Upon the trial evidence of said representations was given by appellants. The agent of respondent was not called as a witness and the testimony of appellants regarding the representations was not contradicted. It seems to be appellants' theory that they were therefore entitled to judgment. Their position is manifestly unsound, as they were required to prove not only the making of the representations but the falsity of said representations. Appellants sought to prove the falsity thereof by evidence regarding the manner in which the pump performed. There was some conflict on this subject. Respondent called as a witness a discharged employee of appellants whose testimony was in conflict with that of appellants. Appellants say that this witness' testimony "should be taken with several grains of salt," but the question of his credibility was one for the trial court. The main dispute here, however, arose over appellants' claim that the pump did not perform as represented by respondent and over respondent's claim that any failure of the pump to perform as represented was not caused through any fault of respondent or through any defect in the pump. Respondent took the position that such failure, if any, was caused either by reason of the manner of installation of the foundations for the pump, which foundations appellants were required to furnish under the terms of the contract, or the rapid lowering of the water level in the well or the negligent manner in which the pump was operated by appellants. A review of the record leads us to the conclusion that there was ample evidence to sustain respondent's claims and that the trial court was justified in finding that said pump "has at all times complied with and conformed to all of the warranties, representations and guaranties made by defendant and cross-complainant."

[4] It is further contended that the trial court "permitted reversible error in sustain-

ing defendant's objection to the letters between plaintiffs and defendant." The error, if any, in refusing admission to the correspondence had between the parties during the time that the pump was in use on appellants' land, does not appear to us to have been prejudicial to appellants. An examination of this correspondence shows that practically the entire subject-matter thereof was covered by oral testimony upon the trial and, furthermore, it appears that such correspondence would have had a greater tendency to sustain respondent's position than to sustain the position of appellants.

In contending that the trial court "permitted reversible error in denying plaintiffs' motion for a new trial," appellants raise no new points, but rest upon the argument made under the other headings of their brief. We are therefore of the opinion that this contention may not be sustained.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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138 Cal.App. 267

MUNICIPAL BOND CO. v. CITY OF RIVERSIDE et al.

Civ. 1427.

District Court of Appeal, Fourth District, California.
April 24, 1934.

Rehearing Denied May 21, 1934.

Hearing Denied by Supreme Court June 22, 1934.

1. Appeal and error 🔑907(3).
Appellate court must presume on appeal, taken on judgment roll, that trial court's fact findings were supported by evidence.

2. Municipal corporations 🔑745½.
Municipal corporation is not liable for torts committed by its agents in performance of public or governmental, as distinguished from private or proprietary, functions.

3. Municipal corporations 🔑733(2).
Improvement of highways within municipality is purely governmental affair.

4. Municipal corporations 🔑747(1).
City having acted in purely public or governmental capacity in improving streets cannot be held liable for conversion of funds, paid to its treasurer on bonds issued to cover assessments against property for cost of improvements (St. 1911, p. 730, as amended).

5. Municipal corporations 🔑173(1).
Holder of city street improvement bonds had no right of action on city treasurer's official bond for amount paid such officer by owners of property assessed to pay cost of improvements and appropriated by him to his own use (St. 1911, p. 730, as amended; Pol. Code § 961, as amended by St. 1925, p. 17; St. 1929, p. 2104, art. 1, § 3, and p. 2121, art. 4, §§ 22–27; Const. art. 11, §§ 6, 8, as amended in 1914).

6. Appeal and error 🔑1218.
Generally, appellate court cannot exercise jurisdiction over case in which remittitur has been issued by its order, unless fraud or imposition on it or opposite party to appeal be shown, in which case it will recall remittitur.

7. Appeal and error 🔑909(6).
Appellate court must presume in support of judgment, denying recovery from city and surety on its treasurer's bond by holder of street improvement bonds for moneys misappropriated by treasurer from redemption fund, that collection thereof or at least embezzlements took place after city's home rule charter became operative, where appeal is on judgment roll alone and findings do not disclose dates of collections or embezzlements (St. 1911, p. 730, as amended; St. 1929, p. 2102; Pol. Code § 961, as amended by St. 1925, p. 17; Const. art. 11, § 6).

8. Trusts 🔑231(1).
Trustee cannot directly or indirectly deal with trust estate to trustee's benefit and beneficiaries' detriment.

9. Appeal and error 🔑1218.
Order dismissing city's appeal from judgment, denying recovery on its cross-complaint against city treasurer and his surety for moneys misappropriated from street improvement bond redemption fund, after accepting payment from surety of amount misappropriated from general fund, must be vacated as improvident and remittitur to trial court recalled, though city and surety acted honestly and with good faith in making settlement (St. 1911, p. 758, § 60, as amended; St. 1929, p. 2102).

JENNINGS, J., dissenting in part.

Appeal from Superior Court, Riverside County; Benjamin F. Warmer, Judge.

Action by the Municipal Bond Company, a corporation, against the City of Riverside and others, in which the City filed a cross-complaint against its codefendants. From a portion of the judgment denying recovery from the City and one codefendant, plaintiff appeals, and, from a portion denying recovery on the cross-complaint, the City appeals. On the City's motion to dismiss plaintiff's appeal or affirm the judgment for the City and plaintiff's motion to set aside an order dismissing the City's appeal.

City's motion to dismiss plaintiff's appeal denied, portion of judgment from which plaintiff appealed affirmed, and plaintiff's motion to vacate order dismissing the city's appeal granted, order vacated, and remittitur to trial court recalled.

Prior opinion, 30 P.(2d) 614.

Hearing denied by Supreme Court; SHENK, J., dissenting.

George W. Crouch and Roscoe R. Hess, both of Los Angeles, for appellant.

Eugene Best, of Riverside, for appellant-respondent City.

W. C. Smith and Everett H. Smith, both of Los Angeles, for respondent Maryland Casualty Co.

A. Heber Winder, of Riverside, and W. C. Smith, of Los Angeles, for respondent Dunbar.

Lawler & Degnan, Freston & Files, James A. McLaughlin, Clarence J. Walker, and John L. Rush, all of Los Angeles, amici curiæ.

JENNINGS, Justice.

This action was instituted by the holder of certain street improvement bonds issued pursuant to the provisions of the Improvement Act of 1911 (chapter 397, Stats. 1911, p. 730) to recover from the city treasurer of the city of Riverside and from the surety on his official bond and from the city of Riverside the sum of $2,758.93, which it was alleged had been paid to said city treasurer by the owners of property upon which assessments had been levied to pay the cost of street improvements and for which assessments bonds had been issued and which said sum was alleged to have been appropriated by the city treasurer to his own use. The city of Riverside filed its answer denying liability to the plaintiff and a cross-complaint against its codefendants, the city treasurer and the surety on his official bond, seeking on behalf of the owners of bonds to recover from said cross-defendants the sum of $5,607.08, which was alleged to have been paid to said city treasurer by property owners in payment of coupons upon bonds issued as aforesaid and in partial redemption of said bonds and appropriated by said city treasurer to his own use. The city treasurer and the surety on his official bond filed separate answers, both to plaintiff's complaint and to the cross-complaint of the city of Riverside, denying liability respectively to plaintiff and to the city. Upon the conclusion of the trial of the issues framed by the pleadings, the trial court rendered judgment in favor of plaintiff for the amount sought with interest thereon against the city treasurer and denied recovery against the city and the surety on the official bond of the city treasurer and denied recovery to the city of Riverside against the city treasurer and his surety on the city's cross-complaint. From that portion of the judgment which denied recovery from the city of Riverside and from the surety on the official bond of the city treasurer, the plaintiff appealed. The city of Riverside also appealed from that portion of the judgment which denied to said city recovery on its cross-complaint. These appeals are presented on the judgment roll alone.

After the city of Riverside had perfected its appeal as aforesaid, a stipulation dismissing said appeal was entered into between the counsel for the respective parties and was filed with this court, whereupon the court made its order dismissing said appeal.

Thereafter the city of Riverside presented a motion to dismiss the appeal taken by plaintiff from that portion of the judgment denying recovery against the city or to affirm the judgment rendered by the trial court in favor of the city. At the time this motion for dismissal or affirmance came on for hearing the plaintiff moved the court to set aside the order dismissing the appeal of the city of Riverside from that portion of the judgment which denied recovery to the city on its cross-complaint from the city treasurer and the surety on his official bond. The appeal of the plaintiff on the merits and the aforesaid motions were submitted to the court for decision. Plaintiff's appeal from that portion of the court's judgment denying recovery from the city of Riverside and from the surety on the official bond of the city treasurer will herein be first considered.

It may be observed at the outset that the opening brief of appellant, Municipal Bond Company, was confined to a discussion of the incorrectness of that portion of the judgment which denied recovery from the surety on the official bond of the city treasurer and no effort was made to show that the court had erred in refusing recovery from the city of Riverside. This fact constituted the principal ground urged by the city of Riverside in support of its motion to dismiss the appeal or affirm the judgment. It is at least open to serious question if appellant has not waived its appeal as to the city. Nevertheless we feel disposed to consider the appeal as taken on its merits, and we shall therefore first discuss the contention that the trial court erred in refusing recovery from the city of Riverside.

[1] The court found that no portion of the total amount paid to the city treasurer upon bonds issued under the provisions of the 1911 Street Improvement Act (St. 1911, p. 730, as amended) was ever deposited in the general fund of the city of Riverside and that none of the funds so collected were expended for the benefit of the city. The court also found that the city treasurer had collected sums of money which amounted to a total of $6,813.16 as payments on bonds issued under the provisions of the 1911 Street Improvement Act, and that of such amount he had failed to account to the 1911 street improvement fund or to the owners of bonds or to the city of Riverside or to his successor in office to the extent of $5,607.08, and that neither he nor any one in his behalf had paid said sum of $5,607.08 to the 1911 street improvement bond redemption fund or to the bond owners or to his successor in office. Since this appeal, as above noted, is taken on the judgment roll, we must assume that the aforesaid findings are not lacking in evidentiary support. The presence of these findings thus supported would seem, on first impression, to require affirmance of that portion of the judgment which denied recovery from the city. It appears, however, that it now contended that the city should be held liable on the theory that it is responsible for the derelictions of its agent, the city treasurer. This contention necessitates analysis of the cause of action which is alleged in the complaint. This pleading alleges that the city treasurer during his term of office collected as payments on coupons upon bonds owned by the Municipal Bond Company a certain sum of money which he deposited in a common fund composed not only of payments upon bonds held by appellant but of all payments from other like bonds, which fund was "known as the street improvement redemption fund or some other designation of similar import," and that he thereafter withdrew from the street improvement redemption fund various sums of money which he deposited in the general fund of the city, so that the street improvement redemption fund was thereby reduced by a sum of money in excess of $4,500 below the requirements for paying to the holders of such improvement bonds the amounts which had been paid on account of said bonds, and that thereafter the city treasurer withdrew from the general fund of the city and misappropriated to his own use a sum of money in excess of the amount which he had withdrawn from the street improvement redemption fund and had deposited in the general fund. It is apparent, therefore, that the civil liability of the city treasurer is, in the final analysis, based upon the alleged commission by such officer of a tort, i. e., conversion of funds. We must then consider whether any liability was cast upon the city by reason of the tort of its agent.

[2-4] In this connection, we must bear in mind the principle well established in California that a municipal corporation is not liable for the torts of its agents committed in the performance by them of public or governmental functions as distinguished from private or proprietary functions. Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; Morrison v. Smith Bros., Inc., 211 Cal. 36, 39, 293 P. 53; Harding v. City of Hawthorne, 114 Cal. App. 580, 300 P. 42; Pittam v. City of Riverside, 128 Cal. App. 57, 16 P.(2d) 768. It is also settled in California that the improvement of the highways within a municipality is a purely governmental affair. McNeil v. City of South Pasadena, 166 Cal. 153, 135 P. 32, 48 L. R. A. (N. S.) 138. It follows therefore that the city of Riverside, in proceeding to improve streets within its boundaries in accordance with the provisions of the 1911 street improvement statute, was acting in a purely public or governmental capacity and may not be held liable for the conversion of funds paid to one of its officers upon bonds which were issued to cover assessments levied against property to pay the cost of such street improvements.

[5] There remains for consideration that portion of the judgment which denied to appellant, Municipal Bond Company, recovery from the surety on the official bond of the city treasurer of the city of Riverside. Respondent Maryland Casualty Company presents two contentions in support of this part of the judgment. These are, first, that its principal, the city treasurer, was not acting in his official capacity as city treasurer, in receiving the funds that were paid to him by property owners to be applied on the principal and interest of the street bonds; and, second, that, in any event, only the obligee named in the bond has the right to bring suit on the bond. It is obvious that, if either of these contentions is correct, the judgment must be affirmed. It is our opinion that the

second of the aforesaid contentions is correct, and that appellant bondholder had no right of action on the official bond of the city treasurer.

The court found that "during the last term of office of the defendant city treasurer, to-wit: the term beginning Jan. 2, 1928, there was paid to said H. N. Dunbar as such city treasurer, in payment of the coupons upon bonds owned and held by the plaintiff herein * * * and the redemption in part of such bonds and penalties thereon as provided by law, and for the use and benefit of the plaintiff herein as the owner and holder of said bonds," certain sums of money constituting a total amount so paid in the sum of $2,758.93. The court neither found the dates on which the various sums were paid nor did it find the date or dates on which the abstraction of funds by the city treasurer occurred. The court, did, however, find that prior to the commencement of this action and on August 7, 1929, appellant bondholder had made demand on the defendant city treasurer and on respondent Maryland Casualty Company for the amount of $2,026.05 of said aforesaid total sum, and on November 6, 1929, for the sum of $732.88 of said total amount, and that payment thereof in each case was refused. Inasmuch as the possession of the funds by the city treasurer was lawful, it would appear that whatever right of action appellant had against the city treasurer and the surety on his bond accrued no earlier than the making of the demands, bearing in mind that the liability of the city treasurer is based upon the conversion by this officer to his own use of funds rightfully belonging to the bondholder and the liability sought to be fastened upon the surety is predicated upon this same conversion of funds which is alleged to be a breach of official duty covered by the obligation of the official bond. Atwood v. Southern California Ice Co., 63 Cal. App. 343, 218 P. 283. Whether the bondholder, which for the purposes of this opinion may be conceded to have been aggrieved by the acts of conversion perpetrated by the city treasurer, has a right of action on the bond, depends, first, on the obligation of suretyship, and, second, on whether the bondholder has been given a right of action by statute.

With respect to the contract of suretyship, it is at once evident that the obligee named in the bond is the city of Riverside and that the surety contracted solely with the city that it would be liable only to the city if a breach of the conditions specified in the bond should occur. Therefore the bondholder may recover only if a right of action has been given to it by statute. Appellant bondholder confidently maintains that it possesses such right of action by virtue of the provisions of section 961 of the Political Code (as amended by St. 1925, p. 17). This statute is in the following language:

"*Suit on bonds.* Every official bond, given pursuant to law, executed by any officer of the state, or of any county or any subdivision thereof, or of any town or city organized under the provisions of this code, or by any officer of a city or county governed by a freeholders charter, is in force and obligatory upon the principal and sureties therein to and for the State of California, or such municipal corporation, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

At first blush, appellant's contention would appear to be well founded. However, it must be conceded that the matter of requiring municipal officers and employees to furnish bonds is a municipal affair and that the provisions of a municipal charter relating to municipal affairs are controlling over general state laws. Therefore, in order to arrive at a correct determination of the problem, it will be necessary to examine the provisions of the city charter which was in effect at the time appellant's right of action accrued.

This charter was adopted in 1929, and became the organic law of the municipality on July 1, 1929. St. 1929, p. 2102. In section 3 of article 1 of this charter (page 2104), we find the following language: "To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter." By this language the municipality clearly indicated its intention to avail itself of the privilege afforded by sections 6 and 8 of article 11 of the Constitution of California, as amended in 1914, and upon municipal affairs to make itself independent of control by general laws. As heretofore stated, the matter of requiring bonds of municipal officers and employees is strictly a municipal affair. We must therefore further examine the city charter of Riverside which was in effect at the time that appellant's cause of action accrued for the purpose of discovering whether it contains any provision giving to appellant or others similarly situated a right of action on the official bond of the city treasurer in which the obligee named is the city of Riverside. Such examination discloses that the charter is silent on the subject. There are provisions in sections 22, 23, 24, 25, 26, and 27 of article 4 of the charter which require that officers and employees of the city shall give and execute official bonds which must be approved as to form by the city attorney and as to substance by the city council, and which require that various designated city officers shall execute bonds to the city in specified amounts which may be increased or decreased by the city council by ordinance. Section 27 contains the following language, which appellant contends is applicable to the problem: "The form and conditions of all official bonds, the affidavits and justification thereon, shall be as is required by the general laws of the state in force at the time such bonds are given." It is urged that this language makes applicable section 961 of the Political Code, as amended in 1925. We think not. Certainly the conferring of a right of action upon one other than the obligee designated in the bond has no bearing upon the form of the bond. Nor do we think that the giving of a right of action may properly be denominated a condition of the bond. A condition of a bond refers to the occurrence of some event which causes the obligation of the bond to become effective. The condition of the bond of the city treasurer in the present proceeding was that he should faithfully perform the official duties pertaining to his office. So long as he did this, there was no obligation which the surety was required to perform. When, however, the principal committed some act which amounted to a breach of his official duty or failed to perform a duty enjoined upon him by law, the obligation of the surety came into existence. The fact that the essential act upon which the very existence of the surety's obligation depended had come to pass had nothing whatever to do with the conferring of a right of action upon the obligation. The surety had agreed to be bound to the city of Riverside and to the city alone. If any other person could have a right of action on the bond, it would have to be by virtue of some statute which expressly conferred such right. The charter contains no other provision which purports to give to any person other than the obligee named in the bond a right of action upon the obligation of the surety. Since the matter of requiring bonds of municipal officers is a municipal affair and the charter of 1929 which was in effect when the right of action on the bond accrued is silent on the subject of conferring a right of action upon any one other than the obligee of the bond, and since the city of Riverside has availed itself of the privilege afforded by sections 6 and 8 of article 11 of the California Constitution, as amended in 1914, and has expressly declared its independence from the control of general laws as to municipal affairs, it follows that section 961 of the Political Code is not applicable and a right of action does not exist in favor of appellant bondholder on the official bond of defendant, the city treasurer. Sunter v. Fraser, 194 Cal. 337, 228 P. 660.

The disposal of this appeal on its merits renders it unnecessary to give consideration to the motion of respondent city of Riverside that the appeal be dismissed or the judgment in its favor be affirmed.

There remains finally for disposition the motion of appellant, Municipal Bond Company, that the order of this court dismissing the city's appeal from that portion of the judgment which denied to the city recovery from the surety on the official bond of the city treasurer be vacated and set aside. This motion appears to be founded on the theory that the city stands in the position of a trustee for all holders of bonds issued by the city treasurer of Riverside pursuant to the provisions of the 1911 Improvement Act, as amended, and that the beneficiaries of this trust have a right to insist that the trustee shall meticulously perform its duty as trustee and that it shall take no action that may conceivably be injurious to the rights of the beneficiaries. For intelligent consideration of this question, a brief recital of certain facts which bear upon it is required.

On November 19, 1932, the city of Riverside gave notice that it appealed from that portion of the judgment which denied to it recovery from the defendant, city treasurer, and from the Maryland Casualty Company, the surety on the official bond of the city treasurer. Thereafter the city of Riverside filed with this court its briefs in support of its appeal. It was the declared position of the city upon this appeal that the city was the trustee for the bondholders, and that in such capacity it was entitled to seek to compel the surety on the official bond of its defaulting officer to reimburse the city to the end that the bondholders might receive payment of moneys collected for their benefit by said city treasurer. On June 9, 1933, there was filed with this court a stipulation entered into between the city attorney of the city of Riverside and counsel representing the Maryland Casualty Company, providing that the appeal of the city of Riverside "may be and is hereby dismissed with prejudice forthwith as against H. N. Dunbar and said Maryland Casualty Company." Thereupon, this court, on June 10, 1933, made its order dismissing said appeal with prejudice as against H. N. Dunbar and the Maryland Casualty Company. On August 9, 1933, a remittitur issued out of this court directed to the trial court. On November 21, 1933, appellant, Municipal Bond Company, filed its notice of motion to set aside the order dismissing the appeal taken by the city of Riverside. It is obvious that the granting of this motion will necessarily require the recall of the remittitur issued on August 9, 1933.

[6] It is the general rule that an appellate court cannot exercise jurisdiction over a case in which a remittitur has been issued by its order and filed in the trial court for the reason that the issuance of the remittitur has divested the appellate court of jurisdiction. This rule rests upon the presumption that all of the proceedings which resulted in the issuance of the remittitur have been regular and that no fraud or imposition has been practiced upon the appellate court or upon the opposite party to the appeal. If it is made to appear that such fraud or imposition has been practiced, the appellate court will assert its jurisdiction and recall the remittitur upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order and that an order obtained upon a false representation or suggestion is not the order of the court and may be treated as a nullity. Trumpler v. Trumpler, 123 Cal. 248, 55 P. 1008; Richardson v. Chicago, etc., Co., 135 Cal. 311, 67 P. 769; Isenberg v. Sherman, 214 Cal. 722, 7 P.(2d) 1006; Crenshaw Bros. v. Southern Pacific Co., 42 Cal. App. 44, 183 P. 208.

It is not contended by appellant that the issuance of the remittitur as aforesaid was accomplished through fraud or imposition practiced upon this court or upon the opposite parties in the appeal of the city of Riverside, or upon appellant bondholder. If such a contention were advanced, it would be unavailing. The stipulation for dismissal of the city's appeal is accompanied by a certified copy of the minutes of the city council which shows on its face that the council authorized the city attorney to compromise and settle the action brought by the city against the city treasurer and the surety on his bond and the city's appeal on its cross-complaint upon the payment to the city of the sum of $2,900 and upon the agreement of the surety to pay any judgment rendered in the action brought by appellant, Municipal Bond Company, against the city and the surety on the city treasurer's bond. The stipulation for dismissal of the city's appeal was therefore authorized, and it cannot be said that any fraud or imposition was practiced upon the court or other parties to the action through the making of the stipulation and the filing of it with the court in which the appeal was pending. Nor may it fairly be said that the order of dismissal was made through inadvertence. This court was in possession of all facts in connection with the appeal and was fully advised in the premises.

It appears to be the contention of appellant that it was entitled to notice of the application for dismissal of the appeal, and that the order of dismissal having been made ex parte without notice to appellant should now be vacated. In this regard it must be noted that, although the order dismissing the appeal was made on June 10, 1933, the remittitur which divested this court of jurisdiction of the city's appeal was not issued until sixty days thereafter. It seems obvious that, although appellant had not been notified of the application for dismissal, it was not, under the circumstances, discharged of the duty to keep itself informed of the status of the appeal, particularly if it expected to rely on the cause of action alleged in the city's cross-complaint. Upon the hearing of the motion for vacation of the order of dismissal, counsel for appellant, Municipal Bond Company, presented to this court a communication addressed to him by the city attorney of the city of Riverside on May 25, 1933, in which is contained the following statement: "We have tried to effect a settlement with the Maryland Casualty Company for the shortage in the general fund of the treasurer's office, and when that is done, we would like to have the record clear as to the liability of the city." The letter concludes with a request that appellant consent to a dismissal of its appeal against the city, "so that the record would be clear, and it would not be necessary to concern ourselves any further with the appeal." To this letter counsel for appellant replied on May 27, 1933, in the following language: "Your letter of May 25, 1933, at hand, stating that you have tried to effect a settlement with the Maryland Casualty Company on behalf of the city and you wondered if we would consent to giving you a dismissal of the appeal against the city. Please be advised that we would not under any circumstances do so. It is apparent that if our construction of the law is deemed correct by the appellate court that the judgment might be reversed under an interpretation of law which would declare rights existing as against the city, not only in favor of the plaintiff but perhaps in favor of the Casualty Company." It is therefore evident that appellant was advised two weeks in advance of the filing of the stipulation for dismissal of the city's appeal that the city was endeavoring to effect a settlement of its claim for the shortage in its general fund against the surety on the city treasurer's bond, and that in spite of this fact it made no inquiry regarding the progress of the negotiations for settlement between the city and the surety, and took no action of any kind until November 21, 1933, when it filed this motion to vacate the order of dismissal made more than five months prior thereto.

It appears, therefore, that, under the circumstances presented, appellant, Municipal Bond Company, has failed to make such showing as is required to justify a recall of the remittitur, and that its motion to vacate the order of this court dismissing the appeal of the city of Riverside should be denied. In re Estate of Ross, 189 Cal. 317, 207 P. 1014; Petersen v. Civil Service Board, 68 Cal. App. 752, 230 P. 196.

For the reasons stated herein, the motion of respondent the city of Riverside to dismiss the appeal taken by appellant, Municipal Bond Company, is denied and that portion of the judgment from which the appeal has been taken by the Municipal Bond Company is affirmed.

MARKS, Justice.

I concur in the order affirming that part of the judgment from which the appeal is taken by the Municipal Bond Company. I also concur in the order denying the motion of the city of Riverside to dismiss the appeal of the plaintiff.

For brevity I will hereafter refer to the Municipal Bond Company as the plaintiff, the city of Riverside as the city, H. N. Dunbar as the treasurer, and the Maryland Casualty Company as the surety.

[7] My reasons for concurring in the order of affirmance of that portion of the judgment from which the plaintiff has appealed are not fully set forth in the foregoing opinion. To make my position clear, I must add the following: The first charter of the city was adopted in 1907, St. 1907, p. 1277. This charter remained in effect until July 1, 1929, when the present charter became operative. St. 1929, p. 2102. Under the first charter, the city did not take advantage of the provisions of section 6, article 11, of the Constitution, to govern its own municipal affairs, which were therefore controlled by the provisions of the general laws of the state. Therefore I am of the opinion that the plaintiff might have had the right to recover those moneys the treasurer misappropriated from the 1911 improvement bond redemption fund between the effective date of the amendment to section 961 of the Political Code (St. 1925, p. 17), and July 1, 1929. But the plaintiff saw fit to appeal on the judgment roll alone. The evidence is not before us. The findings do not disclose the dates of the collections or embezzlements by the treasurer. We are required to presume that the evidence supports the judgment in all particulars. We must therefore presume that collections, or at least the embezzlements, took place after July 1, 1929. The bonds were in small amounts, and the payments of the assessments must have been proportionately small. It seems to me a violent assumption to have to conclude that the treasurer embezzled a total of $5,607.08 from these small payments during the short time between July 1, 1929, and his removal from office, and none before July 1. In view of the application of the imperative presumption that the evidence supports the judgment, I find no escape from this conclusion, and therefore find it necessary to concur in that portion of the judgment refusing any relief to the plaintiff.

[8, 9] I dissent from that portion of the order which denies the Municipal Bond Company's motion to vacate and set aside the order dismissing the appeal of the city of Riverside from that portion of the judgment which denied the relief prayed for in its cross-complaint.

The city filed its cross-complaint to recover $5,607.08 from the treasurer and the surety, which sum it alleged the treasurer had collected as assessments under the Improvement Act of 1911, and appropriated to his own use. The trial court found this to be true. The cross-complaint was filed upon the theory that the city acted in the capacity of trustee for the benefit of all the bond owners and could require the treasurer and the surety to return the money to the 1911 improvement bond redemption fund so that it could pay the bond owners, including plaintiff, the money due them. The trial court found that, of the money misappropriated, $2,758.93 was due the plaintiff, leaving a balance of $2,848.15 due the other bond holders not parties to this action.

Section 60 of the Improvement Act of 1911 (St. 1911, p. 758, as amended) makes it an official duty of the treasurer to collect, keep, and disburse the assessments collected under that act. The city charter of 1929 contained a provision imposing like duties upon him. The bond of the treasurer indemnified the city against loss occasioned by a breach of official duty by that officer.

In the case of City of Oakland v. De Guarda, 95 Cal. App. 270, 284, 285, 272 P. 779, 784, 273 P. 819, the city of Oakland brought suit as trustee for property owners upon faithful performance bonds given in a contract awarded under the Improvement Act of 1911. In holding that the city could recover as trustee under a bond made payable to it for the benefit of the owners for loss occasioned them by a breach of the contract, the court said:

"By the explicit language of the bonds, both defendants are liable to some one if the contract is not performed, and by fair and equitable implication they are liable to those interested in the contract. In substance, the only contention of the defendant National Surety Company here is, not that the surety company is not liable under the bond, but that the surety company is not liable to the plaintiff herein suing as trustee for the benefit of the property holders. But equity will not permit the execution of a trust to fail for want of a sufficient trustee, for equity looks to the intent rather than to the form, and regards that as done which ought to be done, and goes beneath the mere external form to the substance of things for the purpose of making its remedies more complete, thereby awarding and securing to the person beneficially interested the remedy to which he is entitled by the principles and doctrines of equity. * * *

"In Missouri cases cited and relied upon by counsel (St. Louis v. Wright Contracting Co., 202 Mo. 451, 101 S. W. 6 [119 Am. St. Rep. 810]; St. Louis v. Wright Contracting Co., 210 Mo. 491, 109 S. W. 6; St. Louis v. Anderson, 229 Mo. 181, 129 S. W. 528, 138 Am. St. Rep. 414; City of St. Joseph v. Rackliffe-Gibson Const. Co. et al. [Mo. App.] 203 S. W. 223), it does not appear that the statute construed by the learned court contained the numerous provisions enacted in our statute above, showing the direct and tangible interest taken by the city through its council and street superintendent in the performance of the contract and the doing of the work for the benefit of the property holders and the direct interest taken by the city for the benefit of the contractor in requiring the property holder to bear the burdens and pay the expenses of the work, all of which should properly vest in the property holder sufficient correlative rights to enable them to avail themselves of the agency and trusteeship of the city in the enforcement of the statutory bond given to the city for the proper protection of the property holders under the contract in question.

"In the case at bar, the same reasoning and the same rule is applicable as was announced by our Supreme Court in the case of Los Angeles S. Co. v. National Surety Co., 178 Cal. 247, 173 P. 79, where the court used the following language taken from the United States Supreme Court in the case of Equitable Security Co. v. U. S., to Use of McMillan, 234 U. S. 448, 34 S. Ct. 803, 58 L. Ed. 1394: 'The surety is charged with notice that he is entering into what is in a very proper sense a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee, and with respect to whom the latter is a mere trustee.'

"Also in the case of City of Philadelphia (to Use of Rose Brick Mfg. Co.) v. Stewart, 195 Pa. 309, 45 A. 1056, it was held that a city may sue in its own name to use of the persons for whose security it was given, on a bond given it by a contractor for city work, conditioned that he shall pay for labor and material furnished therefor and shall comply with an ordinance for protection of subcontractors as well as laborers and materialmen. It was held in that case that 'the city recovers on its legal title, though the money may ultimately go to the use of plaintiffs.'"

It seems to me that the order of dismissal of the appeal of the city should be vacated if it is legally possible to do so. Otherwise the owners of the improvement bonds will be foreclosed of any opportunity to collect any part of the $5,607.08 which the treasurer misappropriated.

We have been cited to no case in which an order dismissing an appeal and recalling a remittitur has been made under the precise facts now before us. Numerous cases are in the reports in which such orders have been vacated when actual fraud has been practiced on the court. See Trumpler v. Trumpler, 123 Cal. 248, 55 P. 1008, 1009. In that case it was said that the order vacating the order of dismissal was not made "upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be devested by an irregular or improvident order." While this expression, or others of similar import, run through the cases the courts have not been called upon to define their application to cases where actual fraud did not appear. When applied to the facts of the cases in which they were used, they appear to be dicta.

In the instant case no actual fraud existed in connection with the dismissal of the appeal by the city, and none is even suggested by any part of the record before us. All counsel, and the parties, including the officers of the city of Riverside, very evidently acted in the best of good faith in the dismissal of the city's appeal. They all believed that the bondholders could protect themselves in direct actions against the treasurer and the surety. This was strongly urged in the opening brief filed by the city. Entertaining this opinion, the city accepted payment from the surety of the amount due to its general fund and dismissed its appeal, confidently assuming that it was not further interested in the controversy. We have held that the bond owners cannot so recover. This problem was not easy of solution, and our conclusions were reached only after extensive study and lengthy consideration.

The precise question under the exact facts here presented has not been decided in this state. Counsel might easily and with honesty disagree upon the law applicable as the question has not been settled in California, and respectable authority from other jurisdictions is found upholding the right of the bond owners to recover from the surety. The good faith of the city attorney of the city is shown in the following quotation from a letter filed in reply to the motion for an order vacating the order of dismissal: "If the first motion made by the city to dismiss the appeal against it, be granted, the city has no interest (except general) in the questions raised in this brief of amici curiæ, but if the motion should be denied, the city will urge the court to grant the motion of the bond company setting aside the dismissal heretofore entered on the cross complaint and give the city an opportunity to answer the brief of amici curiæ. In other words, if the question of the direct liability of the city to the bond company is to be seriously considered by the court, counsel for the city wishes it to be in the position where it may protect itself by urging the liability of the casualty company to the city."

It is easy to say that at the time the appeal of the city was dismissed "this court was in possession of all the facts in connection with the appeal and was fully advised in the premises." While this is legally true, as we are presumed to have knowledge of all of our records, it is factually incorrect. The case had not been calendared nor otherwise called to our attention until the presentation of the stipulation to dismiss, which was regular in form, and the order followed. None of the members of this court actually knew anything of the facts of the case, the issues to be presented, nor the result of the dismissal in its effect on the chance to recover for the bond owners. To that extent the order of dismissal may be termed an "improvident order." Trumpler v. Trumpler, supra. However, I am willing to concede that a mistake of law on the part of counsel or the members of this court, no matter how honestly made, does not of itself, and standing alone, furnish sufficient ground for the granting of plaintiff's motion to vacate the order dismissing the city's appeal.

We have before us a somewhat novel and unusual situation. The city had a claim against the surety for the money belonging to the general fund which the treasurer had misappropriated. It also seemingly had another and distinct claim against the surety for the money which the treasurer had abstracted from the 1911 improvement bond redemption fund. This second claim was equitable in its nature. The bond owners were the beneficiaries of the trust. Many of them are not parties to this action. The city accepted payment from the surety of the amount due it by reason of the misappropriation of funds by the treasurer from its general fund and proceeded to dismiss its appeal. The money taken from the general fund belonged to the city. The money taken from the 1911 improvement bond redemption fund did not belong to the city when we use the expression in the sense that it possessed the complete ownership. It held the money as trustee for the benefit of the bond owners. The results of the entire transaction may be summarized as follows: The two claims of the city against the surety were separate and distinct, one from the other, though both arose under the same undertaking. The city compromised and settled its own claim against the surety and received payment. It did attempt to enforce its claim as trustee, but dismissed its appeal, thereby defeating any chance of recovery by or for the bond owners who received no benefits but lost their rights of a possible recovery from the surety by the procedure followed.

In my opinion a trustee cannot be permitted such freedom of action with the trust estate when the party with whom it is dealing is charged with notice of the facts. The trustee cannot directly or indirectly deal with the trust estate to its own benefit and the detriment of the beneficiaries. 25 Cal. Jur. 136, and cases cited. The surety had knowledge of all these facts, and, possessing such knowledge, it cannot act in conjunction with the trustee to deprive the beneficiaries of any rights they might possess, for under such circumstances the court will not "enter into any examination of the honesty of the transaction" (Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 P. 496, 499), but will regard it as void. In 25 California Jurisprudence, 223, it is said: "If the transferee had knowledge of the trust, it is of no importance that he acted in good faith or without intention of perpetrating a wrong; his motive or intention cannot affect the rights of the equitable owner."

Freely conceding that both the city and the surety and all their officers and agents acted honestly and with the best of good faith in making the settlement, and dismissing the appeal, I am of the strong conviction that their act of procuring the dismissal was just as void as though actual fraud had been proven. The same results were accomplished. Having reached this conclusion, it necessarily follows that the order should be vacated under the rule laid down in Trumpler v. Trumpler, supra. I must regard the order of dismissal as improvidently made and as a nullity, and the order vacating the order of dismissal, not as a resumption of jurisdiction, but as the assertion of a jurisdiction of which this court has never been divested.

The motion of the city of Riverside to dismiss the appeal of the Municipal Bond Company is denied.

That portion of the judgment from which the appeal of the Municipal Bond Company is taken is affirmed.

The motion to vacate the order which dismissed the appeal of the city of Riverside is granted, and that order is vacated, and the remittitur issued on August 9, 1933, is recalled.

I concur: BARNARD, P. J.

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138 Cal.App. 499

PEOPLE v. FRANTZ.

Cr. 2469.

District Court of Appeal, Second District, Division 2, California.

May 11, 1934.

1. Homicide ⚷340(3).

Where instruction correctly stated degree of lack of caution and circumspection required for conviction of manslaughter, another instruction that such lack of caution and circumspection must be in much greater degree to justify conviction, although inconsistent with previous instruction, *held* favorable to accused (Pen. Code, § 192, par. 2).

2. Criminal law ⚷829(1).

Refusal of instructions essentially covered by instructions given *held* not error.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Paul T. Frantz was convicted of manslaughter and of violating St. 1929, p. 544, § 141, and he appeals.

Affirmed.

Richard H. Cantillon, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

The appellant was convicted of two counts of manslaughter and one count violating section 141, California Vehicle Act (Stats. 1923, p. 562, as amended Stats. 1929, pp. 508, 544, c. 253) in that he did not stop immediately; did not exhibit operator's license; did not give his name and address and motor registration number; and did not attempt to render reasonable assistance after the automobile he was operating had collided with and had fatally wounded two pedestrians. A motion for a new trial was denied and judgment was pronounced upon each verdict of guilty. Appellant appeals from the order and the judgments.

Appellant concedes that the evidence is sufficient to support the judgments, but contends that it is conflicting and that errors in instructing the jury may well have influenced the jury's conclusions.

A review of the evidence establishes, with scarcely any conflict that appellant was accompanied by a young lady as he drove a borrowed light truck on a four-lane lighted city

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

street and that just about the instant the truck entered the intersection of a cross street it struck a man and woman, killing them almost instantly. The truck was on its right side of the street, was being driven, according to evidence, from five to fifteen miles per hour faster than the law permitted at that place, and was mechanically in poor repair as to the brakes and clutch. There is strong evidence that but one headlight was burning. Appellant testified that he saw but one person and that he was practically upon that person when he first saw him. That he swerved the truck, but felt the impact and saw him fall. He further testified that he slackened his pace, drove to the first place he could park at the curb about a block from the scene of the accident and went back. A crowd had already gathered. He saw the two victims, knew that an ambulance had been called, and at the earnest solicitation of his companion, took her to a street car which she boarded for home. He then drove the truck to the owner's place of business, told him he had had an accident, but not that it had caused death, and went away. He was arrested about two hours afterward.

There is testimony from a number of persons who were at the scene of the accident within a few minutes after its happening, that no person appeared asserting that he was the driver of the truck and that those present were looking for the driver. There is, however, convincing corroborating testimony that the truck was parked for a time where appellant said it was parked soon after the accident.

There would seem to be no essential conflict in the testimony except as to the count that the driver did not immediately stop, etc., but there is substantial testimony supporting the verdict of guilty on this count. The instructions particularly referring to this count are in the phraseology of the statute and are accurate. It will then be of no avail to further refer to this count. No reversal of the order or the judgment can be had.

From the statement of fact herein made, the instructions would have to be exceedingly objectionable to cause a reversal of the manslaughter verdicts. It is true that there are several duplications of instructions, mostly caused by the fact that there were two counts of the same nature tried together. The duplications should not have occurred, but the nature of the asserted prejudice to appellant is not pointed out except in very general terms.

[1] There are some inconsistencies in the instructions, but they are favorable rather than prejudicial to appellant. For instance, the court gave an instruction which correctly states the degree of lack of "caution and circumspection" required for conviction in a manslaughter case (section 192, par. 2, Pen. Code) and then gave another instruction to the effect that such lack of caution and circumspection must be in a much greater degree to justify a conviction.

[2] Appellant offered several instructions which were refused and some of them we think could well have been given, but they were essentially covered by other instructions that were given. It would require a very long opinion, and, as we see it, would serve no useful purpose to quote either the instructions complained of or the proposed instructions which were not given. We are convinced that appellant suffered no prejudice in the matter of the instructions.

We are constrained to add that this is a typical automobile fatality case wherein no act of the driver was malicious or of an abandoned nature. Without applying such notice to any issue in this case, we can and do take judicial notice of the fact that veritable wrecks incapable of being safely controlled, are habitually driven over our streets; and that cars in both good and bad repair are habitually driven beyond the legal speed limit zigzagging from one traffic lane to another and "cutting in" without regard to others as anxious to save time as they and totally without regard to persons using the only natural method of locomotion by walking across streets. In this regard there are innumerable drivers potentially as guilty as this appellant who took a chance, killed two human beings, and consigned himself to state prison. The judge of the trial court mercifully ordered that the judgments should run concurrently.

The judgments and the ruling on the motion for new trial are affirmed.

We concur: DESMOND, J.; ARCHBALD Justice pro tem.

PURDY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 9106.

District Court of Appeal, First District, Division 1, California.

April 25, 1934.

Rehearing Denied May 25, 1934.

Hearing Granted by Supreme Court June 22, 1934.

1. Trusts ⚷178.

Testamentary trustee in doubt as to his right to charge trust estate with money borrowed by him must seek instructions from probate court retaining jurisdiction or by independent application to appropriate court (Civ. Code, § 2267).

2. Trusts ⚷178.

Trustee may sue in equity at trust estate's expense for judicial construction of trust instrument and directions as to his conduct in case of bona fide doubt as to meaning thereof or course he should pursue.

3. Trusts ⚷212.

Trustee's right to exercise power to borrow money, implied from express power under trust instrument to manage trust property, depends on whether money is borrowed and used to preserve property or prevent failure of trust (Civ. Code, § 2267).

4. Trusts ⚷372(1).

Burden was on bank in action for amount of deposit, credited on note of trustees for plaintiff, to show that money for which note was given was loaned to and used by trustees to preserve trust estate (Civ. Code, §§ 2267, 3054; Code Civ. Proc. § 440).

5. Trusts ⚷371(3).

Complaint pleading trust instrument, not expressly authorizing trustees to borrow money, sufficiently averred their lack of authority to do so in beneficiary's action against bank for amount of deposit credited on trustees' note for money loaned (Civ. Code, §§ 2267, 3054; Code Civ. Proc. § 440).

6. Trusts ⚷212.

Bank interpreted trust instrument as authorizing trustees to borrow money and charge trust property therewith, without submitting question to court, at its peril, and must show that its advances went into, or were expended for, preservation or necessary advantage of, such property in beneficiary's action for amount of deposit credited on trustees' note for money loaned (Civ. Code §§ 2267, 3054; Code Civ. Proc. § 440).

7. Pleading ⚷36(6).

Defendant bank's denial of allegations of original complaint and supplemental complaint, filed after it purchased bank originally made defendant, as to trust character of deposit, credited by original defendant on trustees' note for money borrowed, did not deprive original defendant's admissions of such allegations of evidentiary effect in beneficiary's action for amount credited (Civ. Code, § 3054; Code Civ. Proc. § 440; St. 1921, p. 1373, § 31).

8. Limitation of actions ⚷58(1).

Trust beneficiary's claim against bank, purchasing another bank, for amount of deposit credited by purchased bank on trustees' note for money borrowed, *held* not barred by limitations, where suit was commenced about two months after such appropriation and submission of case was postponed on suggestion of purchased bank's attorney until determination of plaintiff's pending suit against trustees for accounting (Code Civ. Proc. § 338, subd. 1, § 440; St. 1921, p. 1373, § 31; Civ. Code, § 3054).

9. Trusts ⚷366(1).

Testamentary trustees, declining to take proceedings for restitution of trust property, appropriated by bank crediting amount of trust deposit on trustees' note, *held* not necessary parties to beneficiary's suit against bank, purchasing payee bank, to recover such amount (St. 1921, p. 1373, § 31; Civ. Code, § 3054; Code Civ. Proc. § 440).

10. Trusts ⚷373.

Express finding on issue of trustees' indebtedness for money borrowed from bank when latter appropriated trust deposit for payment of trustees' note was unnecessary in beneficiary's action for amount so appropriated, where case was tried and decided on theory that trustees had no power to bind trust estate for amount of note (Civ. Code, §§ 2267, 3054; Code Civ. Proc. § 440).

11. Trusts ⚷372(1).

Presumption that testamentary trustees did not embezzle money borrowed from bank *held* not to require presumption that they used it in connection with management of trust estate to yield income to beneficiary in latter's action to recover amount of trust deposit, credited by bank on trustees' note (Civ. Code, §§ 2267, 3054; Code Civ. Proc. § 440).

12. Trusts ⚷362.

Trust beneficiary's recovery of amount of deposit credited by bank on testamentary trustees' note *held* not barred on ground that trustees made advances to plaintiff, where amount thereof did not appear and plaintiff had no knowledge of borrowing or note (Civ. Code, § 3054; Code Civ. Proc. § 440).

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Appeal from Superior Court, San Benito County; Maurice T. Dooling, Judge.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 40 P.2d 481.

Action by Anita Christal Purdy against the Bank of America National Trust & Savings Association. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 28 P.(2d) 369.

Louis Ferrari, of San Francisco, C. F. Lacey, of Salinas, and Keyes & Erskine, of San Francisco, for appellant.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for respondent.

McNUTT, Justice pro tem.

Appeal by defendant from judgment of superior court for the county of Monterey holding that the crediting of the trustees' note with the amount of the deposit standing in their names, as trustees for plaintiff, was an unlawful taking of plaintiff's money, and that she was entitled to a judgment against the bank for the recovery of the amount thereof.

After affirmance, a petition for rehearing was granted.

The will of Alberto Trescony proved in Monterey county in 1894 appointed Julius A. Trescony and Robert F. Johnson trustees to hold, invest, manage, and control one-third of all the real property of the deceased for the use of two beneficiaries (grandchildren), one of whom is the (respondent) plaintiff.

In 1895 definite acreage was partitioned off to the trustees to be held, invested, managed, and controlled by them until the plaintiff, then Anita Christal, and Leo Albert Christal, then minors, respectively arrived at the age of 30 years, and to pay over to him or her, or to either of them, or to expend for him or her, or either of them, the income or such part thereof as such trustees deemed suitable until one or the other of them arrived at the age of majority, and, when the plaintiff and Leo Albert, or either of them, should attain his majority, the trustees were to transfer to the one so of age, and the other on like event, the accumulations so accrued, and annually thereafter to one or both so of legal age a share and portion of the net annual income of said trust property, less necessary expenses of said trust, until such time or times as the plaintiff and the said Leo Albert Christal shall respectively arrive at the age of 30 years, at which time or times the trustees were directed to pay over to the plaintiff or Leo Albert Christal, or to both of them, as the case might be, their respective equal shares of the trust property and the net income thereof, if any, less the necessary expenses of the trust.

In 1895 Trescony and Johnson opened a commercial account with the Salinas City Bank as the account of themselves, as trustees for Anita Purdy, then Anita Christal, and her brother, the beneficiaries referred to above; thereafter by successive borrowings they created an overdraft which, on December 31, 1908, was $13,836.97. On January 1, 1909, Trescony and Johnson opened a new account with that bank as that of themselves as trustees for Anita Christal Purdy, respondent, to which they caused said entire overdraft to be charged. On September 8, 1909, they gave the bank a note signed by them as trustees for Anita Christal Purdy and her brother. On December 20, 1914, a renewal note in the sum of $14,500 was given to the bank. That was signed "J. A. Trescony [and] R. F. Johnson, trustees for Anita Christal Purdy and Leo Christal." The court found that the note last named was executed by them without any authority from the court permitting them to borrow money for the use of the trust or of the beneficiaries, and that the note did not bind the trust estate or the plaintiff, and that the plaintiff received no consideration for the said notes, or either of them, and that none moved from the Salinas Bank to the trust estate or to the plaintiff for the notes or for either of them; that on the 30th of October, 1916, the Salinas City Bank, without right, appropriated said deposit of $7,296.16 and applied the same in part payment of the promissory note dated December 20, 1914, for $14,500 without the sanction of the plaintiff and without any authorization so to do from any court. It is further found that the payment of the said promissory note was not secured by lien, pledge, or mortgage. At the time said appropriation of said $7,296.16 was made, plaintiff was not indebted to the trustees in any sum, but it was alleged by plaintiff and proved that at said time they were indebted to her in the sum of $11,548.15 and that no part of said sum had ever been paid by the trustees to her as beneficiary of said testamentary trust.

January 27, 1927, the defendant Salinas City Bank was sold to the Liberty Bank of America, by agreement made pursuant to section 31 of the California Bank Act (St. 1909, p. 95, as amended by St. 1921, p. 1373); February 19, 1927, said Liberty Bank of America, by similar agreement, sold to the

Bank of Italy. March 1, 1927, said Bank of Italy was converted into a national association under the name of Bank of Italy National Trust & Savings Association. By an order of the trial court made July 12, 1930, the plaintiff on motion was permitted to substitute Bank of Italy National Trust & Savings Association, and was granted leave to file an amended and supplemental complaint over the objection of the substituted defendant; that, after granting the order substituting the Bank of Italy for the original defendant, the said bank with another bank, namely, the Bank of America of California, consolidated under the title of Bank of America National Trust & Savings Association, which filed an answer to the original complaint in the action without having applied for or obtained leave to answer anew the original complaint, and filed as well an answer to the supplemental complaint. One of the trustees died prior to the time of the filing of the answer of the substituted and ultimate defendant.

Among the defenses sought to be urged by the ultimate defendant in its answer were that the claim against it was barred by the limitation of section 338 of the Code of Civil Procedure and other sections of said Code.

The complaint alleged (after setting out the character of the trust as hereinabove recited and the making of the note in question) that about the 1st of January, 1909, the said Trescony and Johnson had opened a commercial bank account with the defendant bank as the account of themselves as such trustees for the account of Anita Christal Purdy, plaintiff, and one of the beneficiaries of the trust, to the credit of which account they caused to be deposited certain moneys collected and received by them as such trustees as the one-half share or proportion of the plaintiff of the income or earnings of the said trust, and that on October 30, 1916, there was on deposit with the defendant bank, to the credit of the account of Trescony and Johnson, as such trustees for the account of plaintiff, the sum of $7,296.19, which said sum was an asset of, and property of, the trust, hereinabove in the complaint more particularly described, for the use and benefit of plaintiff; that on October 30, 1916, defendant, without consent or sanction of plaintiff, or of said trustees or of either of them, and without first procuring an order or judgment of any court declaring the said promissory note to be an obligation of said trust estate or chargeable against the interest of the plaintiff in said trust property, fraudulently, wrongfully, and without right appropriated all of said balance standing to the credit of said trustees for plaintiff's account in said account with the bank, and applied said sum in part payment of the principal of said note of said Trescony and Johnson.

Defendant Salinas Bank demurred to the complaint generally and for uncertainty, in that it could not be ascertained whether the promissory note referred to was executed and delivered to defendant upon a good and sufficient consideration; it being alleged merely that there was no consideration "moving from the defendant for said promissory note." The demurrer was overruled.

Defendant Salinas City Bank made answer to the complaint as follows: It denied that Trescony and Johnson as trustees, or the plaintiff, did not receive consideration for the note referred to, and denied that no consideration moved from the defendant bank for said note, but alleged that the consideration for the note was money loaned by the defendant to Trescony and Johnson, as trustees of the trust in question. It denied the insolvency of either of the trustees. It admitted "that the sum of $7,296.19 referred to in the complaint was on October 30, 1916, an asset and property of the trust referred to in the complaint, but nevertheless subject to the right of defendant as a commercial bank to set off the same and credit the same upon the indebtedness of said trustees and said trust estate to the defendant." It denied that the defendant had fraudulently, wrongfully, or without right appropriated said balance, or any part thereof, or had fraudulently or without right applied said sum in payment of the principal in said note given, in whole or in part.

For a further and separate defense, defendant alleged that on October 30, 1916, Trescony and Johnson, as trustees of said trust, and the trust estate represented by them, and the beneficiaries thereof, Anita Christal Purdy and Leo Albert Christal, were indebted to the defendant in an amount in excess of $14,500 for moneys loaned and advanced to said trustees for the use and benefit of the trust estate, and that at the time of said loan defendant was engaged in business as a commercial banker, and has been at all times since, that defendant was not secured, and that the deposit referred to in the complaint was placed with the defendant as a general commercial deposit, and remained such until its appropriation by the defendant and that on the 30th of October, 1916, defendant appropriated the entire deposit in partial satisfaction of said indebtedness and credited the same upon said note and upon its books in partial liquidation of the debt.

The bank appellant justifies the appropriation of the deposit as the proper exercise of a banker's lien (section 3054, Civ. Code), contending that cross-demands existed which were compensated pro tanto under section 440 of the Code of Civil Procedure. The argument advanced is that the testamentary trustees whose powers are hereinabove defined were agents for the trust property or estate, and as such had the right to incur the debts represented by the overdrafts and to make the note to cover them, relying on section 2267 of the Civil Code. That section reads as follows: "Trustee's powers as agent. A trustee is a general agent for the trust property. *His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property* to the same extent as the acts of an agent bind his principal." (Italics for emphasis.) Obviously, if the trust instrument does not confer the power to incur the debt and/or give the note, it does not exist because nothing contained in the chapter of the Code referred to does. The section is a mere statutory statement of an equitable principle.

In Pomeroy's Equity Jurisprudence, vol. 3 (3d Ed.) § 1062, is the following: "Under the general obligation of carrying the trust into execution, trustees and all fiduciary persons are bound, in the first place, to conform strictly to the directions of the trust. This is in fact the cornerstone upon which all other duties rest, the source from which all other duties take their origin. The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligations. If the trust is express, created by deed or will, then the provisions of the instrument must be followed and obeyed."

[1, 2] It is the duty of a trustee when in doubt as to his right in borrowing money to make the same a charge upon the trust estate, to seek instructions from the appropriate court, either the court in probate when jurisdiction is retained or by an independent application. "Whenever there is any bona fide doubt as to the true meaning and intent of provisions of the instrument creating the trust, or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity, at the expense of the trust estate, and obtain a judicial construction of the instrument, and directions as to his own conduct." Section 1064, Pomeroy's Equity Jurisprudence, vol. 3 (3d Ed.).

This trust instrument does not in terms give to the trustees the right or power to borrow money or to incur indebtedness to be charges upon the trust estate. In Pomeroy's Equity Jurisprudence, (3d Ed.) volume 3, note under section 1085 at page 2102, we find the following: "Beatty v. Clark, 20 Cal. 11, 30, shows what payments made by a trustee out of his own funds, and what advances made to him by third persons, can be an equitable lien upon the trust property, namely, if the payment by himself, or the loan by the creditor, was not expressly authorized by the trust instrument, such payment or loan must be necessary for the preservation of the property, or to prevent a failure of the trusts."

[3-5] By the instrument in question the trustees are given the power to hold, invest, manage, and control certain real property and to pay the income, as above indicated.

The question is then presented whether the power to borrow money is one implied from the power to manage and control the property in question, and, if it were conceded for argument's sake that such power arose by implication, the test of the right to exercise the same would be in the purpose for which the money was borrowed and used; namely, for the preservation of the property or to prevent the failure of the trust. It would seem only logical that the burden cannot be upon the plaintiff to show that the money was not borrowed for either of these purposes and put to such use, but, to the contrary, that the burden would be upon the bank which assumed the right to charge the trust estate to show that the money was loaned to the trustees and used by them for the necessary purpose of preserving the trust estate. Appellant takes the position that the complaint contains no averment whatever as to the lack of authority on the part of the trustees to borrow money for the account of the trust estate; the allegation going merely to the lack of authority on their part to execute the $14,500 promissory note without order of court, and to the lack of authority on the part of the Salinas Bank to appropriate the deposit in question without order of court. (Appellant's opening brief, p. 11.) This view does not seem to be tenable because the complaint pleads in full the trust instrument.

[6] The fundamental inquiry, answer to which is determinative of the right of the bank to charge or "bind the trust property" with the amount of the loan or note, arises under section 2267 of the Civil Code, while the method of the appropriation, under section 3054, Civil Code, is of secondary consideration. That section provides merely the mechanics by which a deposit may be absorbed, assuming the freedom of the deposit as a part of the trust corpus from protection due to want of authority of the trustees to render such trust corpus liable for the debt.

The right and power to bind the trust property would seem to be analogous to the right and power to assert an equitable lien. It has its origin in the bestowal of a benefit upon the thing sought to be charged with the burden thereof. Applying this reasoning to the facts of the instant case, the defendant occupies the position of a would-be equitable lienor, and it must show that it has contributed to the integrity or preservation of the trust property. It need not have resolved the question of the trustees' power to borrow and thus to charge the trust property. It might have caused that question to be answered by the court. It assumed, however, to interpret the trust instrument, and must be held to have done so at its peril. Surely if it were asserting its right to an equitable mortgage on the trust property it would have to show that its advances had gone into or had been expended upon it for its preservation or necessary advantage. The answer of the Salinas City Bank admits that such funds as it took were of the corpus of the trust.

[7] We come now to the question whether any violence has been done to the rights of the ultimate nominal defendant (appellant bank) because of the judgment rendered in spite of the denials asserted by it in its answer to the supplemental complaint. The supplemental complaint was a mere repetition of the original complaint except to the extent that it set out that the account of the trustees with the beneficiaries of the trust had become final and that a copy thereof was attached thereto. Since the purchasing defendant bank stands in the shoes of the original defendant bank, it was unnecessary that any supplemental or any complaint be filed against it to bring it into the action. In any aspect of the case, the fact that the ultimate defendant denies for want of information those allegations of the original and supplemental complaint in respect to the character of the deposit which were admitted by the original defendant cannot deprive the admission of the original defendant of such evidentiary effect as was given it by the trial court.

[8] Appellant contends that the claim of plaintiff is barred by subdivision 1 of section 338, Code of Civil Procedure, on the ground that a claim against a purchasing bank for an alleged liability of the selling bank is upon a statutory liability. Suit herein was commenced about two months after the appropriation. Trial was in progress when the attorney for defendant Salinas City Bank suggested that submission should not be had until the determination of the case of Purdy v. Johnson, a pending suit by respondent against the testamentary trustees for an accounting. The court adopted the suggestion. The original trial judge died and a new trial was had, resulting in the judgment appealed from.

If by section 31 of the California Bank Act (as amended by St. 1921, p. 1373) the ultimate purchaser of the Salinas City Bank stands in the shoes of the original defendant, the statute of limitations cannot be successfully urged. In the sense in which appellant construes the words "statutory liability," it cannot be said that the defendant bank is bound. The provisions of the California Banking Act compel a purchasing bank to assume every obligation of the purchased bank.

Section 31 of the California Bank Act reads:

"The rights of creditors of the selling bank shall not in any manner be impaired by any such sale [of its banking business], nor shall any liability or obligation for the payment of any money due or to become due, or any claim or demand, in any manner, or for any cause existing against such selling bank, * * * be in any manner released or impaired, and all the rights, obligations and relations of all the parties, creditors, depositors, trustors and beneficiaries of trusts shall remain unimpaired by the sale, but such bank to which the other shall sell all its business or all the business of any of its departments, shall succeed to all such relations, obligations, trusts and liabilities and be held liable to pay and discharge all such debts and liabilities and to perform all such trusts of the selling bank in the same manner as if such bank to which the other had sold had itself incurred the obligation or liability or assumed the relation of trust."

This is in harmony with the view expressed in Barreiro v. Bank of Italy National Trust & Savings Association, 125 Cal. App. 153, 13 P.(2d) 1017. The progressive sales and purchases from and by the original bank to the ultimate defendant have no greater significance in the premises so far as concerns the obligation in suit than would a change of name of the bank.

[9] Error is urged by appellant in overruling the demurrer of the purchasing bank for nonjoinder of the trustees individually or as trustees. In view of the fact that the trustees were called upon to take proceedings to cause a restitution of the property appropriated by the bank, and declined to do so, they are not necessary parties to this suit. They are estopped to assert any claim against the bank and thus any double payment by the bank is prevented. Assuming that they might have been proper parties, this case did not finally come on to trial and was not submitted until after the distribution of the trust estate to the plaintiff, and therefore not until after the trust period had elapsed. It was appropriate, in consequence, that judgment be rendered in her favor directly against the bank as the trust had lapsed.

[10] Appellant says that the decision is against law because no finding was made upon the issue raised by the answer which alleged "an indebtedness by the trustees of plaintiff in the sum of about $14,500 for money advanced to them as such trustees, which was unsecured, and was due, owing and unpaid at the time of the appropriation in question." An express finding upon that subject was unnecessary, for the reason that this case was tried and decided upon the theory that under section 2267 of the Civil Code, the trustees had no right or power to bind the trust estate for the amount of the note, or of any overdrafts which the note represented. Therefore there is an implied finding that there was no indebtedness by the trustees of the plaintiff as such in that or in any sum to the bank.

[11, 12] Appellant argues that there is a presumption that the trustees did not embezzle the borrowed money, and that hence it must be also presumed that they used it in connection with the management and operation of the trust estate that it might yield plaintiff an income. This deduction does not follow because the right to bind the trust property flows either from an express power to borrow or from a showing (here absent) that the money was used for the preservation of the trust property or to prevent a failure of the trust. Again it is urged that "the trustees made advances to Mrs. Purdy herself"; but it is conceded that the amount thereof "does not appear." The evidence is uncontradicted that Mrs. Purdy had no knowledge of the borrowing or of the note in question.

In conclusion, says appellant, in any case "Mrs. Purdy had the benefit of the money loaned by the bank, either because it was used to enable the trustees to produce an income for her, or because it was actually advanced to her. Consequently, to permit her to recover a judgment against the bank is in effect to compel the bank to pay her twice, which is a glaring injustice." This statement is grounded upon assumption rather than upon proof. Judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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138 Cal.App. 514

In re KLINE'S ESTATE.

KLINE et al. v. CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

Civ. 9580.

District Court of Appeal, Second District, Division 1, California.
May 14, 1934.

Rehearing Denied May 21, 1934.

Hearing Denied by Supreme Court July 12, 1934.

1. Charities 🔑31.

As respects contention that legacies for charitable purposes are favorites of courts, courts can have no fixed policy which will admit of operation of a principle by which one party to litigation will be favored to detriment of other party therein.

2. Courts 🔑26.

Business of courts is to administer justice as nearly as may be in accordance with fixed rules of law and procedure aided wherever and whenever proper and necessary by established and governing principles which relate to equity jurisprudence.

3. **Wills** 🔑435.

Estate of testator is bound by specific and express directions contained in testator's will rather than by inconsistent references or side remarks interspersed therein.

4. **Perpetuities** 🔑8(7).

Under will creating trust in perpetuity for "persons, charitable organizations, and/or corporations" organized for purpose of aiding and for betterment of crippled children, trust *held* void as noncharitable trust in perpetuity, since under will trustee could properly disburse funds to noncharitable uses.

5. **Wills** 🔑660.

Legatees who filed petition for construction of will *held* not deprived of their legacies because of provision in will that legatees seeking to impair, invalidate or to set aside its provisions should receive only $1.00, since legatees sought not to invalidate will but to ascertain its true meaning.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the matter of the estate of Joseph L. Kline, also known as Joseph Lyon Kline and as J. L. Kline, deceased, wherein Arthur I. Kline and others filed a petition for construction of a will, opposed by the Citizens' National Trust & Savings Bank of Los Angeles, as executor. From decrees, petitioners appeal.

Reversed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

G. Harold Janeway and George I. Devor, both of Los Angeles, and Walter S. Hilborn, of New York City, for appellants.

Hunsaker & Cosgrove, Cosgrove & O'Neil, and Crop & Crop, all of Los Angeles, for respondent.

HOUSER, Justice.

In this matter it appears that one Joseph L. Kline died leaving a last will that included the following provision with reference to the disposition of the residue of his estate, to wit: "All of the rest and remaining net income received and derived from the trust estate, and after the death of Charles S. Kline and/or Carrie Pedder the income to which he or she would be entitled, if living, shall go and be paid, used and/or disbursed by my said Trustee to such persons, charitable organizations and/or corporations situated in the City of Los Angeles, County of Los Angeles, State of California, organized for the purpose of aiding and for the betterment of crippled children, the persons, charities or organizations that shall receive the benefit of this charitable trust to be selected by my said Trustee in its absolute and uncontrolled discretion. This trust is created perpetual and is to be known as the Joseph L. and Minnie S. Kline Charitable Trust for Crippled Children in the City and/or County of Los Angeles, State of California."

In due course, two of the natural heirs of the deceased presented their petition, and one of such heirs presented his separate petition, to the superior court, wherein it was prayed that said court place its construction particularly upon that provision of the will by which the residue of the estate of the deceased was directed to be paid "to such persons, charitable organizations and/or corporations * * * organized for the purpose of aiding and for the betterment of crippled children, the persons, charities or organizations that shall receive the benefit of this charitable trust to be selected by my said trustee in its absolute and uncontrolled discretion."

At the same time, by likewise separate petitions to said court, the said petitioners also prayed for distribution to each of them of a legacy of the sum of $1,000 left to each of them by the said testator in his said will.

After answering the allegations contained within each of such petitions, the executor of the will pleaded a separate provision of the will of said deceased wherein, in substance, it was provided that, should any devisee or legatee named in such will seek "to impair, invalidate or set aside its provisions," etc., such devisee or legatee should receive the sum of $1 and no more; and thereupon the executor prayed that, because of the fact that the petitioners had sought to have the terms of the will construed by the court as aforesaid, it be decreed that such petitioners had forfeited all rights and benefits which otherwise would have accrued to them, save and except the sum of $1.

After a hearing on said petitions, the court construed the paragraph of the will in question and in effect ruled that a charitable trust was thereby created for the purpose of aiding, and for the betterment of, crippled children. In effect, the court also ruled that, by having instituted the judicial inquiry with reference to the construction of such paragraph, each of the petitioners therein had forfeited his legacy of $1,000 and was entitled to receive the sum of $1 and no more. It is from each of the ensuing separate orders or decrees rendered by the court that the instant appeals are taken.

It is conceded by the parties that, unless the words of the will to which attention has been directed are sufficient to create a valid charitable trust, the rule against perpetuities will prevent the operation of the instrument as a will in that regard. In that connection, the issue is clearly recognized by the respondent in its brief wherein it makes the declaration that: "Appellants assert, and we do not deny, that if the income from a perpetual trust may, without violating the terms of the trust, be used either for charitable or noncharitable purposes, the entire trust is void under the constitutional prohibition against perpetuities except for eleemosynary purposes. The sole question here involved is, does the will permit any of the income of said trust to be used for noncharitable purposes?"

By the provisions of a written stipulation filed by the respective parties to the inquiry at the time when the several petitions came on for hearing before the court, in substance it appears that at the date of the execution of the will, and continuously thereafter, there were within the city of Los Angeles certain organizations of persons specializing for profit in the "aiding and betterment of crippled children"; and likewise during all of said time, within the said city at least one incorporated organization, to wit, Societe Francaise de Bienfaisance Mutuelle de Los Angeles (familiarly known as the French Hospital), that operated without profit in "aiding and bettering" those crippled children only who were members of said corporation. By said stipulation it also was agreed by the parties that the said corporation "is not a charitable institution but is the same corporation mentioned in the Estate of Dol, 182 Cal. 159, 187 P. 428, and was organized and operated at all times as in said decision set forth."

Reverting to the particular language of the provision of the will in question, it will be noted that, as of first impression, the designated beneficiaries of the proposed trust are: (1) Persons; (2) charitable organizations; and (3) [charitable] corporations; or (4) unclassified corporations. But in effect it is argued by the respondent that such language should be construed to mean that each of such beneficiaries is "charitable"; which conclusion is reached in consequence of the suggestion that the word "charitable," which follows the word "persons" and which immediately precedes the word "organizations," should be held to apply to and modify each of the other designated proposed beneficiaries. to wit, "persons, and/or corporations."

Although certain rules of construction and authorities generally are cited by each of the parties herein which to some extent furnish a guide for a correct decision of the question here at issue, in none of such authorities was language used in a will that is either identical with or analogous to the language here under consideration. To refer to such cases and to attempt to distinguish each of them from the instant case would serve no useful purpose. It may suffice to state that in none of them was a word therein placed as is the word "charitable" herein held to apply either to a word placed like "persons," which precedes the proposed (modifying) adjective, or to words which follow such qualifying word that are immediately preceded by the word "or." No rule of construction to which the attention of this court has been directed either requires that the word "persons" be modified by the word "charitable," or even admits of the word "persons" being so modified. As to the words and character "and/or corporations," which follow the words "charitable organizations," it may be that, if the word "or" had been omitted, the word "charitable" might be held to designate the kind of corporations that were intended; but, considering the use of the disjunctive "or," it becomes obvious that a class of corporations other than charitable and which are unauthorized by law to take charitable bequests or devises, was included as a possible beneficiary of the trust.

Respondent directs attention to other language used by the testator in his will, in which he refers to "the amount devised for charity," to "said charitable trust," as well as to other so-called "earmarks" of a similar character; whereupon respondent invokes the rule that an ambiguous phrase, clause, or paragraph in a will may be explained by and with reference to other clear, pertinent expressions that may be contained therein. In other words, if we may assume the existence of a condition which in fact does not exist, we then may have an infallible remedy therefor; but the difficulty encountered when such rule is attempted to be applied herein is that the questioned language presents no ambiguity. It is clear enough that, in the language actually used by the testator, the only way by which any ambiguity may be discerned therein is when a rule which has no application to the situation is attempted to be applied.

[1-3] Respondent makes the suggestion that, since legacies and devises for charitable purposes "are the favorites of the courts, * * * the language should be liberally construed so as to create a valid trust if possible." Even though the fact be conceded that when, in the course of the operation of their proper functions in cases of this kind, in some scattered instances the courts may seem to have strained legal principles in decreeing the creation of charitable trusts, it cannot be accepted as a correct statement of a legal or equitable principle to say that in such situation the courts, as an institution, are required to show partiality in favor of litigants who would be benefited by such declaration. On reflection, it should be apparent that the courts can have no fixed policy which will admit of the operation of a principle by which one party to litigation will be favored to the detriment of the other party therein. Manifestly, even-handed justice cannot be administered on the basis of partisanship, expressed or indicated, either in favor of, or in antagonism against, either of the parties to the litigation. Nor may the subject-matter in controversy in any manner affect the scales of justice. The business of the courts is to administer justice as nearly as may be in accordance with fixed rules of law and procedure, aided wherever and whenever proper and necessary by established and governing principles which relate to equity jurisprudence. Any intentional departure from such a course, no matter how worthy the objective, must result in reproach to the surest foundational support of our government. Hence, in the instant inquiry, however obvious it may be that what the testator himself had in mind was to dispose of certain of his property in a benevolent manner, even though it may have been "for the purpose of aiding and for the betterment of crippled children," his good intentions in the matter cannot be carried into effect by the creation of a charitable trust therein in the face of his plain language which permits his trustee to devote his estate, or some portion thereof, to purposes that are legally noncharitable. It may be that the testator probably thought that what he had in mind was to create that which in the law constituted a charitable trust; but the estate of the testator is bound by the specific and express directions contained in the testator's will, rather than by inconsistent references or "side remarks" interspersed therein. Taylor v. Keep, 2 Ill. App. 381; In re Sutro, 155 Cal. 730, 102 P. 920; In re Walkerly, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; In re Vance, 118 Cal. App. 163, 4 P.(2d) 977.

In Estate of Doane, 190 Cal. 412, 415, 213 P. 53, 54, it is said: "The decedent having made an invalid provision in clear, unequivocal language, the courts are without power to alter that language to express what may have been in the testator's mind but was not attempted to be expressed by him, however beneficent such unexpressed intent may have been. 'It may be said of all wills, that the testator's intent is to make a valid disposition of his property. * * * But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.' Estate of Walkerly, supra, 108 Cal. 627, 659, 41 P. 772, 780, 49 Am. St. Rep. 97."

And again, in the Matter of Frasch's Will, 245 N. Y. 174, 156 N. E. 656, 658, where the bequest was carefully, "ear-marked," among other things, the court said: "So, too, a trust which may include social, educational or moral benefit, confined to members of a corporation and in which the general public has no direct participation, has been declared a trust for a private use. Attorney General v. Hewer, 2 Vern. 387; Carne v. Long, 2 De Gex, F. & J. 75; Miley v. Attorney General (1918) 1 Irish Rep. 455. In such cases since the use is not charitable even in a broad sense, an intent or purpose on the part of the creator of the trust to confer an indirect benefit upon the public does not change the character of the trust. Not even if the designated use might tend to create the contemplated public benefit would the rule be different. 'There is no authority for holding a charitable tendency to be a charitable use; in other words, that a gift to a person for his own benefit, whereby consequential charity may arise, is not a charitable use.'"

[4] As executed, the effect of the paragraph of the will to which attention hereinbefore has been directed is that the trustee therein named is permitted to disburse a portion of the income of the trust property to uses that in legal contemplation either are or may be noncharitable. Especially as applied to a noncharitable corporation, that such a provision in a will defeats its intended purpose is attested by so many authorities that to cite them would amount to a superfluity. However, as to general governing principles, see the cases hereinbefore cited; also Estate of

Dol, 182 Cal. 159, 187 P. 428, which relates particularly to an attempt to create a charitable trust in favor of a noncharitable corporation.

From the foregoing it may be deduced that, in the opinion of this court, no legal trust was created.

[5] With respect to the appeal from the order or decree by which it was ruled that, in accord with the provisions of the will, because the petitioners had instituted the proceedings by which they sought to have the court place its construction upon the provisions of the will to which consideration hereinbefore has been given, the petitioners had forfeited their respective legacies therein provided and were entitled to receive the sum of $1 and no more, in principle the question therein presented seems to be settled by the decision rendered by the Supreme Court of this state in the case entitled In re Walkerly, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97, wherein it was held (syllabus): "While the election of the widow to take under the will estops her from denying the validity of the instrument as a will, it cannot estop her from insisting upon a proper interpretation of the instrument nor from questioning the validity of trusts attempted to be created thereby."

A similar thought is expressed in Estate of Vanderhurst, 171 Cal. 553, 558, 154 P. 5, 8, where it is said: "There was a provision in the will that in case any legatee or devisee contested it his or her share of the estate should be $1. Appellants argue that the respondents * * * contested the will. The mere statement of this contention refutes it. They opposed the petition for distribution, but they did not seek, in any way, to contest the will. They merely sought interpretation of it."

In Estate of Bergland, 180 Cal. 629, 182 P. 277, 5 A. L. R. 1363, it was held that (syllabus): "An attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, does not fall within the forfeiture clause of the genuine will."

And that ruling was quoted with approval in Lobb v. Brown, 208 Cal. 476, 484, 281 P. 1010, where the general subject of forfeitures of legacies and devises is considered by the court.

In Black v. Herring, 79 Md. 146, 28 A. 1063, 1065, where a situation like that here involved was under consideration, it was said: "It is a mistake to assume that the appellant, in filing this bill, by which he seeks only the true construction of said will and codicil thereto, and the enforcement of his rights thereunder, is seeking to thwart the designs of the testatrix, or in any manner to interfere with the due execution of her wishes as expressed in her testamentary papers. It would be an anomaly in the law, and a very unjust restriction, if such a contention could be upheld."

But perhaps one of the clearest expressions of opinion concerning the legal effect of a forfeiture clause in a will where it appears that a judicial inquiry has been instituted by a legatee regarding the construction of the will in general, may be found in the case of Tate v. Camp, 147 Tenn. 137, 245 S. W. 839, 844, 26 A. L. R. 755, where, among other things, it is said: "* * * If the action of a legatee is merely one to determine the true construction of the will, or of any of its parts, the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning." See, also, Schouler on Wills, § 605.

Considering the facts herein, this court is in accord with the law as indicated in the foregoing authorities. It follows that each of the several orders, decrees, or judgments from which the instant appeals are taken should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

138 Cal.App. 450

JOHNSTON v. JOINT HIGHWAY DIST. NO. 12.

Civ. 4968.

District Court of Appeal, Third District, California.
May 7, 1934.

1. Contracts ⚷170(2).

Where experienced contractor delivered more than half of 21,330 cubic yards of asphaltic concrete knowing that it was being measured in place as provided by his bid and contract with highway district, and made sworn demands for payments based on such measurement, contractor's claim for payment based on measurement in vehicle at place of delivery *held* properly rejected, though specifications, which were made a part of the contract, provided for such measurement (Civ. Code, §§ 1649, 1654; Code Civ. Proc. § 1864)

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

2. Contracts ⚿170(1).

Where contract is ambiguous, court may consider how one party knew the other understood the contract and how the parties practically construed the contract in performing it (Civ. Code, § 1649; Code Civ. Proc. § 1864).

◆

Appeal from Superior Court, Sutter County; E. P. McDaniel, Judge.

Action by J. E. Johnston against the Joint Highway District No. 12 of the State of California. From a judgment for defendant, plaintiff appeals.

Affirmed.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for appellant.

Loyd E. Hewitt, of Yuba City, for respondent.

WEYAND, Justice pro tem. delivered the opinion of the court.

[1, 2] The plaintiff, appellant herein, was a contractor and performed certain road work for joint highway district No. 12 of the state of California, under a contract dated July 18, 1930. There is but one ultimate question involved herein, and that is whether the asphaltic concrete used on the roadway should have been measured in the wagon at the point of delivery to the place of use, or whether it was to be measured after the same had been compressed into the roadbed, as the roadway was finally constructed.

Appellant contends that the contract should be so construed that he be paid for this asphaltic concrete, measured in the wagon upon its delivery to the place of use. The respondent road district contends the asphaltic concrete should have been measured when compressed "in place."

The contract under which the plaintiff was operating had therein a provision as to the asphalt to be furnished, and paid for, worded as follows: "5B 21330 Cubic yards asphalt concrete base with type 'A' surface in place (Alternate 'B') at seven dollars and sixty cents per cu. yd." Plans and specifications were as usual made a part of the contract; direct provision was made for payment of concrete work according to dimensions shown on the plans and cross section. There is in the specifications, however, a provision worded as follows: "Material paid for by the cubic yard will be measured in the vehicle at the point of delivery on the road." In connection with the specifications as to the delivery of materials sold by the cubic yard, it was provided that each truck delivering material should be marked as to its cubic content. Work on the contract was begun in the summer of 1930.

The actual capacity of the trucks that delivered asphalt to the present road job varied from 4 cubic yards to 5.6 cubic yards. On June 28, 1931, a representative of plaintiff measured the trucks for the first time and found their capacity as last above stated. This was not done until after the delivery of asphalt was about three-fourths completed.

During the delivery of the asphalt and as the work progressed, the plaintiff from time to time signed claims for part performance, and in all these claims payment was to be made at the rate of $7.60 per cubic yard of asphalt concrete "in place."

The bid of the plaintiff for this work was for asphalt concrete "in place."

During the performance of the work, and up to a time when more than one-half thereof was completed, no measurement was or could be made of asphalt, in wagon at place of delivery, because no measured wagons were provided by plaintiff or used by him. A measurement was made of asphalt "in place," and the payments to be made by the district therefor were based on cement in place in computing the progress claims, and these claims were from time to time signed and verified by appellant.

The specifications and cross sections clearly indicated that an estimate of 21,330 cubic yards of asphaltic concrete in place were necessary for the completed job, and it was evident that, if asphalt was to be paid for according to measurement in wagons at place of delivery, over 30,000 cubic yards were required.

Appellant contends that, as the contract was ambiguous, and as the district, by its officers, provided the contract, they should suffer because of this uncertainty. Section 1654, Civil Code, is cited in support of that contention.

We cannot concede that the contract is uncertain, because in the general specifications there is the language, "Material paid for by the cubic yard will be measured in the vehicle at the point of delivery on the road," when in the body of the contract it is provided payment is to be made for asphalt "in place." The specifications are necessarily general, but the final contract is special and definite. However, if we do consider the whole contract as being uncertain, the very wording of section 1654, Civil Code, puts upon the private party the blame for such uncertainty.

The appellant was an experienced contractor, and had performed much road work.

If we are to consider the contract involved herein as being ambiguous or uncertain as to the provision relating to payment for the asphaltic concrete used, there are two well-settled rules that we are at liberty to use.

One rule is that we may consider how one party knew the other party understood the agreement. In the instant case the plans and specifications and the cross sections disclosed conclusively that four alternative types of construction were contemplated. Bids were asked on all four types. The entire yardage of material when placed in the finished roadway was the same. The bid made by Johnston was the lowest bid made. Discussion was then had with Johnston, and the plans and specifications and the cross sections were again called to his attention. The yardage was fully shown in the cross sections, and there was no difference in yardage whether cement was used or asphaltic concrete. The yardage being the same, appellant knew that the respondent must have meant cubic yards in place. No other meaning could be in the mind of respondent.

Another rule that we may consider is that we may go with the parties during performances of the agreement, and see how they performed the contract. In the present case appellant delivered more than one-half of the asphalt knowing it was being measured in place. Appellant, as before stated, signed and swore to demands based upon measurement in place.

From an examination of the record herein, it seems apparent that appellant must have known that the respondent district would interpret the provision as to payment for the asphalt, as the same was interpreted by the district.

Our Civil Code, § 1649, provides as follows: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Section 1864, Code of Civil Procedure, expresses the same thought, but is applied to the question of the introduction of evidence.

Without dispute, the evidence discloses that, after the bids were made, and before the contract was actually let, appellant was questioned by the board and the engineer as to how it came and why it was that his bid was so much lower than other bids. Appellant did not explain this difference except to say that his generosity, coupled with the fact that he owned his own rock-crushing plant, made up for his ability to quote the figure he gave as a bid. As before stated, he was a contractor of long experience. The cross sections of the work were before him. His bid was for asphalt "in place." The only explanation he could have given, if his present claims are to be given credence, would have been that he was going to demand that asphalt would be measured in wagon before compression into the constructed roadway. No such explanation was made by him. In other words, he either rested upon the assumption that after the work was done he would make that claim, or was so careless or unconcerned as to permit the officers of the district to believe that his bid was the lowest bid, when he knew or should have known that it was much higher than many of the bids submitted, if asphalt was to be paid for measured in wagon at place of use.

In Williston on Contracts, § 623, p. 1206, it is said: "The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts, but the declarations of the parties may be considered. But if the meaning of the contract is plain, the acts of the parties cannot prove a construction contrary to the plain meaning."

Quite the same provision is set forth in Elliot on Contracts, in § 1537, vol. 2, of said last-named work.

As a rule of evidence relating to this subject, Jones' Commentaries on Evidence, vol. 3, § 453, says: "It is a familiar rule that where the language of a written instrument is ambiguous or indefinite, the practical interpretation of the parties may be proved, and is often entitled to great weight."

Without quoting from them, it may be said that the following California cases fully support the above rule: Grant v. Bannister, 160 Cal. 774, 118 P. 253; Yul v. Miller, 80 Cal. App. 609, 252 P. 733; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951.

As we view the contract, we cannot say it is ambiguous or uncertain as to how payment was to be made, but it is apparent that during the trial the learned trial judge did so assume, and was justified in so doing. Much of the testimony was addressed to that question, but, even so, we can see no error to the prejudice of appellant in any of the rulings made.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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138 Cal.App. 485

KRUGER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 9476.

District Court of Appeal, First District, Division 2, California.
May 10, 1934.

1. Prohibition ⚷10(2).

Divorced husband *held* entitled to writ of prohibition restraining court from awarding former wife counsel fees and costs for prosecution of, and maintenance and support pending, action for specific performance of husband's agreement, after court lost jurisdiction to set aside or modify divorce decree.

2. Divorce ⚷222.

Superior court has no jurisdiction to award divorced wife counsel fees and costs for prosecution of action for specific performance of agreement by husband, or award her maintenance and support during pendency of such action, after losing jurisdiction to set aside or modify divorce decree.

◆

Original application by Harry Kruger for a writ of prohibition to the Superior Court in and for the City and County of San Francisco.

Peremptory writ granted.

John D. Harloe and Walter C. Frame, both of San Francisco, for petitioner.

Stella Donovan, of San Francisco, for respondent.

SPENCE, Justice.

This is an original application for a writ of prohibition.

Petitioner and Ernestine Kruger were husband and wife. On February 26, 1932, the wife obtained an interlocutory decree of divorce. Said decree settled the property rights of the parties, and no provision was made for alimony. About one year later the parties resumed marital relations and continued to live together for approximately eight months. The wife then left petitioner because of alleged acts of cruelty. In September, 1933, the wife made a motion to set aside the interlocutory decree of divorce upon the ground that the parties had become reconciled. Said motion was denied. In January, 1934, the wife filed an affidavit for a restraining order and order to show cause in said divorce action. She alleged in said affidavit that the respondent court had lost jurisdiction to set aside the interlocutory decree and that she desired to file a separate action to compel specific performance of an alleged agreement. The agreement referred to was one alleged to have been made orally at the time the parties resumed marital relations whereby petitioner agreed "that he, said defendant, would set aside the interlocutory decree of divorce," would give her "one-half of the drug store" and "one-half of the income of said drug store," and would be kind to her. The trial court issued its order restraining petitioner from disposing of his property and ordering him to show cause "why he should not pay to plaintiff a reasonable sum per month for her maintenance and support and further sum as may to the court seem just for her counsel, and a further sum for costs and counsel fees for the prosecution of an action in equity as set forth in the affidavit of said plaintiff on file herein." It is alleged in the petition herein that, unless restrained and prohibited from so doing, the respondent court will entertain and hear said order to show cause and grant the relief asked. Said allegation is not denied.

[1, 2] We are of the opinion that the writ should issue. It is conceded that the respondent court had lost jurisdiction to set aside or modify the decree of divorce in the divorce action. Dell v. Superior Court, 53 Cal. App. 436, 200 P. 85; Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 238 P. 93; Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70. We believe that the respondent court is clearly without jurisdiction in the divorce action to award to the wife counsel fees and costs for the purpose of prosecuting an independent action and is without jurisdiction in the divorce action to award her maintenance and support during the pendency of such independent action.

Let a peremptory writ of prohibition issue as prayed.

We concur: NOURSE, P. J.; STURTEVANT, J.

COOPER v. KELLOGG et al. *

Civ. 4825.

District Court of Appeal, Third District, California.

May 14, 1934.

Hearing Granted by Supreme Court June 12, 1934.

Automobiles ⇨244(20).

Where automobile host, sued by guest, answered, "I must have been," when asked whether he was asleep at time of accident, answer *held* not responsive nor sufficiently enlightening to support finding that host was asleep and hence not guilty of gross negligence.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 31 P.(2d) 797.

James, Brann & Rowe, of San Francisco, for appellant.

Bronson, Bronson & Slaven, of San Francisco, for respondents.

PER CURIAM.

From the petition of respondent for a rehearing it appears that in the main opinion we perhaps laid too great stress upon the effect of the question, "Were you asleep?" and the answer thereto, "I must have been." Conceding that respondent is correct in his contention that appellant, not having moved to strike out the answer as being the conclusion of the witness, he cannot now be heard to complain, we still are of the opinion that the answer is not responsive nor sufficiently enlightening upon which to base a finding. The witness does not state he was asleep, but only offers that supposition as an explanation of his conduct. He had previously testified that the window of the car on the driver's side was open and the rain and cool night breeze acted as a stimulant and he felt no indication of drowsiness.

As defendant was passing through Novato, about three miles from the point of collision, he testified he felt no indication of sleepiness, and even at a point one-half or three-quarters of a mile out of Novato near the point of collision, he testified he was wide awake. When asked on cross-examination the direct question, "You don't know why your machine ran into the automobile going in the opposite direction?" he answered, "No." He also answered the question by the court as to whether or not he was asleep, and replying, "I must have been," he was asked, "You don't know whether you were or not, Mr. Kellogg?" answered, "No, that seems to be the only logical conclusion to be drawn. Q. That is your conclusion as to what you thought might have happened? A. Yes."

In addition to the foregoing, clearly the conduct of the driver of the car, in view of the explanation last given must be held to be gross negligence. While usually such a question is a finding of fact, we believe that here, in view of the facts surrounding the collision and the lack of explanation of the cause thereof, there is nothing left for the court to do but hold the injuries to plaintiff were the result of gross negligence.

Rehearing is denied.

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138 Cal.App. 484

HALL et al. v. BERLINER et al.

Civ. 1343.

District Court of Appeal, Fourth District, California.

May 9, 1934.

Appeal and error ⇨1160.

Where instruction for directed verdict was erroneously given, judgment was reversed and cause remanded for a new trial upon all issues pursuant to stipulation to that effect.

Appeal from the Superior Court of Kern County; Robert B. Lambert, Judge.

Action by Russell E. Hall, individually, and as guardian ad litem for Wallace Edward Hall, a minor child, against J. J. Berliner and another. From a judgment in favor of the defendants, the plaintiff appeals.

Reversed, and cause remanded for a new trial.

Richard C. Waltz, of Beverly Hills, and Brittan & Mack, of Bakersfield, for appellants.

Borton & Petrini, of Bakersfield, for respondents.

PER CURIAM.

This is an appeal from a judgment following a directed verdict in an action for damages for wrongful death. All parties concerned are now convinced that the instruction

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*For subsequent opinion see 42 P.2d 59.

for a directed verdict was erroneously given and, by stipulation, have consented and requested that the judgment be reversed and the action remanded for a new trial upon all of the issues.

It is therefore ordered that the judgment be reversed and the action remanded for a new trial upon all of the issues and that the remittitur issue forthwith.

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138 Cal.App. 455

AUGENTHALER v. PINKERT et al.

Civ. 9299.

District Court of Appeal, First District,
Division 2, California.
May 8, 1934.

1. Automobiles 🔑245(6, 72).

Where pedestrian's evidence sustained theory that motorist disregarded traffic signals and knocked pedestrian down, and motorist's evidence sustained theory that pedestrian disregarded signal and stumbled and fell without being struck by car, case was for jury.

2. Appeal and error 🔑920(6).

Where record did not show moving papers, commission, or any other facts relating to deposition taken outside state, and trial judge overruled objection that deposition was taken on oral interrogatories, it must be presumed in support of judgment that ruling was correct and that plaintiff waived written interrogatories (Code Civ. Proc. §§ 2024, 2025).

3. Evidence 🔑318(1).

Where deponent was asked whether diagram of scene of accident was correct and answered affirmatively, and later was asked some questions about various objects shown on diagram, diagram *held* properly admitted as part of deposition as against objection it was hearsay.

4. Trial 🔑63(1).

In personal injury action by pedestrian allegedly struck by automobile, testimony as to whether witness saw automobile strike pedestrian *held* properly excluded as part of plaintiff's rebuttal, since subject-matter thereof was part of plaintiff's case in chief.

5. Witnesses 🔑240(4).

Where defendant's witness, after being excused, was called by plaintiff who was permitted to reopen case in chief, question on direct examination whether witness saw defendant's automobile strike plaintiff *held* properly excluded as leading.

6. Trial 🔑228(1).

Where instructions defining contributory negligence did not purport to deal with burden of proof, failure to state in such instructions that burden of proof on such issue rested on defendant, *held* not error, the subject being properly covered by other instruction.

7. Automobiles 🔑246(4).
Trial 🔑255(11).

Instruction that if defendant's automobile had passed stop signal before bell closing the traffic rang, defendant was entitled to proceed across intersection *held* not erroneous as entitling defendant to run plaintiff pedestrian down, and plaintiff, if desiring instruction covering such factor, should have requested it.

8. Automobiles 🔑246(58).

Instruction that if defendant motorist had clear view ahead and saw plaintiff pedestrian, defendant was required to stop to avoid striking plaintiff *held* properly refused, since instruction was attempt to apply last clear chance doctrine without stating all its elements, and since, under evidence shown in record, last clear chance doctrine was inapplicable.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Joe Augenthaler against Ruth Pinkert and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Ernest M. Torchia and David L. Sefman, both of Los Angeles, for appellant.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for respondents.

STURTEVANT, Justice.

In an action brought to recover damages for personal injuries, the jury returned a verdict for the defendant. The plaintiff made a motion for a new trial, which was denied, and from the judgment entered on the verdict the plaintiff has appealed under the alternative method.

[1] The plaintiff contends that the judgment is contrary to the law and the evidence. The contention cannot be sustained. The record contains evidence that is so conflicting that a verdict in favor of either party would have been sustained by an abundance of evidence. The accident happened at the intersection of Venice boulevard and Hill

street in Los Angeles. The boulevard runs east and west. Hill street runs north and south. A double track street railway extends south in Hill street and both tracks curve to the west into the boulevard. A gas station occupies the northwest corner and buildings occupy each of the other corners. Automatic electric signals are located one on each corner pursuant to certain local ordinances and by the terms of such ordinances it is unlawful for pedestrians or vehicles to cross a street when the lights show red as to such crossing. It is also unlawful to cross either street except at the crossing marked as such. About 7 o'clock on the evening of May 24, 1930, the defendant, together with three guests, drove north on Hill street, intending to cross the boulevard. The streets were lighted by street lights and also from the shop windows. The signals were operating. A street car was approaching on the west track coming from the north. Later it came to a stop slightly north of the boulevard. At or about the time the defendant reached the intersection the plaintiff was on the northeast corner of the sidewalk. Conflicts arose as to nearly every other fact. It was the theory of the plaintiff that when the signal opened for east and west traffic, that he lawfully started to cross Hill street and that the defendant unlawfully started to cross the boulevard and in doing so she overtook and knocked him down. It was the theory of the defendant that she lawfully entered the boulevard and when she was three-fourths across that the signal changed and before the signal opened for east and west traffic the plaintiff left the sidewalk, stepped into the street, walked a few steps, and then commenced to run diagonally northwest in front of her car, stumbled and fell, and that her car never touched him nor did he touch her car. As stated above, there was evidence introduced which would clearly sustain either theory. If the jury believed the evidence tendered by the defendant, and from its verdict we must assume it did, the judgment was neither contrary to the law nor to the evidence.

[2] At the time of the trial Miss Hertha Shenk was residing at 131 Clyde avenue, Evanston, Ill. She was one of the passengers riding with the defendant at the time of the alleged accident. The defendant produced her deposition and offered it in evidence. The plaintiff objected to it on the ground that it was taken in Illinois on oral interrogatories, whereas it should have been taken on written interrogatories. (Code Civ. Proc. §§ 2024 and 2025.) The point may not be sustained. The record shows that the deposition was read and the contents thereof. It does not show the moving papers, the commission, nor any other facts. When the objection was interposed during the trial, the trial judge asked to see the document. It was delivered into his hands we may assume, together with the moving papers and the commission. Thereupon the objection was overruled. In support of the judgment we must presume the ruling was correct. Under the provisions of section 2025 of the Code of Civil Procedure the plaintiff had the right to waive written interrogatories and, nothing to the contrary appearing in the record, we must assume he did so.

[3] To the deposition was attached a sketch or diagram of the place where the alleged accident happened. When the deposition was being read, the plaintiff objected to the diagram on the ground it was hearsay. The record does not show it to be hearsay. When it was shown to Miss Shenk, she was asked if it was correct and she said it was. Later she was asked some questions about some objects delineated on the face of the diagram. We see no error in the ruling admitting the diagram as part of the deposition.

[4, 5] In presenting her case the defendant called as a witness Raymond Travelle, who was a passenger riding on the street car. He was examined and cross-examined and excused. As a part of his rebuttal the plaintiff called the same witness and asked him if he saw the defendant's car strike the plaintiff. An objection was made and sustained on the ground the subject-matter was a part of the plaintiff's case in chief and not in rebuttal. Thereupon the plaintiff asked permission and he was given permission to reopen his case in chief. He then propounded the same question, to which the defendant objected on the ground it was leading. The objection was sustained. The rulings were clearly correct.

[6] The plaintiff objects to instructions No. 4 and No. 6, which define contributory negligence, saying they omitted to state that the burden of proof on that issue rested on the defendant. They did not purport to deal with the burden of proof. That subject was properly covered by instruction No. 12.

The plaintiff objects to instruction No. 9 because, as he asserts, contributory negligence is no defense unless it was a proximate cause of the injury. A most cursory reading of the instruction shows it was not subject to that criticism.

The next instruction objected to is No. 10. He cites Sullivan v. Market Street Railway

Co., 136 Cal. 479, 69 P. 143. That was a passenger case and it is not in point in the instant case.

He next quotes instruction No. 11 and then asserts that it failed to tell the jury that it should return a verdict in favor of the guilty party. This criticism is manifestly inadvertent. It will suffice to state that the instruction has been approved. Sheldon v. James, 175 Cal. 474, 480, 166 P. 8, 2 A. L. R. 1493.

Instruction No. 18 is objected to on the same grounds as No. 11. The attack has no merit.

[7] Instruction No. 34 was as follows: "You are instructed that if the automobile of the defendant had passed the stop signal before the first bell closing the north and south traffic rang, then it was her right to proceed on across the intersection, and under such circumstances she was not negligent in thus proceeding across the intersection." The plaintiff asserts that under the circumstances stated the defendant was not entitled to run the plaintiff down. The instruction attacked said nothing to the contrary. If the plaintiff wanted an instruction covering that particular factor, he should have made a request therefor.

Instructions No. 37 and No. 40 are set forth and the statement is made that they instruct on questions of fact. As to what fact or facts is not stated. We see none.

[8] The plaintiff then complains because the trial court refused to give some proposed instructions which he numbers 1 to 6. The first one was not pertinent to any set of facts in the record. The second attempted to state the doctrine of the last clear chance. However, it wholly failed to do so. Supp. Cal. Jur. 1928, p. 233. Nos. 3, 4, and 5 were fully covered by the exhaustive charge and instructions given by the trial court. The plaintiff requested and the trial court refused to give an instruction worded as follows: "The court instructs you that if you find from the evidence that the defendant Ruth Pinkert, from her position, had a clear view ahead of her and saw the plaintiff, it was her duty to stop her automobile to avoid striking him." The refusal was not error. The instruction was an attempt to apply to the case the doctrine of the last clear chance. But it failed to state all of the elements. Nor does it appear from the briefs that the evidence would have warranted the giving of an instruction on the last clear chance. It is clear that when the defendant entered the intersection, the plaintiff was standing on the sidewalk in a place of safety. As the defendant proceeded across, the plaintiff stepped into the street. At first he started to walk. Then he commenced to run diagonally away from, and in front of, the defendant. At the instant, if at all, that he was in danger, the record does not disclose that the defendant had a clear chance to avoid the accident. Poncino v. Reid-Murdock & Co. (Cal. App.) 28 P.(2d) 932.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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138 Cal.App. 509

HUGHES et al. v. MACIEL et al.

Civ. 1305.

District Court of Appeal, Fourth District, California.

May 12, 1934.

1. Chattel mortgages 🔑229(2).

In action by mortgagee of stock in ditch company, brought against mortgagor and son to recover such stock or its value, allegation that mortgagor to defraud mortgagee permitted stock to be sold for unpaid assessment and caused son to purchase it sufficiently charged that son participated in fraud.

2. Chattel mortgages 🔑229(3).

Relationship of parent and child in connection with other suspicious circumstances is important in determining whether there was fraud against mortgagee of ditch company's stock when mortgagor permitted stock to be sold for unpaid assessment and caused son to purchase it.

3. Chattel mortgages 🔑229(3).

In action by mortgagee of stock in ditch company, brought against mortgagor and son to recover such stock or its value, evidence *held* to sustain findings of fraud, where mortgagor permitted stock to be sold for unpaid assessment and caused son to purchase it.

4. Witnesses 🔑317(1).

Where part of witness' testimony was contradicted, court was justified in disbelieving all of his testimony.

5. Chattel mortgages 🔑229(1).

Mortgagee of stock in ditch company, suing to recover such stock which had been sold for delinquent assessment, *held* not guilty of laches, where action was begun about a month and a half after year of redemption expired.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action to recover possession of stock or its value brought by Vesta Helen Hughes and others against F. R. Maciel and another. From an adverse judgment, defendant F. R. Maciel, Jr., appeals.

Affirmed.

Thomas F. Lopez, of Fresno, for appellant.

Sherwood Green, of Madera, for respondents.

BARNARD, Presiding Justice.

In 1923, F. R. Maciel mortgaged certain property to the plaintiffs to secure notes to the amount of $15,000 which were payable in 1932. The mortgage covered 240 acres of land in Kings county and also "5/32 of one share of the capital stock of the Peoples Ditch Company." It is conceded that this fractional share of stock in this mutual water company was not appurtenant to the mortgaged real property or to any real property, but that the water represented by the stock could be used by its owner anywhere within the district. A default having been made in certain payments required by the note and mortgage, foreclosure proceedings were commenced on December 16, 1930, and both the mortgaged real property and the fractional share of stock referred to were, by a commissioner, sold to the plaintiffs on May 29, 1931. In the meantime, on December 2, 1930, an assessment on this fractional share of stock fell due. The same was not paid, and by proceedings which were conceded to have been regular this stock was sold at public auction by the People's Ditch Company on February 3, 1931, to F. R. Maciel, Jr., a son of the mortgagor, for the sum of $15.75, being the amount of an assessment of $15 plus a 5 per cent. penalty. The undisputed evidence is that this fractional share of stock was at that time worth $1,500. The year of redemption having expired on May 29, 1932, plaintiffs brought this action on July 18, 1932, to recover possession of the stock or the value thereof if delivery could not be had.

The theory of this action is that the mortgagor and his son connived together to permit the assessment to go delinquent to the end that the stock should be purchased by the son, and the complaint alleges that the father, for the purpose of defrauding the plaintiffs, refused to pay the assessment, caused the stock to be advertised for sale by the ditch company, and caused the son to purchase the same, by reason of which the stock was sold by the ditch company and a new certificate issued to the son in lieu of the certificate formerly held by the father. The trial court found in all respects in favor of the plaintiffs and entered judgment providing for the delivery of the stock to them upon the repayment to the son of all amounts paid by him as assessments upon the stock, or for the sum of $1,500 in the event delivery of the stock could not be had. From this judgment the defendant F. R. Maciel, Jr., alone has appealed.

[1] It is first contended that the complaint fails to state a cause of action against the appellant in that it is not expressly charged therein that the son participated in the fraud alleged to have been practiced by his father. The complaint alleges that the father, for the purpose of defrauding the respondents, permitted the stock to be sold and caused the appellant to purchase the same at the sale. We think it sufficiently appears that the appellant was charged with participation in the fraud alleged, the entire case was tried upon that theory, and the complaint must be held to have been sufficient under the circumstances shown by the record.

[2, 3] The appellant's main contention is that the evidence is entirely insufficient to sustain the findings of fraud on the part of himself and of his father. It is pointed out that the appellant testified that he had never discussed the matter of the purchase of this stock with his father, that he did not know that the stock he was purchasing had been formerly owned by his father or that this was the same stock which his father had previously mortgaged to the respondents, and that there is no direct evidence to the contrary.

It is hardly to be expected that direct evidence would be available to the effect that this father and son discussed this matter and agreed upon the steps of a fraudulent transaction, and it is a rare case where parties charged with fraud openly admit the same in their testimony. From the very nature of things, in such a case, proof of fraud must usually rest upon surrounding circumstances and indirect rather than direct evidence. This principle is well recognized in our law and needs no citation of authorities. In setting aside fraudulent conveyances it is well settled that, while no legal presumption of fraud arises from the relationship of parent and child, this fact, when coupled with other suspicious circumstances, may be sufficient to raise an inference of fraud. 12 Cal. Jur. 974, and cases there cited. Such a relationship between the parties may well serve to strengthen the presumption that may arise from other circumstances, and frequently is of great importance in determining the truth as to what has happened. 12 Cal. Jur. 1070. While the stock here in question was not conveyed directly from the father to the son, in effect it was such a transfer and a similar rule may properly be here applied.

[4] Examining the evidence with these principles in mind, we think it is sufficient to sustain the findings attacked. The appellant was 26 years of age at the time of the trial, and was then residing and had always resided with his father and mother on their home place, which was not the mortgaged real property herein referred to. The home place had been deeded by the father to the mother some years before this action arose. About the time of the transaction involved in this case, the exact time not appearing, the father, who owned a large herd of dairy cattle, conveyed the same to his son, the appellant, and thereafter went through bankruptcy. For some two or three years before the trial the appellant, while living with his father, had managed and conducted the business theretofore conducted by his father. The water secured by means of the stock here in question had formerly been used for the purpose of irrigating the real property mortgaged to the respondents. This fractional share of water stock was the only stock the father had ever owned in the People's Ditch Company. The appellant testified that he needed some more water for the dairy which he owned and also for some land he had leased, and that he purchased this water stock in order to get such additional water. He also testified that he had never talked with his father about this stock; that he learned that such a fractional share of stock was to be sold by the ditch company through seeing a notice published in a Hanford paper to the effect that 5/32 of one share of stock in the People's Ditch Company would be sold on a certain date; that he attended the sale and bought the stock without his father knowing anything about it; that he did not remember of anything being said at the time of the sale to the effect that the stock being sold was the stock owned by his father; that he did not learn until two months later that the stock had formerly belonged to his father; and that he had been using the water since on the home place and on the land he had leased. The notice of sale which was published by the ditch company was introduced in evidence, and was to the effect that a certain assessment had been levied upon the shares of the corporation, payable on or before a certain date to the secretary at a given address, and that any share upon which the assessment remained unpaid would be sold at a certain time and place. The notice does not mention 5/32 of one share of stock in the corporation or any other specific amount of stock therein. This evidence contradicts the appellant's statement that he learned that this precise amount of stock was to be sold on that date by reading this notice, and, under a familiar rule, the court was justified in disbelieving all of the appellant's testimony. The secretary of the People's Ditch Company testified that the only stock in the corporation sold on the date in question was the 5/32 of one share formerly owned by the appellant's father, that at the time of the sale, while the appellant was present, he announced that the stock to be sold was that standing on the books of the corporation in the name of F. R. Maciel, that it was for 5/32 of one share, and he then stated the number of the certificate, the amount of the assessment due, and the penalty.

We think this evidence, with the inferences reasonably to be drawn therefrom, justified the court in concluding that this father and son, who were living together and who had transferred other property and business formerly owned and conducted by the father to the son, had, in effect, done the same thing with this water stock, that this was fraudulently done in an attempt to release the stock from the lien of the mortgage, and that the evidence sustains the findings made.

[5] Some claim is made that the respondents are estopped and barred by laches from asserting their claim to this stock because their claim was not actively asserted until more than a year after the mortgaged property was sold at a commissioner's sale. The mortgagor had a right to redeem the property sold at any time within one year after the date of the sale. This action was begun about a month and a half after the year of redemption expired, and it cannot be held that this was an unreasonable delay. It further appears that the court provided for the repayment to the appellant of any amounts expended by him in the meantime for assessments upon the stock and no material prejudice appears to have been suffered by the appellant by the short delay after the rights of the respondents became fixed and final.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

220 Cal. 767

DAUGHERTY et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14641.

Supreme Court of California.

May 17, 1934.

Rehearing Denied June 14, 1934.

Master and servant 🔑405(4).

Evidence sustained Industrial Commission's finding that death of employee was not compensable because not caused by fall on employer's stairway.

◆

In Bank.

Certiorari from Industrial Accident Commission.

Proceeding by Minnie Daugherty and another for compensation under the Workmen's Compensation Act for the death of Charles A. Daugherty, employee, opposed by J. B. Quinn, trustee in bankruptcy for A. H. McFarland, employer, and the Pacific Indemnity Company, insurance carrier. To review an order of the Industrial Accident Commission denying compensation, claimants bring certiorari.

Affirmed.

For prior opinion, see 27 P.(2d) 774.

Doyle, Clark, Thomas & Johnson, of Long Beach, and V. Betty Doheny, of Hynes, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

F. Britton McConnell, of Los Angeles, for Pacific Indemnity Co.

SHENK, Justice.

This is a proceeding to review an order of the respondent commission denying disability indemnity and a death benefit to the petitioners as surviving widow and daughter of Charles H. Daugherty, deceased.

Daugherty was employed as a helper at an oil well plant in Long Beach. On August 24, 1931, in the course of his employment, he was descending a stairway when within a step or two from the bottom he was seen by a workman on an adjoining property, Hawley by name, to stumble and fall backward. He did not arise quickly so Hawley went to him. When he got to his side Daugherty was standing. Hawley took him by the arm, helped him to walk a short distance, when he sat down on a bench. Daugherty seemed dazed but said he thought he was all right, whereupon Hawley departed to resume his own work and did not see the deceased again. No wound or other traumatic conditions were observed by Hawley except that one of Daugherty's fingers was bleeding. Apparently Daugherty was a night workman, for the accident occurred at 7 o'clock in the morning, and his wife testified that he came home about 7 that morning and that this was his usual time of arrival.

On arriving at his home he went to bed as usual but got up in about an hour complaining of a terrible headache. About noon of that day he had a convulsion. These spells recurred until, on September 6, 1931, he was, on the affidavit of his wife, taken to the psychopathic ward of the general hospital, where his trouble was diagnosed as probable cerebral thrombosis. He remained in the hospital for about ten days, after which he went home, returning to the hospital every few days for treatment. He was discharged from the hospital on September 25th, and on October 15th went with his wife to his former home in Texas. In Texas he was unable to walk without assistance, the convulsions recurred, he gradually became worse, and died in Texas on January 22, 1932. The certificate of the attending physician noted "epilepsia caused by clog on brain" as the cause of death.

Upon a full and extensive record of the evidence, both lay and professional, the commission found that it did not establish either that Daugherty's disability or his death was caused, aggravated, or accelerated by any injury sustained by him, or by reason of his employment. The controversy hinges on whether there is substantial evidence to support the finding.

The deceased was a man about 48 years of age and prior to August 24, 1931, had been in apparent good health. He was not a robust man, but was considered by relatives as an "average healthy man." The history of his case taken at the general hospital showed that the wife had stated to a member of the hospital staff that the deceased had had a convulsion while at work. On August 21st, three days before he fell while at work, he had suffered visionary disturbances of the left eye. On September 22d his eyes were examined by an ophthalmologist, who reported "visual activity 20/50 with glasses and evidence of choked disc in the left eye." The evidence of the specialists, based upon a history of the case, showed that progressive visual disturbances with choked disc was "a sign universally accepted as evidence of increased intra-cranial pressure"; that the symptoms and signs presented by Daugherty between August 24, 1931, and January 22, 1932, were not due to the fall which took place on August 24, 1931; and that the fall was the result of a "petit mal" type of seizure which was the initial symptom of preexisting lesion in the cerebrum. One of the doctors expressed the opinion that Daugherty's case was one of the intra-cranial hemorrhages due to his fall. There was no evidence of concussion of the brain, and other doctors stated that in order to bring about concussion of the brain and the consequent intra-cranial hemorrhage it was necessary that the patient sustain adequate trauma and that the symptoms of Daugherty from the outset were incompatible with the assumption of intra-cranial hemorrhage; that the fall sustained by Daugherty was due to a seizure of epileptiform character, and that the steady progression of intra-cranial tension extending over a period of five months was the cause of death. It is true that Dr. George W. Jones, assistant medical director of the commission, questioned whether Daugherty really fell, notwithstanding the uncontradicted testimony of Hawley that he saw him fall. It is therefore contended by the petitioners that the testimony of Doctor Jones was based upon a false premise, viz., the absence of a fall, and that the conclusion expressed by him is without evidentiary value. The opinions of Doctors John C. Ruddock and John B. Doyle were, however, based on the assumption of a fall on August 24, 1931, and on all of the other evidence in the proceeding. Their review of the case, which is full and complete, was sufficient in itself to support the finding of the commission. There were conflicting opinions of the physicians and specialists as to the cause of the convulsions, and the controversy developed into a lively contest. The commission within its powers, as trier of the facts, could have adopted either view. The responsibility lay with the commission to make a determination on this conflicting evidence and on the record presented it cannot be said, as a matter of law, that the finding is without substantial support in the evidence. In such case the order must be affirmed. North Pac. S. S. Co. v. Industrial Acc. Com., 174 Cal. 500, 163 P. 910; Jenks v. Carey et al. (Cal. App.) 28 P.(2d) 91.

The order is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.

220 Cal. 753

LORRAINE et al. v. McCOMB et al.

L. A. 14497.

Supreme Court of California.

May 15, 1934.

1. Appeal and error ⚷966(1).
Continuance ⚷9.

Whether continuance should be granted on stipulation of parties rests in trial court's discretion, subject to revision by higher courts if discretion is abused (Code Civ. Proc. § 595, as amended by St. 1933, p. 1873, § 96).

2. Continuance ⚷9.

Statute providing that court shall postpone trial for period not exceeding 30 days when all attorneys of record of parties who have appeared agree in writing to such postponement *held* not compulsory on court, but directory (Code Civ. Proc. § 595, as amended by St. 1933, p. 1873, § 96).

◆

In Bank.

Proceeding for a writ of mandate by Sarah R. Lorraine and another against Marshall F. McComb, judge of the Superior Court of the state of California for the County of Los Angeles, and others.

Alternative writ discharged, and petition dismissed.

Lawrence Cobb, of Los Angeles, for petitioner Sarah R. Lorraine.

Henry G. Bodkin, of Los Angeles, for petitioner I. B. Doyle.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and A. G. Ritter, all of Los Angeles, for respondents.

PRESTON, Justice.

By this application for writ of mandate petitioners seek to ascertain the validity of the recent amendment to section 595 of the Code of Civil Procedure (Stats. 1933, p. 1873, § 96), which, so far as here material, provides: "In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed thirty days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement."

A certain action entitled Sarah R. Lorraine, Plaintiff, v. I. B. Doyle, Defendant, No. 347—524, begun January 18, 1933, was at issue in the superior court of the county of Los Angeles, prior to August 24, 1933, on which date the cause was regularly set for trial for October 5, 1933. Later the trial was postponed to October 9, 1933. On the last-mentioned date, instead of going to trial, the plaintiff and defendant, through their respective counsel, agreed in writing to postpone the trial date to October 24, 1933, or other subsequent date within the thirty-day period from October 9th. However, his honor, Marshall F. McComb, the judge in charge of the trial calendar, refused to allow this requested postponement, and as counsel did not proceed with the trial, the cause was ordered to the list of off calendar cases, to be again restored in the original manner required by the rules of practice of the court. The parties, acting jointly, by this proceeding seek to compel the reinstatement of the cause to its previous status on the calendar.

[1] The essence of the grievance of petitioners is that under said practice a trial court, by insisting upon trial on a day certain, over protest of both litigants, acts so arbitrarily as to violate the legal rights of the parties. However, it requires no effort to see that there are two sides to this controversy. The orderly and effective dispatch of legal business is the controlling factor with the court. The rights and conveniences of the parties to each particular cause present the other side. It is regrettable that a clash may at times occur between these forces. But the exercise of controlling discretion in such a situation must be exerted by the trial court, subject to revision by the higher courts if such discretion is abused. Ordinarily it should be possible to accommodate the parties in cases where they mutually agree to a postponement of the trial date, but in case this becomes impracticable, the judicial control reposed in the court by the Constitution must prevail.

Petitioners rest their contention upon the provisions of section 1a, subsec. 5, art. 6, of the Constitution, which provides that the judicial council may make rules of practice and procedure for the courts when "not inconsistent with laws that are now or that may hereafter be in force." Respondents reply, asserting that a court has the power expressly conferred by section 7, article 6, of the Constitution, which reads: "The judges of each superior court in which there are more than two judges sitting, shall choose, from their own number, a presiding judge, who may be removed as such at their pleasure. Subject to the regulations of the judicial council, he shall distribute the business of the court among the judges, and prescribe the order of business."

There is no lack of harmony between these provisions of the Constitution; first, because a prescribing of the order of business on a calendar is the exercise of judicial discretion and is not necessarily promulgating a rule of practice or procedure; secondly, the laws which inhibit contrary rules of practice or procedure must be valid enactments.

The triune powers of the state, as shown by the three departments, are thoroughly independent in certain of their essential functions, and at the same time mutually dependent in others. Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A. L. R. 1507, and cases there cited. This truth often gives rise to occasions where the line of separation is not clear and distinct. Accordingly, repeated instances are to be found where the judicial department has submitted to the regulatory power of the legislative department. This is particularly true in matters of procedure. But there must come a point beyond which the judicial department must be allowed to operate unhampered by legislative restriction. However, we are not called upon to expressly declare the statute in question unconstitutional, as we well might do upon the authority cited by respondents. A., T. & S. F. Ry. v. Long, 122 Okl. 86, 251 P. 486; Schario v. State, 105 Ohio St. 535, 138 N. E. 63; Riglander v. Star Company, 98 App. Div. 101, 90 N. Y. S. 772, affirmed 181 N. Y. 531, 73 N. E. 1131. In the latter case it is said (page 104 of 98 App. Div., 90 N. Y. S. 772, 774):

"One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers, and jurisdiction by constitutional provisions, has been the right to control its order of business, and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs."

[2] We cannot ascribe to the Legislature the intent to make the action of the parties compulsory upon the court in each instance. Its provisions must be held directory and on a par with such statutes as section 632 of the Code of Civil Procedure, which requires the court, on trial of a question of fact, to make and file its written decision within thirty days after submission of the cause to it; or section 634 of the Code of Civil Procedure which purports to require the trial judge to delay signing findings for five days after service of proposed findings; or section 664 of the Code of Civil Procedure, which provides that the judgment upon a verdict must be entered

within twenty-four hours after rendition of the verdict.

In further illustration of the trend of the courts respecting statutes of this class could be cited a long list, were it thought profitable, such as section 57 of the Code of Civil Procedure, providing for preference on the calendars of appellate courts, of appeals in probate proceedings and contested election cases, or section 1264 of the Code of Civil Procedure, providing for preference on the calendar for trial of eminent domain cases.

The alternative writ is discharged and the petition is dismissed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

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220 Cal. 620

PEOPLE v. D'A PHILIPPO et al.

Cr. 3729.

Supreme Court of California.

April 28, 1934.

1. Constitutional law 🔑203.
Criminal law 🔑1201.

Statutory provision increasing penalty when accused is found guilty of prior felony convictions *held* not ex post facto or unconstitutional (Pen. Code, § 644).

2. Constitutional law 🔑203.

Penalty on conviction for grand theft could not be increased on account of prior convictions of defendant for forgery, where crime primarily charged was committed prior to amendment of habitual criminal statute to include forgery among felonies considered (Pen. Code, § 644, as amended by St. 1931, p. 1052, § 1; Const. U. S. art. 1, § 9, cl. 3).

3. Criminal law 🔑321.

Jurisdiction of foreign court from which duly authenticated judgment regular on its face is presented is presumed (Code Civ. Proc. § 1963, subd. 16).

4. Criminal law 🔑320.

In prosecution for grand theft, in which prior conviction in United States Court for China was charged, court must assume that foreign court had jurisdiction, and that law respecting forgery prosecutions in that court is same as in California (Pen. Code, § 644).

5. Criminal law 🔑438.

Where prior convictions were charged, admission of photographs of finger prints used in trial resulting in conviction, of which defendant pleaded guilty, *held* not error, where photographs were used to identify defendant with another conviction which defendant denied (Pen. Code, §§ 644, 1025).

6. Criminal law 🔑1202(3).

Evidence incidentally connected with admitted prior conviction may be introduced if it is competent proof of fact necessary to establish guilt of principal offense or of another prior conviction which defendant denies (Pen. Code, §§ 644, 1025).

7. Criminal law 🔑1137(5).

Defendant who, on witness stand, voluntarily referred to prior conviction waived objection to incidental reference thereto in evidence introduced by prosecution (Pen. Code, §§ 644, 1025).

8. Criminal law 🔑636(4).

Agreement of defendant's attorney, made after defendant left courtroom, to stipulate to authenticity of certain record, *held* not prejudicial, where stipulation was thereafter renewed in open court in defendant's presence.

9. Criminal law 🔑865(1).

Court's question to jury, when they first returned, whether they thought further consultation might aid them in agreeing on remaining counts of indictment, following which jury again retired, *held* not improper.

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In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Pierre D'A Philippo was convicted of grand theft and of prior convictions of forgery, and he appeals.

Reversed with directions.

Prior opinion, 26 P.(2d) 838.

Paul Gehres, R. C. Pardoe, and B. S. Crittenden, all of Stockton, for appellants.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Guard C. Darrah, Dist. Atty., and Ward A. Hill, Asst. Dist. Atty., both of Stockton, for the People.

PRESTON, Justice.

We hereby adopt as part of this opinion the following language from the opinion prepared by Mr. Justice R. L. THOMPSON, heretofore rendered herein by the honorable District Court of Appeal for the Third Appellate District:

The defendant Pierre D'A Philippo was charged by an indictment filed in San Joaquin county July 28, 1932, with the crime of grand theft, together with two prior convictions of separate forgeries. The indictment was drawn in seventeen counts, separately charging the defendant with the appropriation of numerous shares of stock belonging to different named individuals, upon specified dates from April 7, 1930, to April 9, 1931, aggregating the value of $11,035. Prior to the trial six of these counts were dismissed. Upon arraignment the defendant pleaded not guilty to each of the separate charges of theft, and also pleaded not guilty to one of the charges of prior conviction of forgery. He admitted a prior conviction of forgery which occurred in the superior court of Santa Clara county. At the trial he was convicted of each of the remaining counts, except the first and second ones. A verdict of guilty was rendered against him on counts Nos. 3, 4, 7, 8, 9, 10, 11, 16, and 17, which charged him with the theft of stock aggregating the value of $8,330. He was also found guilty of both charges of prior convictions of felonies, to wit, forgeries. He was thereupon sentenced to imprisonment in the state prison at Folsom, for the term of his life, under the provisions of section 644 of the Penal Code.

The appellant contends the court erred in receiving evidence during the trial, in his absence, and also in permitting testimony to be adduced contrary to the inhibition of section 1025 of the Penal Code, relative to the prior conviction of forgery in Santa Clara county, to which he had previously admitted his guilt. It is claimed the pronouncing of life sentence upon the defendant as an habitual criminal was unauthorized and void, since at the time of the commission of the crime of grand theft by the defendant, section 644 of the Penal Code did not include forgery among the felonies, the prior conviction of which might then be considered in determining whether the accused was an habitual criminal. It is further asserted section 644 of the Penal Code is ex post facto and unconstitutional for the reason that it provides for a double penalty for former crimes. Finally, it is asserted the verdict is the result of coercion and misconduct on the part of the judge, and that the district attorney was also guilty of prejudicial misconduct which precluded the defendant from receiving a fair trial.

[1] Section 644 of the Penal Code is not ex post facto or unconstitutional on account of its provision increasing the penalty upon conviction of a felony when the accused at the same time is also found guilty of prior convictions of two other felonies which are therein mentioned. Ex parte Gutierrez, 45 Cal. 429; People v. Vaile, 112 Cal. App. 258, 296 P. 901; People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786; People v. James, 71 Cal. App. 374, 235 P. 81; 8 Cal. Jur. 641, § 614; Cooley's Const. Lim. (7th Ed.) p. 382.

[2] However, the foregoing observation does not seem to meet the situation before us. Here the crimes for which defendant stands convicted were committed during the period from April 7, 1930, to April 9, 1931. The previous crimes for which he was convicted were forgery. Forgery did not become an ingredient of the provisions relating to habitual criminals until August 19, 1931 (section 644, Pen. Code; Stats. 1931, p. 1052); therefore, had defendant been convicted subsequent to April 9 and prior to August 19, 1931, he could not have been sentenced as an habitual criminal. Hence, to so sentence him for said crimes subsequent to August 19, 1931, was to palpably increase his punishment for the offenses after their commission. To so interpret the amendment to the statute is clearly to violate article 1, § 9, cl. 3, of the Constitution of the United States. "And this clause has been interpreted as meaning that no person is to be subjected by statute either to a penalty for an act which at the time of its commission was not the object of prosecution, or to a penalty higher than was attached to such act at the time of its commission." Wharton's Criminal Law (12th Ed.) vol. 1, § 41, p. 58. See, also, Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162; Cooley's Const. Lim. (8th Ed.) pp. 541–545, and cases cited. Also, In re Lee, 177 Cal. 690, 695, 171 P. 958.

In State of Iowa v. Jones (D. C.) 128 F. 626, 628, it is said: "And what is an ex post facto law? In Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162, Chief Justice Marshall said: 'An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.' A better, or more accurate definition has not been given. From this definition it is seen that the punishment provided for when the crime was committed is the punishment that must be imposed. If no punishment was then provided for, none can be imposed by subsequent legislation. If punishment was then provided for, subsequent legislation cannot be enacted, increasing the punishment, and such legislation can only refer to subsequent crimes. The punishment can be lessened, but never increased, as against any one, for a crime already committed. No more beneficent provision is found in the Constitution for the protection of the individual, and it must be and will be enforced on behalf of the bad citizen or criminal as well as for the good citizen."

Quoting again from said opinion of the Honorable District Court of Appeal:

[3] The defendant asserts that the prior conviction of a felony in the United States Court for China, at Shanghai, is void for the reason that that court was without jurisdiction. A certified copy of that judgment was received in evidence over the objection of the defendant, showing that in 1914 he was convicted of forgery in that court under the name of Peter A. Grimes. The only objection which was offered to this record was that Peter A. Grimes was not shown to be the same person as the defendant, and upon the further ground that there "has been no foundation laid." The identity of the defendant as the same Peter A. Grimes, who was convicted of forgery in that court at Shanghai, was satisfactorily established. The defendant failed to specify any other particular reason why the foundation for the introduction of the certified judgment was not sufficiently laid. The court therefore properly admitted the document in evidence as proof of the former conviction of the defendant. The defendant failed to object to the introduction of the record on the ground of a lack of jurisdiction. We are directed to no evidence tending to show a lack of jurisdiction on the part of the United States Court for China, either of the person of the defendant or of the crime of forgery with which he was charged. In the absence of proof to the contrary, the jurisdiction of a court in a sister state or in a foreign country, from which a duly authenticated judgment which is regular upon its face is presented in evidence, will be presumed. Collins v. Maude, 144 Cal. 289, 77 P. 945; McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036, 101 Am. St. Rep. 125. It is said in 34 C. J., page 1140, § 1615 (b): "In an action on a judgment recovered in another state, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject-matter and the parties, in the absence of proof to the contrary."

Section 1963, subdivision 16, of the Code of Civil Procedure, provides that in the absence of evidence to the contrary, the presumption is satisfactory proof: "That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction."

[4] Since there is no evidence to the contrary we must assume that the United States Court for China had jurisdiction to try criminal cases wherein an accused was properly charged with forgery. In the absence of proof to the contrary, we must assume that the law with respect to the prosecution of forgery in the United States Court for China is the same as it is in California. In the case of Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118, it is said in that regard: "There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here, and it must therefore be assumed that the law with respect to those matters was the same there as in California."

A United States Court for China was created by an act of Congress June 30, 1906. (22 USCA p. 93, § 191, c. 3934, 34 Stat. 814.) That court was given jurisdiction over civil and criminal proceedings involving citizens of the United States in China. In the absence of statutory provisions with relation thereto, the procedure of the common law is made applicable to criminal trials in China. Biddle v. United States (C. C. A.) 156 F. 759. Forgery was a crime, punishable by law, under the common law. 2 Bishop's New Crim. Law, p. 300, § 523. There can be no doubt the United States Court for China, which was located at Shanghai, had jurisdiction over the person and of the criminal charge of forgery, for which the defendant was there tried and convicted.

[5] It is claimed prejudicial error occurred by permitting evidence to be adduced at the trial, contrary to the inhibition of section 1025 of the Penal Code, regarding the defendant's prior conviction of forgery in Santa Clara county in spite of the fact that he had pleaded guilty to that particular charge. There is no merit in this contention. While the defendant admitted his guilt of the former conviction of forgery in Santa Clara county under the name of James H. Rogers, he pleaded not guilty to the charge of former conviction at Shanghai, China, under the name of Peter A. Grimes. He also denied that he had ever gone by the name of Grimes. It therefore became necessary in proof of the Shanghai conviction to show that the Peter A. Grimes who was convicted in China in 1914 was this defendant. He was fully identified by an expert witness as the same individual, by comparison of a photograph and

reproductions of his fingerprints which were used in connection with his conviction at Shanghai, with his physical appearance at the trial of this case, and photographs of his fingerprints which were used in connection with the Santa Clara trial.

[6, 7] It is not error to admit evidence incidentally connected with a prior conviction of the defendant, to which he has pleaded guilty, provided such evidence is competent proof of any material fact necessary to establish his guilt of the principal offense or any other alleged prior conviction included in the charge for which he is being tried, of which he has not admitted his guilt. People v. McFarlan, 126 Cal. App. 777, 14 P.(2d) 1066; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Forrester, 116 Cal. App. 240, 2 P.(2d) 558. Moreover, the defendant waived any objection to a reference to the prior conviction to which he had pleaded guilty, by subsequently becoming a witness in his own behalf and voluntarily referring to that case in an effort to explain the facts and excuse the crime. People v. Fontes, 110 Cal. App. 141, 293 P. 835. Reference to the defendant's former conviction in Santa Clara county became necessary on account of his denial of his identity as Peter A. Grimes, as a matter of impeachment, which was competent. To protect the defendant against an improper consideration of the evidence of the former conviction, the court charged the jury as follows: "The defendant, Pierre D'A Philippo, has admitted that he has been previously convicted of felony. You must not consider this fact for the purpose of raising a presumption or inference of his guilt of the offenses of which he now stands charged. Evidence of former conviction of felony can be considered by you only for the purpose of impeachment of the defendant as a witness."

[8] The record does not indicate that any evidence was adduced at the trial in the absence of the defendant. It is true that the court adjourned the trial on Monday afternoon, December 12, 1932, on account of the illness of the defendant. After the defendant left the courtroom a discussion arose between respective counsel regarding the urgency of establishing proof of the former conviction which occurred in China, by a foreign witness who was then present, but who was required to leave the city that day. To accommodate the witness, the defendant's attorney agreed to stipulate to the authenticity of the record when court again convened. Thereupon the jury was dismissed until the following day. When court again convened no objection was made to the authenticity of the record. A statement in open court, in the presence of the defendant, was then made regarding the substance of the former stipulation, which was conceded by the attorney for the defendant. The district attorney then proceeded to read the record in evidence, subject to the objection only that, "It don't tend to prove or disprove any issue in this case, and that the statement is incompetent, irrelevant and immaterial." The former agreement, which was made in the absence of the defendant, was harmless. The same stipulation was subsequently made in open court in the presence of the defendant, by affirming the district attorney's statement that it had been previously agreed upon. Error may therefore not be predicated on that circumstance.

There is nothing in the record to indicate that the judge of the court or the district attorney was guilty of any prejudicial misconduct in the trial of the case. The defendant appears to have had a fair and impartial trial. The verdict and judgment are adequately supported by the evidence.

[9] Nor was there any irregularity or coercion in procuring or returning the verdict. The only thing to which the defendant objects is that the jury first returned into open court and presented a proposed verdict in which it appeared they had found the defendant guilty of many counts contained in the indictment, but in which they had failed to agree upon several other counts. Before the verdict was recorded by the clerk, the judge observed this omission, and called the attention of the jury to that fact, asking them generally if they thought further consultation might aid them in agreeing to the remaining counts. Several jurors said they believed they might so agree. Nothing was said by the court intimating whether the jury should convict or acquit the defendant on those counts. The jury did retire and again deliberated on their verdict. They subsequently returned into court and formally rendered their verdict, in which they had agreed to the defendant's guilt with respect to all of the counts except two, which still remained without agreement thereto. The verdict was then accepted, read to the jury and confirmed by the members thereof, and formally recorded by the clerk. There was no error in this procedure.

It appearing, as above stated, that the trial court was without jurisdiction to adjudge defendant an habitual criminal, such judgment is hereby reversed with directions to the court below to resentence defendant as required by law.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

220 Cal. 748

PARADISE IRR. DIST. v. BARRY.

Sac. 4819.

Supreme Court of California.

May 15, 1934.

1. Quieting title 🔑10(1).

Plaintiff in quiet title action must prevail on strength of his own title and not on weakness of his adversary's title.

2. Quieting title 🔑10(2).

In lessor's action to quiet title, lessee could not claim alleged deficiency in lessor's title because after execution of lease doubt existed as to lessor's title to mineral rights where parties executed written addendum to lease which declared that lessor was granting right to mine only on mineral claims or land to which lessor then had or might later acquire title.

3. Quieting title 🔑14.

In lessor's action to quiet title, lessee could not claim that lease was not terminated because statutory notices were not given, where notices were unnecessary in action to quiet title, and were required only to terminate tenancy or estate at will and not to terminate lease for definite term (Civ. Code, § 789; Code Civ. Proc. § 1162).

4. Quieting title 🔑51.

Finding of trial court supported by evidence that lessee had failed to comply with provisions of lease and therefore forfeited all rights thereunder precluded grant of specific performance to lessee in lessor's action to quiet title (Civ. Code, § 3392).

5. Quieting title 🔑15.

In lessor's action to quiet title, lessee could not defend on ground that he was prevented from performing agreement because of lessor's failure to secure approval of state engineer and bond certification commission to mining operations, where lease did not specify who should obtain approval and lessor obtained written statement from state engineer that approval was not required.

In Bank.

Appeal from Superior Court, Butte County; Ernest Weyand, Judge.

Action by the Paradise Irrigation District against Robert Barry, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals, and plaintiff moves to affirm the judgment.

Affirmed.

Willis S. Mitchell and Franklin J. Cole, both of Los Angeles, for appellant.

J. Oscar Goldstein and Bond & Deirup, all of Chico, for respondent.

WASTE, Chief Justice.

Plaintiff brought this action to quiet its title to certain real property situate in the county of Butte. The defendant, by way of answer and cross-complaint, set up an interest in the property under a two-year lease by the terms and provisions of which he was given the right to mine for and extract minerals from the property. He prayed that plaintiff take nothing by its action and that the terms and provisions of the lease be specifically enforced. At the conclusion of the trial, the court below found, in substance, that plaintiff had performed its part of the agreement, that defendant had failed to perform any and all of the things required of him under the lease, and that plaintiff, because of such breach, had theretofore notified defendant in writing of its election to terminate the lease, as therein provided. Though the evidence is conflicting in many respects, there is substantial evidence supporting each of these findings. Judgment was accordingly entered quieting plaintiff's title and decreeing that defendant take nothing under his cross-complaint. This appeal followed.

[1, 2] Defendant's first point is that a plaintiff in a quiet title action must prevail upon the strength of his own title and not upon the weakness of his adversary's title. With this elementary principle we have no quarrel. In an attempt to show its pertinency to the present case, the defendant contends that plaintiff's own witnesses testified that shortly after the execution of the lease some doubt arose as to whether plaintiff had title to the mineral rights on certain of the lands leased to the defendant. In view of this alleged deficiency in its title, it is contended that plaintiff cannot prevail. The record does not bear out the defendant's contention. It is true there is evidence to the effect that plaintiff, shortly after the execution of the lease, dis-

covered that some doubt existed as to its title to the mineral rights pertinent to a portion of the demised lands. However, there is also evidence to the effect that the parties, in order to overcome this deficiency, executed a written addendum to the lease which, among other things, declared that "it is further understood and agreed by and between both parties to this lease that the lessor is granting by this lease the right to mine only on mineral claims or land to which the lessor now has, or may later acquire a title."

The foregoing paragraph of the addendum, duly executed by the parties thirteen days after the execution of the lease, served to modify the same and limit the rights demised to minerals rights then owned or subsequently acquired by the lessor. In view of this, the asserted deficiency in plaintiff's title is without support.

[3] Defendant next urges that a lease can only be terminated as provided by statute and that the giving of the notices provided for in section 789 of the Civil Code and in section 1161 of the Code of Civil Procedure is an essential prerequisite to such termination and right of re-entry. Hanes v. Coffee, 212 Cal. 777, 300 P. 963, 964, was an action to quiet title, the parties being lessor and lessee, respectively. It is there declared: "Of the several contentions raised on this appeal, the first is that the proceeding to quiet title was improper for lack of notice of termination of the lease as required by statute. It has, however, been held that in this state the landlord's remedies of ejectment, unlawful detainer, and quiet title are distinct, and that the statutory notice provided for in section 1161 of the Code of Civil Procedure is unnecessary in an action to quiet title."

The case of Andrews v. Russell, 85 Cal. App. 149, 259 P. 113, 115, presented an action to quiet title to certain lands which had been the subject of an oil lease to the defendant's assignor, it being alleged that the drilling operations had not been performed as provided in the lease. It is there stated: "Our attention is also called by appellant to sections 789 and 790 of the Civil Code and section 1162 of the Code of Civil Procedure. Section 789 of the Civil Code provides for the termination of a tenancy or estate at will; section 790 of the same Code, for the method of recovery; and section 1162 of the Code of Civil Procedure prescribes how the notice shall be served. These sections are not applicable as the leasehold here was not a tenancy or estate at will. It was a lease for a definite term of three years, with certain provisions that it would terminate if the covenants were not fulfilled. Appellant cites us to several cases as holding that unlawful detainer is the statutory method of restoring possession from a tenant. The decisions cited, however, do not hold that unlawful detainer is the exclusive action by a landlord against a tenant. * * It would seem that a lessee who has forfeited his rights under his lease by reason of his failure to comply with the covenants of the lease is analogous to a vendee under a contract of purchase who has defaulted in the payment of his installments, and it has been held that an action to quiet title will lie in such case, * * * and in Lewis v. Agoure, 8 Cal. App. 146, 96 P. 327, in which case a transfer to the Supreme Court was denied, it is held that an action to quiet title is the proper action against a lessee in whom no right remained, and here the court found that all rights of appellant in the lease had terminated prior to the commencement of the action. As to appellant's second point that plaintiff cannot escape the obligation to give notice of default and demand for possession, there is no merit. Plaintiff does not rely upon the statute permitting an action for unlawful detainer with its accompanying penalties, but upon an action to quiet title. * * *"

These decisions sufficiently and satisfactorily dispose of the second contention.

[4, 5] Defendant finally contends that the terms and provisions of the lease should be specifically enforced. The finding of the trial court, which is amply supported by the evidence, that the defendant had failed to comply with the terms and provisions of the lease and had therefore forfeited all rights thereunder, precludes the granting of such relief. Section 3392, Civ. Code. Nor do we find any merit in the point that defendant was prevented from performing his part of the agreement by reason of plaintiff's failure to perform certain conditions precedent. In this connection defendant refers us to the following provision of the lease: "This lease is executed subject to the approval of the State Engineer and the Bond Certification Commission of the State of California and no actual mining operations are to be commenced under the terms of this lease until such approval shall be first had and obtained."

While this provision of the lease requires that such approval be obtained before operations are commenced, it is singularly silent as to which party is charged with the duty of obtaining the approval. Certainly the provision casts no greater burden on plaintiff than on the defendant. Inasmuch as the defendant was to carry on the mining operations under the lease it might reasonably be contended that he should seek and procure such approval before proceeding.

However, there is an additional answer to this particular contention of the defendant. Plaintiff did obtain from the state engineer, who was a member of the bond certification commission designated in the provision, a written statement that the approval mentioned in the above-quoted provision was not required. In response to plaintiff's inquiry the state engineer wrote: "Referring to lease by district of mining rights on the Magalia reservoir site: An agreement for such a lease apparently does not require the approval of the Bond Commission, but is a matter entirely within the discretion of the board of directors. However, since the subject was first brought to our attention in April, 1929, legislation governing the supervision of dams has been enacted, placing such supervision under the State Engineer, to whom the matter should be referred if there appears to be any possibility of the proposed mining operations endangering the safety of Magalia dam or reservoir."

What has been said sufficiently disposes of the appeal and of the motion to affirm filed by the plaintiff.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

* * *

220 Cal. 652

TROUT v. TAYLOR et al. (two cases).

L. A. 12510, 12574.

Supreme Court of California.
April 30, 1934.

1. Deeds 🔑32.

Fraudulently procured deed which, unknown to grantor, failed to designate any one as grantee when executed and acknowledged, though corporation with which grantor was dealing subsequently inserted in blank names of strangers as grantees *held* void.

2. Estoppel 🔑96.

Vendor and purchaser 🔑239(9).

Deed void for want of grantee cannot serve as basis of good title even under equitable doctrine of bona fide purchase, though innocent purchaser may find protection in doctrine of estoppel where negligence or other misconduct of other party contributed to the loss (Civ. Code, § 3543).

3. Mortgages 🔑11.

Where deed was void for want of grantee, and grantor was not estopped from rescinding fraudulently procured contract resulting in such deed wherein names of strangers were subsequently inserted as grantees, parties taking trust deeds from such strangers in good faith as security for loans must bear loss if unable to recover from parties to fraud though part of property had been bid in by a holder of trust deed at foreclosure sale (Civ. Code, § 3543).

In Bank.

Appeals from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Two actions by Kate C. Trout against R. H. Taylor, A. H. Taylor and wife, and others, and against R. H. Taylor, R. P. Archer, A. H. Taylor and wife, and others. From the judgments, plaintiff appeals in the first case, and plaintiff and defendants appeal in the second case.

Reversed with directions.

Prior opinion, 17 P.(2d) 761.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for appellant Trout.

Sherman & Sherman and Austin C. Sherman, all of Los Angeles, for respondent R. H. Taylor et al.

Tobias R. Archer, of Los Angeles, for defendants R. P. Archer and Title Guarantee & Trust Co.

PER CURIAM.

A hearing was granted in this case, on petitions of both plaintiff and defendant Archer, after decision by the District Court of Appeal, Fourth Appellate District. We now adopt, as part of our decision, the following portions of the opinion rendered therein by Mr. Justice pro tem. Morton:

"Plaintiff, an elderly woman, without business experience, and of very limited schooling and education, was induced by an agent of R. H. Taylor Corporation on April 18, 1927, to exchange her two acres located in Sawtelle, Los Angeles county, of a reasonable market value of $12,500, for 110 shares of Running Springs Park, Inc., having property in San Bernardino county. This stock was represented to her as having a value of $30,000, and she was assured that it would pay her $5,000 every six months commencing September 1, 1927, and until she had received $30,000. The stock was in fact of no value whatever, and paid no returns. The deed signed and acknowledged by plaintiff to her lots was in blank as to a grantee, which was not discovered by her at the time. Subsequently the names of A. H. Taylor and Mae Taylor were inserted as grantees pursuant to certain alleged transactions with the R. H. Taylor Corporation, Inc. After recording the deed, a trust deed was placed on lot 1 securing a promissory note for $4,000 in favor of the notary who took the acknowledgment of plaintiff's deed, and a trust deed was placed on lot 2 securing a promissory note for $3,000 in favor of the agent who induced plaintiff to enter into the deal. Both notes were sold to defendant R. P. Archer for $6,660. A. H. Taylor and wife defaulted on the $4,000 note secured by a trust deed on lot 1, and at the foreclosure sale defendant R. P. Archer bid in the property. They paid off the $3,000 note secured by the trust deed on lot 2, and thereafter executed a new note for $2,500, payable to L. E. Arnold, secured by a trust deed on this lot. Since bidding in lot 1 defendant Archer has expended for assessments and taxes $521.51. On November 5, 1928, plaintiff served notice of rescission; she did not discover, however, that the deed executed by her was in blank until the taking of the deposition of R. H. Taylor on March 23, 1929. The trial court decreed the deed executed by plaintiff to be null and void and canceled, and held that no interest or title passed thereby. Defendant R. P. Archer was adjudged to be entitled in equity to the return of his $521.51, together with interest, and also $4,611.16, with interest at 7 per cent. from June 23, 1928; that being the amount due at the foreclosure sale of that date. To secure the payment of these amounts, defendant R. P. Archer was awarded a lien against lot 1. Defendant L. E. Arnold was declared by the judgment to have a lien on lot 2 in the sum of $2,500, together with interest, less any amounts paid to him on principal or interest. Plaintiff is willing to repay to defendant Archer the $521.51, together with interest, but appeals on the judgment roll from the Archer judgment for $4,611.16, with 7 per cent. interest from June 23, 1928, and also the Arnold judgment of $2,500, plus interest. The court found that R. P. Archer and L. E. Arnold acted in good faith and relied on the record title. Because the grant deed to A. H. Taylor and wife was a nullity, plaintiff contends that neither R. P. Archer nor L. E. Arnold acquired any title or lien on the property, even though they acted in good faith, without knowledge of the fraud perpetrated, and relied on the record title. Instead of giving plaintiff judgment against all the defendants except Archer and Arnold for the amounts evidenced by the trust deeds, plaintiff maintains that this judgment should be in favor of Archer and Arnold, and plaintiff's property decreed free of the two liens.

"Defendant Archer, claiming to be an innocent purchaser, files a separate appeal from the judgment denying his title to lot 1 and allowing him only a lien thereon. In this appeal the clerk's and reporter's transcripts bring before us the entire evidence. The two appeals have been consolidated, and therefore they will be considered jointly here.

"[1] The fraud of the defendants, excluding Archer and Arnold, has not been challenged, so we turn our attention at once to the law of this state dealing with deeds executed in blank. In Jones v. Coulter, 75 Cal. App. 540, at page 547, 243 P. 487, 490, the court held: 'There can be no doubt as to the utter invalidity of the instruments under which appellant's grantor, Meng, deraigned his purported title. The blank deeds signed by respondent and subsequently filled out under Neilson's direction, with Meng's name inserted as the purported grantee, were mere nullities. According to the great weight of authority, a deed executed in blank is void and passes no title. Wunderlin v. Cadogan, 50 Cal. 613, and cases cited infra. As was said in Whitaker v. Miller, 83 Ill. 381: "There must be, in every grant, a grantor, a grantee and a thing granted, and a deed wanting in either essential is absolutely void." In the instant case each of the instruments signed by respondent was wanting in all three of these essentials to a valid deed. Though the decisions of other jurisdictions are not in entire harmony upon the question, it has been definitely decided in this state that under our statute of frauds the name of the grantor or grantee or a description of the property cannot be inserted by an agent for the grantor, in the absence of the latter, unless the agent's authority be in writing. If the authority of the agent be not in writing, his insertion of the name of grantor or grantee or description of the property does not pass the title. Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Vaca Valley, etc., R. R. v. Mansfield [84 Cal. 560, 24 P. 145], supra; Harris v. Barlow, 180 Cal. 142, 179 P. 682. See, also, Lund v. Thackery, 18 S. D. 113, 99 N. W. 856. In Upton v. Archer, supra, the court says: "* * * As it could not become the plaintiff's deed until the name of a grantee was inserted, that act could not be performed by an agent, in the absence of the plaintiff, unless his authority was in writing."' Videau v. Griffin et al., 21 Cal. 390, 392; Tannahill v. Greening, 85 Cal. App. 714, 259 P. 1017; Barden v. Grace, 167 Ala. 453, 52 So. 425, Ann. Cas. 1912A, 537.

"In view of these authorities, the conclusion is inescapable that the deed in question was not voidable, but was void in toto; a nullity. The record shows no agency, and no authority, express or implied given by plaintiff to defendant R. H. Taylor. The findings state that she believed the name of R. H. Taylor Corporation as grantee was written in the deed when she signed and acknowledged it, and that she was not aware it was blank as to the grantee. The question of agency is therefore not involved."

The trial court, as stated above, adjudged title to the properties to be in the plaintiff, subject to liens of the two parties who lent money thereon in good faith, to the extent of their expenditures. Defendant Archer objects to this determination of his rights, and claims full title as a bona fide purchaser, to the land which he bought at the foreclosure sale. Plaintiff attacks this position and objects to any payments save for the sums expended for taxes, etc.

[2] Numerous authorities have established the rule that an instrument wholly void, such as an undelivered deed, a forged instrument, or a deed in blank, cannot be made the foundation of a good title, even under the equitable doctrine of bona fide purchase. Promis v. Duke, 208 Cal. 420, 281 P. 613; Gould v. Wise, 97 Cal. 532, 32 P. 576, 33 P. 323; Barden v. Grace, supra. Consequently, the fact that defendant Archer acted in good faith in dealing with persons who apparently held legal title is not in itself sufficient basis for relief. An innocent purchaser taking a void instrument can, however, find protection in the doctrine of estoppel, where circumstances are presented which establish negligence or some other misconduct by the other party, which contributed to the loss. Section 3543 of the Civil Code provides broadly that "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

[3] In this connection the court failed to find any negligence on the part of plaintiff, and in fact, expressly found that "it is not true that plaintiff ought now to be estopped to urge said claims against defendant R. P. Archer, or against defendant L. E. Arnold, and it is not true that plaintiff was guilty of gross laches, or any laches." There is no evidence in the record to warrant a different finding. The loss resulting from the fraud must fall, therefore, where the course of business has placed it. Security Mortgage Co. v. Delfs, 47 Cal. App. 599, 191 P. 53; Gould v. Wise, supra. Defendants Archer and Arnold must seek their recourse against the fraudulent defendants who occasioned the loss.

The judgment is therefore reversed with directions to the trial court to enter judgment in accordance with the views expressed in this opinion.

In re SCHNUR'S ESTATE.

L. A. 13960.

Supreme Court of California.
April 27, 1934.

As Modified May 24, 1934.

Rehearing Granted May 26, 1934.

1. Trusts 🔑272(3).

Where extraordinary dividends are declared and paid on corporate shares left in trust, they are distributed by giving corpus sufficient to keep intact value of shares as they were when trust began, and by giving rest to those entitled to income.

2. Trusts 🔑272(3).

Stock subscription right issued to holder of shares left in trust may be given in whole or part to life tenant, so long as distribution comes from earnings and does not decrease intact value of corpus (Civ. Code, § 748; Code Civ. Proc. § 1963, subd. 12; Civ. Code, § 297, as added by St. 1931, p. 1763, § 2).

3. Trusts 🔑272(3).

Presumption is that proceeds from sale of stock subscription rights as between life tenant and remaindermen are to be regarded as capital belonging to remaindermen.

4. Executors and administrators 🔑227(1).

Claim against estate of decedent need not be drawn with precision required of complaints in ordinary civil actions, but, if facts are sufficient to apprise executor or administrator of nature and amount of demand, it is sufficient.

5. Executors and administrators ⚿227(1).

Claim against estate of life tenant made by remaindermen for proceeds derived by life tenant from sale of stock subscription rights *held* sufficient, where facts making up demand were fully and clearly stated.

> It was contended that claim was insufficient for failure to allege that, when deceased's life estate terminated, stock was of less value than when life estate was created as result of decedent's retention of the proceeds, and for failure to allege that any part of proceeds involved should be apportioned to corpus of trust estate to preserve its value intact as of date of creation. It was further objected that claim failed to allege that retention of proceeds by deceased was improper exercise of right to appropriate corpus which was expressly given him in agreement creating life estate.

6. Executors and administrators ⚿241.

Where executor and court allowed claim as presented against decedent's estate, inference obtains that nature of claim and its amount were understood and approved in determining sufficiency of claim.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the matter of the estate of William Schnur, deceased. Claim by John H. McDaniels and others, opposed by Mrs. Perry D. Clark. From a judgment sustaining contest to the allowance of claim against estate, claimants appeal.

Reversed, with directions.

Prior opinion, 25 P.(2d) 462.

Manley C. Davidson, of Los Angeles, and John H. McDaniels, Myrick & Deering and Scott, and Francis V. Keesling, all of San Francisco, for appellants.

Lawrence L. Larrabee, of Los Angeles, for respondent.

PER CURIAM.

We ordered a transfer of this cause to this court after its decision by the District Court of Appeal. The opinion rendered therein by the District Court of Appeal was in part as follows:

This is an appeal from a judgment of the superior court sustaining a contest to allowance of a claim against the estate of William Schnur, who died October 7, 1930. Decedent by his will left three-fourths of the residue of his estate to his sister, Mrs. Perry D. Clark, respondent here, and the other fourth to Ellowene Delahoyde, a sister of his wife Vilona, who had died February 14, 1925. Mrs. Delahoyde, her sister Mary H. Boorman and her nephew John H. McDaniels appear in this action as appellants, contending that their claim filed against William Schnur's estate should have been recognized as valid by the superior court. This claim was for the sum of $8,172.09, proceeds derived by decedent from the sale in 1929 of certain stock subscription rights issued by Columbia Gas & Electric Corporation. Vilona Schnur had died intestate, leaving as her heirs at law the three appellants, each entitled to one-sixth of her estate (which was entirely separate property) and her husband entitled to one-half thereof. While the estate of Vilona Schnur was pending, the heirs entered into a written agreement by which all participation by the appellants in the property which she left was postponed until after the death of her husband, he being granted $4,000 in cash and a life interest in the real property, also certain rights in the personal property consisting of shares of stock in several corporations, some Liberty bonds and approximately $20,000 cash in bank. As to these items of personal property the agreement provided that William Schnur was to have the income thereof during his lifetime, with the additional right to draw upon the "property itself" if at any time the income should prove insufficient to support and maintain him "with the necessary and proper comforts and conveniences." As to the corporate stocks the agreement provided that the certificates representing the same should be issued to William Schnur, to be by him endorsed and assigned in blank and held in trust by Mrs. Delahoyde and himself, and by them deposited in a safe deposit box to which both should have access. The Liberty bonds were to be held in trust in the same way. Upon the death of William Schnur the trust was to terminate and the property be distributed in equal shares by Mrs. Delahoyde "as surviving trustee" to herself, Mrs. Boorman, and Mr. McDaniels. One block of stock so held in trust consisted of 1,519 shares of Ohio Fuel Corporation. About a year after this agreement was signed that corporation merged with Columbia Gas & Electric Company to form a new corporation named Columbia Gas & Electric Corporation and as a result of the merger and exchange of stocks, the item of 1,519 shares of Ohio Fuel Corporation became 532 shares of the common and 237 shares of the preferred stock of Columbia

Gas & Electric Corporation. This corporation in April, 1929, increased its common stock from 4,000,000 to 10,000,000 shares and issued to its stockholders 2½ new shares of common stock for each share of common previously held. In this way the original 1,519 shares of Ohio Fuel Corporation were transmuted into 237 shares of preferred and 1330 shares of common stock of Columbia Gas & Electric Corporation. In May of 1929 this last-named corporation announced an issue of rights to subscribe for additional shares of its common stock, the documents evidencing those rights being known as warrants. These warrants were sold by decedent for $8,172.09, the proceeds being deposited by him in his personal account instead of in the joint account where, under the terms of the above-mentioned agreement, he and the other trustee, Mrs. Delahoyde, kept the cash of the Vilona Schnur estate. The question is whether the warrants or subscription rights which William Schnur sold constituted income to which deceased was entitled under the agreement of the parties, or an item of capital which should have been credited by him to the corpus of the trust estate.

The appellants contend that the decedent was not entitled to the warrants or the proceeds thereof, a contention which they have asserted heretofore by filing the above-mentioned claim against decedent's estate for the full amount thereof. This claim was allowed by the executor of William Schnur's estate and approved by the probate commissioner and the judge in probate. Later, a motion to vacate the order allowing the claim was denied but permission given to file objection within three weeks thereafter and prior to final distribution. This objection took the form of a contest which was sustained and which, as stated above, is brought before us on this appeal.

So far as counsel have been able to ascertain, the courts of this state have never been called upon heretofore to determine whether stock subscription rights issued during a life tenancy belong to the life tenant or to the remainderman. In approaching the solution of that question on the facts in the present case we note that the agreement between the parties stated that it was the desire of all that in addition to a life estate in the real property of Vilona Schnur and the sum of $4,000 cash, the surviving husband, William Schnur, "shall also have *all of the income* from the remaining property of the estate from the time of the death of said Vilona McD. Schnur, and during his lifetime." The arrangement to which we have referred calling for issuance of stock certificates directly to William Schnur and assignment in blank by him was made "in order to provide for the payment of the *income* from said personalty to William Schnur during his lifetime, *and for the distribution of said personalty upon his death.*" It was provided further that interest on the bonds "and also the *dividends* on said stock during the lifetime of said William Schnur shall be collected by, paid to, and belong to the said William Schnur individually." (Italics in the foregoing excerpts added.)

In their very able and exhaustive briefs counsel for the respective parties have reviewed thoroughly the cases in which courts of this country have been called upon to determine the ownership as between life tenant and remainderman of dividends declared during the life period, calling attention to the three rules that have been adopted in various jurisdictions and which are summarized as to their operation on stock dividends in Re Joy's Estate (1929) 247 Mich. 418, 225 N. W. 878, 883, 72 A. L. R. 973, 980, as follows: "Under the Massachusetts rule, a stock dividend, declared during the life interest, whether earned partly before or partly during such life interest, goes in its entirety to the corpus of the estate; under the Kentucky rule, it is treated as income and goes to the life beneficiary; and under the Pennsylvania rule, it is apportioned between the corpus and the life beneficiary in such a way as to prevent loss to the corpus by a reduction of the actual intrinsic value of the shares as of the date when the life interest accrued. These rules are also applicable to extraordinary cash dividends."

The Massachusetts rule is one of convenience, as appears from the following language in Lyman v. Pratt (1903) 183 Mass. 58, 66 N. E. 423: "In Minot v. Paine, 99 Mass. 101-108, 96 Am. Dec. 705, it is said that in such cases 'a simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital.' This general rule has been followed by this court ever since. [Cases.] In determining what is a cash dividend and what is a stock dividend, substance, and not form, is regarded. * * * In dealing with investments of this kind, *it is impracticable for courts to ascertain what has been earned by the corporation* after the time of an investment by a trustee, *so as to determine accurately the income* upon the investment *for the purpose of an exact adjustment of the rights and interests of tenants for life and remaindermen.* It is necessary to resort to some simple, arbitrary rule, and this which has been adopted works in most cases, although not always, with substantial equity." (Italics ours.)

The rule under which stock dividends belong to the remainderman has been extended in Massachusetts to include stock subscription rights. See Chase v. Union National Bank (1931) 275 Mass. 503, 176 N. E. 508, 510, where the court says: "The right to subscribe for an increase of stock to be issued by a corporation must be treated as property capitalized by the corporation. It is in the nature of a stock dividend. Hyde v. Holmes, 198 Mass. 287, 293, 84 N. E. 318. * * * In Atkins v. Albree, 12 Allen [Mass.] 359, the life tenant was entitled to income by the terms of the will, and the court held that the proceeds of the sale of rights, to subscribe to new stock constituted capital and did not belong to the life tenant," etc.

In this cited case of Atkins v. Albree, decided in 1866, the character of a stockholder's pre-emptive stock subscription right is analyzed as follows: "The right or privilege to take new shares in a corporation upon an increase of the capital stock within the limits fixed by the charter is a benefit or interest which attaches to stock, not as profit or income derived from the prosecution of the corporate business, but as inherent in the shares in their very creation. Gray v. Portland Bank, 3 Mass. 364 [3 Am. Dec. 156]. It is true that the value of this right must always depend essentially on the success with which the operations of the corporation have been conducted, and on the prospect of future income and profits which the condition of the business of a corporation holds out to its stockholders. But this does not change the nature of the right or interest. It is still an original incident or attribute appertaining to each share; *a right to a larger participation or ownership in the capacity of the corporation to earn profits;* and not the gain or income itself, actually earned by the corporation. In this view, the value of the right must be regarded as a part of the *corpus* of the property devised in trust." (Italics added.)

It may be pertinent to quote at this point from the article "Corporations," 6A Cal. Jur. 759, § 427:

"The rule is generally established that upon increase of stock the existing shareholders are entitled to subscribe to or purchase it in ratable proportions, in order to preserve their relative strength in the corporation. Such is the rule in the absence of statute, but by statute the rule is reversed in California.

" 'Unless otherwise provided in the articles, the board of directors may issue shares, option rights or securities having conversion or option rights, without first offering the same to shareholders of any class or classes.' (Gen. Corp. Law, sec. 297, Civ. Code.)" The quoted section 297 was added to the Civil Code in 1931.

Alluding to the terms of Albree's will by which he left the income from twenty shares of stock to his widow the court in Atkins v. Albree, supra, uses the following language: "This gives her no property in the shares, or in money derived from the sale of an interest which formed a part of the original right appertaining to the shares, but only to receive the entire income to be derived therefrom, whether it continues to be represented by the number of shares held by the testator at his decease, or a portion of it becomes converted into money by the sale of the right to take new shares in the capital stock of the corporation. * * * The original shares and the money received from the sale of rights to take new shares in the capital stock of the corporation constitute the body of the trust property, which is to be treated as the capital or principal fund, the income of which is to be paid to the widow as directed by the will, and the whole is to go to the nephew on the happening of either of the events therein designated [i. e., remarriage or death of the widow]. Hill on Trustees, 386, 446. Paris v. Paris, 10 Ves. 185. Witts v. Steere, 13 Ves. 363."

A review of the Massachusetts cases from Atkins v. Albree (1866) to Chase v. Union Nat. Bank (1931) shows that where the matter under consideration is the determination of conflicting claims by life tenant and remainderman to stock rights there has been no departure in that commonwealth during a period of almost seventy years from the principles laid down by Chief Justice Bigelow in the first of these two cases.

However, since "income" is a flexible word, and, as pointed out by Mr. Justice Cardozo in Equitable Trust Co. v. Prentice (1928) 250 N. Y. 1, 164 N. E. 723, 725, 63 A. L. R. 263, "what is income in one relation may at times be principal in another," we find that the Massachusetts court in Tax Commissioner v. Putnam (1917) 227 Mass. 522, 116 N. E. 904, 910, L. R. A. 1917F, 806, decided that gains derived from the sale of rights to subscribe for new stock to be issued by a corporation may be taxed as "income" on the theory that such rights may properly be classed as intangibles. In that case the court took occasion to remark that: "It is manifest that there is no inherent necessary and immutable reason why stock dividends should always be treated as capital. * * * The same is true of our rule * * * [cases] to the effect that rights to subscribe for new stock which have a market value are to be attributed to principal and not to income. Some other states hold the value of such rights to be income and not principal."

In Rhode Island Hospital Trust Co. v. Tucker (1931) 51 R. I. 507, 155 A. 661, 662, 83 A. L. R. 1253, we find the following:

"The Massachusetts rule, as applied to so-called stock dividends, although probably not approved by a majority of courts, is followed in many jurisdictions, including the United States Supreme Court. See Gibbons v. Mahon, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525; Towne v. Eisner, 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254; Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; Hayes v. St. Louis Union Trust Co., 317 Mo. 1028, 298 S. W. 91, 56 A. L. R. 1276; Lamb v. Lehmann, 110 Ohio St. 59, 143 N. E. 276, 42 A. L. R. 437; Green v. Bissell, 79 Conn. 547, 65 A. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287; Humphrey v. Lang, 169 N. C. 601, 86 S. E. 526, L. R. A. 1916B, 626; Security Trust Co. v. Rammelsburg, 82 W. Va. 701, 97 S. E. 122.

"The same principle applies to rights to subscribe for stock and to rights to subscribe for debentures and bonds convertible into stock of the issuing company. In each instance a portion of corporate surplus has been permanently capitalized. See Greene v. Smith, 17 R. I. 28, 19 A. 1081; In re Brown, 14 R. I. 371, 51 Am. Rep. 397."

On this point, see, also, In re Merrill's Estate (1928) 196 Wis. 351, 220 N. W. 215, 216, 59 A. L. R. 1528, where it is said: "It is a well-nigh universal rule that the benefit of a right given by a corporation to its stockholders to subscribe at par, or other fixed amount less than the intrinsic value, for a new issue of stock, whether sold or exercised by taking new stock, is awarded to corpus and not to income, to the remainderman and not to the life tenant. 5 Fletcher on Corporations, § 3463; 2 Cook on Corporations, § 559; 24 A. L. R. 84; 42 A. L. R. 458. The note to the citation in Cook on Corporations and the note to be found in 24 A. L. R. 84 contain copious references to the authorities upon this question and an extensive review of them here will serve no good purpose. Lauman v. Foster, 157 Iowa, 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14, is a recent case upon this subject, containing a rather extensive review of the authorities, wherein it is said that Holbrook v. Holbrook, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 A. 124, is the only case coming to the attention of the Iowa court holding to the contrary, and even in that case 'the difficulties in the way of treating such option or right to subscribe for additional stock as income are suggested.' "

Here it may be noted that the case of Lauman v. Foster was decided in 1912 and since then, as will appear hereafter, the views of the New Hampshire court as expressed in 1907 in Holbrook v. Holbrook, supra, in regard to ownership of stock rights have been accepted by the Supreme Court of Pennsylvania in Nirdlinger's Estate (1927) 290 Pa. 457, 139 A. 200, 203, 56 A. L. R. 1303, and Jones v. Integrity Trust Co. (1928) 292 Pa. 149, 140 A. 862, 863. The difficulties in the application of the rule as to value of stock rights are the same as those noted in respect to stock dividends in Lyman v. Pratt, supra (see italics), but have not been considered insuperable by the courts of New Hampshire and Pennsylvania. See, also, Weston v. Second Orthodox Congregational Society (1919) 79 N. H. 245, 110 A. 137, and Weston v. Second Orthodox Congregational Soc. (1915) 77 N. H. 576, 95 A. 146, 147.

While the courts of Massachusetts say a stock subscription right is in the nature of a stock dividend (Chase v. Union Nat. Bank, supra), the courts that established what is known as the Kentucky rule long ago decided in Hite's Devisees v. Hite's Ex'r (1892) 93 Ky. 257, 20 S. W. 778, 780, 19 L. R. A. 173, 40 Am. St. Rep. 189, that "this right stands upon a different footing from the claim to a stock dividend," harking back to the case of Atkins v. Albree, supra, as will be seen from the almost identical language used in the two decisions.

Since, under the Massachusetts rule, stock rights, like stock dividends, belong to capital it is but natural for the courts employing that rule to announce that the two interests are of a similar nature. And it is not surprising that the Kentucky court, awarding stock rights to capital and stock dividends to the life tenant (Hite's Devisees v. Hite's Ex'r, supra), finds them dissimilar.

[1] Our Supreme Court has adopted neither the Massachusetts rule nor the Kentucky rule in determining the ownership of stock dividends, preferring, in the two cases where that question has been presented (Estate of Duffill [1919] 180 Cal. 748, 183 P. 337,

and Estate of Gartenlaub [1921] 185 Cal. 375, 197 P. 90, 24 A. L. R. 1), to apply the reasoning developed under the American or Pennsylvania rule as to which Simpson, J., in Re Dickinson's Estate (1926) 285 Pa. 449, 132 A. 352, makes the following comment: "From Earp's Appeal, 28 Pa. 368, to Harkness' Estate, 283 Pa. 464, 129 A. 458, we have uniformly held that—'Where extraordinary dividends, whether of cash, scrip or stock, are declared and paid on shares of corporate stock left by a decedent in trust, they are to be distributed by giving to the corpus sufficient to keep intact the value of the shares as they were at the time the trust began, and by giving the rest of the dividend to those entitled to the income of the estate.' Following our lead, this has become the rule in nearly all the states of the Union."

In Re Harkness' Estate, supra, may be found an interesting refutation of the claim that because the Supreme Court of the United States has said in cases there referred to (notably Gibbons v. Mahon, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525, a case arising in the District of Columbia), that a stock dividend is capital, the courts of every state must say so. The opinion reads as follows, on that point: "The decisions of that eminent tribunal are entitled to the greatest consideration; but since, so far as concerns the present question, no construction of the 'Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made * * * under the authority of the United States,' entered into the determination of those cases, we are at liberty, under the facts above set forth, to follow the rules of property long established in our own state; and, in principle, that court has frequently so decided."

In Re Dickinson's Estate, supra, holding that stock dividends should be equitably apportioned between life tenant and remainderman, we find the Pennsylvania court, as late as 1926, following the rule early declared in that state (Biddle's Appeal [1882] 99 Pa. 278), and awarding the proceeds derived from the sale of stock subscription rights to the corpus of the trust. In the following year, however, the same court, in Nirdlinger's Estate, supra, after an exhaustive and able review by Mr. Justice Kephart of the adoption and operation of the three rules as to dividends, cash and stock, in the various jurisdictions of the country, has this to say of stock subscription rights:

"There is another situation where a corporation, for its own purposes, issues new stock for which rights to subscribe are given shareholders. They are commonly called 'rights,' and as such have a value. The benefit of these rights, whether sold by the trustee or exercised by taking new stock, is in other states generally awarded to the remainderman. [Citing cases.] In jurisdictions following the Massachusetts rule, this result follows as a logical consequence. In other jurisdictions it would seem the life tenant should receive the benefit of the right so far as it is attributable to earnings that have accumulated during the life interest, provided the intact value of the corpus be maintained. This was the decision in Holbrook v. Holbrook, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 A. 124. As noted, however, in Lauman v. Foster [157 Iowa, 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14], supra, the decision in the Holbrook Case is contrary to the great weight of authorities.

"There is some conflict in the Pennsylvania cases on this point. See Wiltbank's Appeal, 64 Pa. 256, 3 Am. Rep. 585, and Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164, where Wiltbank's Appeal, supra, was distinguished upon the ground that the rule there stated applied only where there was an actual profit, whereas in the case then before the court the issue of the new shares reduced the value of the original shares held by the trust estate. [Citing cases.]"

Such conflict as had previously existed in Pennsylvania on the pertinent question was terminated in the following year by the decision in Jones v. Integrity Trust Co., supra, as will be noted more particularly hereafter.

In Holbrook v. Holbrook, supra, the court, after reciting conditions peculiar to the case, said: "If this interpretation of the case is correct, it is difficult to see why the giving of the rights to stockholders should not be considered a distribution of income, the same as the giving of stock is in the case of a stock dividend, provided it is shown that the rights represent net earnings that have accrued during the term of the life tenant. And, when the distribution is in the form of stock rights, the argument that it may be difficult to ascertain whether they in fact represent income or capital is of no greater weight than when the distribution is in the form of a stock dividend. The object of the inquiry in each case is to do justice by the parties and effectuate the intention of the creator of the trust. If this interpretation of the case is incorrect, and upon a further hearing it should be made to appear that some part of the value of the rights was due to surplus earnings that accrued prior to the creation of the trust, or to natural growth and increase in the value of the corporate plant and business, then the trustee should be directed to make such disposition of the stocks or their proceeds as will repay the life tenant for the sums advanced by him in purchasing the stock and such further sums as any value in the rights is due to surplus earnings that accrued between 1900 and 1903, and the balance should be held by him as a part of the corpus."

Then follows a commentary upon the attitude of the Pennsylvania court in various cases, including Biddle's Appeal, supra; Moss' Appeal, 83 Pa. 268, 24 Am. Rep. 164; Earp's Appeal, supra, and Wiltbank's Appeal, 64 Pa. 256, 3 Am. Rep. 585, some of which gave rise to the remark in the Nirdlinger Case, supra, that there was some conflict in the Pennsylvania cases on the point involved. The reasoning of Holbrook v. Holbrook, favorably referred to in Nirdlinger's Estate, was followed in Jones v. Integrity Trust Co., supra, where we find the following: "So far as concerns the 10 per cent. stock rights, the case stated shows that some of the stockholders took the new shares, but it does not disclose what was done by the estate. This is important in determining who should receive the benefit of those rights. We stated in Nirdlinger's Estate, 290 Pa. 457, 466, 139 A. 200 [56 A. L. R. 1303], that there was some conflict in the authorities with respect to the proper disposition of such rights. We now definitely decide that, where a corporation gives to the trustees of an estate the right to subscribe for new stock, and they avail themselves of such offer, the benefit resulting therefrom must be apportioned in the same manner as an extraordinary stock dividend would be; that is, there should be allotted to the corpus of the trust sufficient thereof to maintain unimpaired the intact value of the stock held by it, and the life tenant should receive the balance, because it represents corporate earnings which accumulated after he became entitled to all dividends at any time thereafter payable out of such accumulations."

As we have stated, the Supreme Court of California has accepted the rule of apportionment of stock dividends between life tenant and remainderman as developed by the Pennsylvania courts, Mr. Justice Melvin saying in Estate of Duffill, supra, at page 758 of 180 Cal., 183 P. 337, 340: "That we adopt the American or Pennsylvania rule is evident from the foregoing discussion and the cases cited. In re Osborne, 209 N. Y. 450–477, Ann. Cas. 1915A, 298, 50 L. R. A. (N. S.) 510, 103 N. E. 723, 823, is an excellent example of the application of the rule which there was stated as follows: '(1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.'"

[2] The decision in Estate of Gartenlaub, supra, holding that the remainderman is entitled to the value of the stock as it existed at the date of the creation of the trust and that the accumulations beyond that date are distributable to the life tenant as income or profits confirms the policy declared in the Duffill Case. Since this policy in Pennsylvania and California rests upon the view that stock dividends may be given in whole or in part to the life tenant, so long as such distribution comes from earnings and so long also as it does not decrease what the Pennsylvania court calls the "intact value" of the corpus, we see no logical reason why California should not take the further step along with Pennsylvania and following the lead of New Hampshire adopt the same view as to a stock subscription right.

The objection may be urged that such a view ignores the right of a shareholder to maintain his original proportionate interest in the corporation by the purchase of new stock at each increase, an argument advanced in support of the Massachusetts rule in jurisdictions where that rule has been adopted, e. g. Hayes v. St. Louis Union Trust Co. (1927) 317 Mo. 1028, 298 S. W. 91, 56 A. L. R. 1276. But as we have seen by reference to section 297, Civil Code, this argument has little or no weight to-day in California. Recent comment on this subject by Professor Ballantine appears in his work on California Corporation Laws (1932 Ed., pp. 98–101) where under the caption "Abrogation of Preemptive Rights," discussing the objections to and departure from the old rule, he says: "The idea of the committee which drafted the present provision (referring to section

297, Civ. Code) was that justice and convenience could be served more effectually by holding directors to high standards of good faith and fairness in the exercise of their power to issue shares rather than by any positive rule conferring preemptive rights. The so-called preemptive right is in effect simply a remedy or device to enforce fair dealing as to existing shareholders. Stock structures have become so complex in recent years that it has become impracticable to find any fair basis of apportionment of new issues between different classes of shares. The practical solution is to issue the shares for their reasonable market value without favoritism toward the insiders. Even when a new issue of shares is offered to existing shareholders pro rata, it will often work injustice, because many of the shareholders may be unable to take their allotment and may thus lose their relative interest and influence. In many cases the directors may exercise their discretion to make a first offering to existing shareholders in order to avoid any suspicion or charge of favoritism on their part." See, also, article on "Conflicting Claims of Life Tenant and Remainderman to 'All stock—No Cash' Dividends," 46 Harvard Law Rev. 298, p. 303, n. 34 (Dec., 1932). That our courts have not been greatly impressed with the so-called pre-emptive right as related to the intricate stock structures of recent years was evidenced more than a decade ago by their refusal to accept the Massachusetts rule, and their holding, on the contrary, that the shareholder's right is fully protected if the intact value of the stock which belongs to him in remainder is not impaired when it reaches him.

The foregoing portion of the opinion of the District Court of Appeal, we hereby approve and adopt as a part of the opinion of this court. As we have seen, the trial court rendered judgment in this action in favor of the estate of the deceased life tenant, and thereby sustained the contest of the devisee under the will of the life tenant to the claim presented against his estate by the remaindermen, the appellants in this action, which claim had been allowed and approved by the executor and the court. The trial court apparently acted upon the theory that the warrants and the stock subscription rights were income from the trust fund, and that it belonged to the life tenant, which would be the case if the so-called Kentucky rule prevailed in this state. It would follow, therefore, if this were the only basis of the trial court's judgment, that said judgment should be reversed. In this connection, we might say that contestant, the respondent herein, set up two grounds of contest in her written contest to the allowance of said claim. In the first ground she alleged that, under the terms of the trust agreement between the deceased Schnur and the appellants, the former was entitled to all of the income from the trust property, and that the $8,172.09 in this controversy were the proceeds of said warrants and stock subscription rights, and that they were income from said trust property. As her second ground of contest, she alleged facts which, if true, showed that the value of the trust estate had not been diminished by the issuance of said warrants and the sale thereof and retention of the proceeds of said sale by the decedent, William Schnur, and therefore the proceeds thereof were income. In the second ground of contest is the specific allegation "that the value of said rights so sold by the deceased did not represent an accretion in value of the corporate assets of said Columbia Gas & Electric Corporation, and that the value of said rights represented earnings of said Columbia Gas & Electric Corporation, and of Ohio Fuel Corporation with which it was merged, accumulated after the creation of said trust estate and after said deceased became entitled to all the income from said trust estate." It will thus be seen that respondent's second ground of contest, if the facts alleged therein were true, was sufficient to show that, even under the so-called Pennsylvania, or American, rule the proceeds received from the sale of said warrants were income and therefore, belonged to the deceased, William Schnur, the life tenant. But, as we have seen, she produced no evidence in support of this ground of her contest, and the court for that reason found the allegations therein contained were untrue. We have held that contestant cannot prevail under the first ground of her contest, as it was based entirely upon the theory that the said sum of $8,172.09 was income from the trust property. As the court found all the allegations of her second ground of contest untrue, it would seem that the judgment can find no support from that source.

[3] Notwithstanding this condition of the record, the respondent contends that the judgment sustaining the contest should be affirmed. The basis of her contention is that the burden of proving that the proceeds from the sale of said warrants belonged to the corpus of the trust, and was not income, was upon the remaindermen, the appellants herein. We find, however, that the rule is just the reverse, or in other words, that, under the Pennsylvania rule which also prevails in the state of New Hampshire, the presumption

is that the proceeds from the sale of stock subscription rights as between the life tenant and the remaindermen are to be regarded as capital and belonging to the remaindermen. Peirce v. Burroughs, 58 N. H. 302, 303; Rockwell v. Dow, 85 N. H. 58, 154 A. 229, 235; and Waterhouse's Estate, 308 Pa. 422, 430, 162 A. 295, 297. In the first of these three cases the court said: "A part of the estate was stock of various railroads. During the life estate the railroads issued new stock, giving stockholders the right to buy the new shares at par. * * * Was it capital, or income? * * * Without any evidence tending to show that it was income, it should be regarded as capital. * * * There being no evidence that the right to take new shares was property, or the proceeds of property earned by the corporations, or that it was in any sense income or profits, it is capital belonging to the remainderman." The Supreme Court of Pennsylvania in Waterhouse's Estate, supra, stated the rule as follows: "When the trustees sell stock rights, the presumption is that the proceeds derived therefrom represent capital assets of the estate, and the burden of showing the contrary rests on those who assert a claim to the fund or part of it. In the present case, the burden of proof rested on the life tenants." These authorities clearly hold that the burden of proving that the proceeds of the sale of said warrants were income rested upon the respondent, who claimed under the life tenant. In the absence of any evidence, the presumption was that these proceeds belonged to the appellants. Respondent's case, we think, is not strengthened by reference to either section 748 of the Civil Code, or to subdivision 12 of section 1963 of the Code of Civil Procedure. The first of these two sections purports to define the term "income" and provides that "the income of property, as the term is used in this part of the code, includes * * * the interest of money, dividends upon stock, and other produce of personal property." This section of the Code evidently refers to ordinary dividends upon corporate stock, and has no reference to stock subscription rights which may or may not be income, depending entirely upon whether they represent net earnings of the corporation. Subdivision 12 of section 1963 of the Code of Civil Procedure lists certain presumptions in force in this state, one of which is the presumption, "that a person is the owner of property from exercising acts of ownership over it." The facts of the instant case show that William Schnur received these warrants, or stock subscription rights under the trust agreement creating the trust, and it would be a most unconscionable assumption to construe his wrongful appropriation of these rights as an act tending to show his ownership of said property. The evidence shows all the conditions under which William Schnur received and disposed of these stock subscription rights and his acts in that transaction furnish no basis for any presumption that he was the owner thereof.

[4-6] Finally respondent attacks the sufficiency of appellants' claim, and contends that it fails to allege that, when deceased's life estate terminated, said stock was of less value than when the life estate was created as a result of the retention by decedent of the proceeds of said sale, and, furthermore, that said claim is invalid in that it fails to allege that any part, or all, of the proceeds of said sale should be apportioned to the corpus of the trust estate to preserve its value intact as of the date of its creation. The further objection is made that said claim fails to allege that the retention of said proceeds by the deceased was an improper exercise of the right to appropriate the corpus which was expressly given him in the agreement creating the life estate. In effect, these objections to said claim might be likened to a general demurrer to said claim on the ground that it did not state facts sufficient to constitute a valid claim against the estate of said decedent. They appear to be based upon the assumption that a claim against an estate must be drawn with the precision required of a complaint in an ordinary civil action. It has never been so held in this state. On the other hand, if the facts stated in a claim are sufficient to apprise the executor or administrator of the nature and amount of the demand, it is a sufficient demand against the estate. 11 Cal. Jur., p. 702; Robinson v. Chapman, 98 Cal. App. 278, 276 P. 1081; Standiford v. Cantrell, 87 Cal. App. 736, 741, 262 P. 800; Pollitz v. Wickersham, 150 Cal. 238, 250, 88 P. 911, 916. In the last-named case we find the question of the sufficiency of a claim against a decedent's estate discussed as follows: "The claim read fair enough upon its face, not stating facts which necessarily put it under the ban of the Constitution. Whether the transaction was, in fact, in contravention of the constitutional provision, was a question of fact that could only be determined by a consideration of the circumstances under which it was had, and the conduct of the parties in reference thereto, * * * and plaintiffs were not required to show those circumstances in their claim. It is not required that a claim against an estate

should state the facts with all the preciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should, of course, as said in McGrath v. Carroll, 110 Cal. 79, 83, 42 P. 466, 468, 'sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it,' and this, we think, the claim in question did." The facts which go to make up appellants' demand against the estate of William Schnur, deceased, were fully and clearly stated in their written claim filed against said estate and are sufficient to show the nature and amount of appellants' demand. As shown, the executor and the court allowed the claim as presented, and it must be inferred from such allowance and approval that the nature of the claim and also its amount were understood and approved both by the executor and the court. Standiford v. Cantrell, supra, page 741 of 87 Cal. App., 262 P. 800.

The judgment is reversed, with directions to the trial court to ascertain (in the event the respondent so desires) the extent, if any, of the diminution of the corpus of the trust by reason of the retention by decedent of the proceeds of the subscription rights, and thereafter to proceed in accordance with the views expressed in the opinion; and, if it be found that no diminution of the corpus has taken place, to enter judgment dismissing said contest.

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138 Cal.App. 503

THATCHER et al. v. SAN DIEGO COUNTY et al.

Civ. 1068.

District Court of Appeal, Fourth District, California.

May 11, 1934.

Hearing Denied by Supreme Court July 9, 1934.

1. Appeal and error 🔑1078(3).

Appellate court need only determine whether complaint states cause of action, on appeal from judgment entered following order sustaining general and special demurrers to complaint, wherein grounds of special demurrers were not argued.

2. Municipal corporations 🔑407(1).

Acquisition and Improvement Act which permits "pyramiding" of assessments *held* constitutional (St. 1925, p. 849).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by F. R. Thatcher and others against the County of San Diego, a municipal corporation, and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Hillyer & Boldman, of San Diego, for appellants.

Harvey H. Atherton, of San Diego, for respondents Toberman & Co., and West Coast Life Ins. Co.

Thomas Whelan, Dist. Atty., and Edward W. Goodman, Deputy Dist. Atty., both of San Diego, for respondents County of San Diego, L. H. Aul, Edgar F. Hastings, E. A. Hornbeck, Thomas M. Hurley, S. P. McMullen, Herbert A. Croghan, James H. Johnson, Chauncey R. Hammond, and W. S. Heller.

Lloyd S. Nix and George W. Nix, both of Los Angeles, and Joe Raycraft, of Los Angeles, amici curiæ.

MARKS, Justice.

This is an appeal from a judgment entered following an order sustaining demurrers to appellants' amended complaint without leave to amend, their counsel announcing that they did not desire leave to amend.

Appellants, who brought this action for themselves and the other property owners of the district, own property in Acquisition and Improvement District No. 13, which was organized for the improvement of Market street, both within the city limits of the city of San Diego and outside such limits and within the county of San Diego, under the Acquisition and Improvement Act of 1925 (Stats. 1925, p. 849), commonly known as the "Mattoon Act." In addition to the county of San Diego, which instituted the improvement proceeding with the consent of the city of San Diego, the members of its board of supervisors, its tax collector, assessor, auditor, and treasurer, the other defendants are alleged to own all of the bonds issued to pay for the improvement. As disclosed by the amended complaint, appellants sought a judgment, (1) declaring the Acquisition and Improvement Act of 1925 unconstitutional and the bonds issued under its provisions for district number thirteen null and void; (2) that the owners of such bonds deliver them up for cancellation; (3) that the county of San Diego and its officers be enjoined from proceeding with the levy of any assessment on the property in the district to pay the interest or principal of the bonds or from collecting or enforcing any assessment already levied; (4) that appellants' title to their properties be quieted.

[1] While the demurrers were both general and special, the grounds of the special demurrers are not argued by counsel, and we need only determine whether or not the allegations of the amended complaint state facts sufficient to constitute a cause of action.

[2] The constitutionality of the Acquisition and Improvement Act of 1925 has been before the Supreme Court several times and its provisions have been sustained. Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897; Allied Amusement Co. v. Bryam, 201 Cal. 316, 256 P. 1097; City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873; Southlands Co. v. San Diego, 211 Cal. 646, 297 P. 521; Young v. Superior Court, 216 Cal. 512, 15 P.(2d) 163; La Mesa, etc. District v. Hornbeck, 216 Cal. 730, 17 P.(2d) 143; American Securities Co. v. Forward (Cal. Sup.) 32 P.(2d) 343.

Appellants direct their attack upon the constitutionality of the act in question upon the provisions which they contend permit what is known as the "pyramiding" of assessments. This precise question was before the Supreme Court in the case of American Securities Co. v. Forward, supra, and the constitutionality of the act upheld on this ground. This case and the others cited resolve all of the contentions of appellants against them.

It follows that the judgment must be affirmed. It is so ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

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138 Cal.App. 563

BARR v. VENICE GIANT DIPPER CO., Limited.

Civ. 9301.

District Court of Appeal, First District,
Division 2, California.
May 16, 1934.

1. Carriers 🔑235.

Operator of roller coaster owed duty of common carrier to passengers for hire riding thereon (Civ. Code, § 2100).

2. Carriers 🔑321(21).

Instruction on res ipsa loquitur *held* proper in action by passenger on roller coaster against operator for injuries sustained when passenger, at instance of operator's employee, stepped out of moving car.

3. Damages 🔑130(2).

$5,000 to minor for broken leg, sprained wrist, and general discomfort, *held* not excessive, where record did not indicate passion or prejudice.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by William Frederick Barr, a minor, by William Barr, guardian ad litem, against the Venice Giant Dipper Company, Limited. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mills, Hunter & Dunn and C. R. Liljestrom, all of Los Angeles, for appellant.

Henry P. Goodwin and Stewart, Shaw & Murphey, all of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The guardian of the minor brought this action to recover damages for injuries suffered by the minor while a passenger on a roller coaster operated by the defendant. The coaster was in the nature of a miniature scenic railway consisting of a train of small cars constructed to carry two passengers each. The minor and two companions boarded one of the cars; an employee of defendant notified them that the cars would carry but two, whereupon the minor stepped out of the car, which was then in motion, and was thrown violently off of the platform and injured. The cause was tried before a jury, and plaintiff had a verdict. The appellant raises just three points, which will be taken in order.

[1] The criticisms of the instructions relating to the degree of care required of appellant all relate to the general question whether the operator of such a device as the roller coaster is subject to the rule of liability applicable to common carriers. Appellant cites and relies on Pointer v. Mountain Ry. Const. Co., 269 Mo. 104, 189 S. W. 805, L. R. A. 1917B, 1091, and cases which have followed the reasoning of that opinion. Respondent cites and relies on O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407, and cases following that decision. The cases cited by respondent follow the general and accepted rule which is thus

stated in 10 C. J. 609: "The owner and operator of a scenic railway in an amusement park is subject, where he has accepted passengers on such railway for hire, to the liabilities of a carrier of passengers generally." In support of the rule are Brown v. Winnwood Amusement Co., 225 Mo. App. 1180, 34 S.W.(2d) 149; Cooper v. Winnwood Amusement Co. (Mo. App.) 55 S.W.(2d) 737; Best Park & Amusement Co. v. Rollins, 192 Ala. 534, 68 So. 417, Ann. Cas. 1917D, 929; Tennessee State Fair Ass'n v. Hartman, 134 Tenn. 159, 183 S. W. 735; Sand Springs Park v. Schrader, 82 Okl. 244, 198 P. 983, 22 A. L. R. 593; Bibeau v. Fred W. Pearce Corp., 173 Minn. 331, 217 N. W. 374; 4 R. C. L., p. 1001. See, also, Smith v. O'Donnell, 215 Cal. 714, 719, 12 P.(2d) 933, where the reasoning of the O'Callaghan Case is cited with approval. Upon these authorities we hold that there was no error in the instructions to the jury charging the appellant with the utmost care and diligence required of a common carrier of persons under section 2100 of the Civil Code.

[2] The instruction applying the doctrine of res ipsa loquitur was proper under the rule of Smith v. O'Donnell, supra, and Godfrey v. Brown (Cal. Sup.) 29 P.(2d) 165.

[3] The appellant complains that the verdict is excessive. Five thousand dollars was awarded for a broken leg, sprained wrist, and general discomfort. There is nothing in the record, however, to indicate that the award was the result of passion or prejudice, and we cannot say that it is so gravely disproportionate to the injury suffered that it should not be sustained.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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138 Cal.App. 575

PEOPLE v. LEHR.

Cr. 166.

District Court of Appeal, Fourth District, California.
May 16, 1934.

Criminal law ⚿1081.

Where transcript showed notice of appeal and statement of grounds were each dated 3 days after and each filed 12 days after pronouncement of judgment, notice of appeal *held* ineffectual since filed too late (Pen. Code, § 1239; Rules for District Court of Appeals, rule 2, § 7).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Fred Lehr was convicted of burglary in the second degree, and he appeals. On motion to dismiss appeal.

Motion granted and appeal dismissed.

Fred Lehr, in pro. per.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

This is a motion to dismiss an appeal taken by the defendant after conviction of burglary in the second degree. The motion to dismiss was made on the ground that the appeal was not taken within the time prescribed in section 1239 of the Penal Code and on the ground that a statement of the grounds of appeal was not filed within five days after giving notice of appeal, as provided for in rule II, section 7, of the rules governing this court.

It appears from the transcript that judgment was pronounced on March 9, 1934, and that a notice of appeal and a statement of the grounds of the appeal, each dated March 12, 1934, were filed on March 21, 1934. The record contains nothing to indicate that any other notice of appeal was given and the appellant concedes that there was none. The notice of appeal was filed too late and is ineffectual for any purpose. Pen. Code, § 1239; People v. Payne, 106 Cal. App. 609, 289 P. 909; People v. Sullivan, 123 Cal. App. 436, 11 P.(2d) 420.

We may add that we have read the opening brief already filed by the appellant and, with one exception, the points raised are entirely without merit. One technical error in procedure is pointed out, but it fully appears that this error was corrected in the trial court and that the appellant suffered no prejudice thereby or therefrom. An examination of the entire record, including the evidence, fails to reveal any miscarriage of justice.

The motion is granted and the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

138 Cal.App. 526

PEOPLE v. METZINGER.

Cr. 2525.

District Court of Appeal, Second District, Division 2, California.

May 15, 1934.

1. Criminal law ⚿1144(12).

Presumption is that trial court's discretion in permitting testimony of witness taken at preliminary hearing to be read was properly exercised (Pen. Code, § 686).

2. Criminal law ⚿543(2).

In prosecution for burglary and robbery, permitting testimony of victims given at preliminary hearing to be read *held* not error where victims were master and servant sojourning within state, had since departed therefrom, and after diligent search could not be found therein (Pen. Code, § 686).

3. Criminal law ⚿1037(2).

In absence of objection and request that trial court admonish jury to disregard allegedly improper remarks in prosecutor's argument to jury, possible effect of such remarks upon the jury will not be considered on appeal.

◆

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Lowell Metzinger was convicted of burglary and robbery, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant appeals from a judgment which followed his conviction of the crimes of burglary and robbery and from the order denying his motion for a new trial.

The evidence discloses that at about 3:30 o'clock in the morning of October 24, 1933, in company with another man, defendant entered the bungalow apartment of one Leigh, pointed a gun at the latter and his servant Bahr, and obtained certain money from them. At the preliminary hearing in municipal court on November 3, 1933, Leigh and Bahr testified to the facts and circumstances surrounding the commission of the offenses charged and identified defendant as one of the participants in the holdup. At the trial of defendant on the charges on January 29, 1934, the court permitted the prosecution to read in evidence the testimony of Leigh and Bahr taken at the preliminary hearing, upon a showing that their attendance at the trial could not be secured and that Leigh was last seen in New York on December 8, 1933.

[1, 2] Appellant contends that the trial court abused its discretion in permitting the reading of the testimony of Leigh and Bahr taken at the preliminary hearing. No question is raised as to the sufficiency of the evidence to support the verdicts finding defendant guilty of buglary in the first degree and on two counts of robbery in the first degree.

The testimony of a witness taken at a preliminary hearing may be read at the trial "upon its being satisfactorily shown to the court that he * * * cannot with due diligence be found within the state." Pen. Code, § 686. Two months before the trial process servers started their efforts to serve a subpoena on the witnesses Leigh and Bahr. Leigh was an Englishman, a resident of London, England, temporarily residing in a bungalow apartment in Los Angeles while working under a contract with a motion picture studio. When his work was concluded he returned to New York, where he was seen by his agent, according to her testimony at the trial. He was not seen elsewhere and could not be located in California by personal search or mail. It was a reasonable inference that Leigh's personal servant, Bahr, accompanied him. There was substantial evidence to support the trial court's conclusion that due diligence had been shown in the effort to secure the attendance of these two witnesses. There is nothing to indicate that any greater degree of diligence in this case would have secured the presence of either of them. There is a presumption that the discretion of the court in this matter has been properly exercised, and this presumption has not been overcome by a clear showing. People v. O'Shaughnessy (Cal. App.) 26 P.(2d) 847; People v. Land (Cal. App.) 30 P.(2d) 433.

[3] A certain portion of the argument of the district attorney to the jury is assigned here for the first time as prejudicial misconduct. Counsel has not indicated and it does not appear in what manner prejudice may have resulted to appellant. In fact, it does not appear in what manner the argument could possibly have prejudiced appellant. No objection was made in the lower court to such portions of the argument, and in the absence of objection, coupled with a request

that the trial court admonish the jury to disregard the alleged improper remarks, their possible effect upon the jury will not be considered for the first time on appeal. People v. Metzler, 21 Cal. App. 80, 130 P. 1192.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

138 Cal.App. 303

GIBSON et ux. v. EASLEY.

Civ. 9112.

District Court of Appeal, First District, Division 2, California.

April 26, 1934.

Hearing Denied by Supreme Court June 25, 1934.

1. Appeal and error 🔑882(12).

In automobile guests' action, defendant requesting instructions stating substantially same rule as plaintiffs' instructions could not complain on appeal that plaintiffs' instructions made defendant's acts of driving too fast and swerving her automobile, if done intentionally, willful misconduct, where such objection was not made in trial court.

2. Automobiles 🔑244(20)

In guests' action for injuries sustained when automobile struck light pole, evidence *held* to sustain verdict of host's willful misconduct.

3. Appeal and error 🔑1170(9).

In guests' action for injuries sustained when automobile struck light pole, where evidence was sufficient to sustain verdict of host's willful misconduct when properly defined, judgment would not be reversed because of erroneous instruction which host asserted made acts of driving too fast and of swerving automobile, if done intentionally, willful misconduct (Const. art. 6, § 4½).

4. Trial 🔑296(3).

In automobile accident case, instruction not adding words "if any" after "willful misconduct" was not erroneous as instructing that host was guilty of willful misconduct, where instruction immediately following stated, if jury did not find any willful misconduct from evidence, to find for host.

5. Automobiles 🔑245(50).

In action for injuries to guests in automobile colliding with pole, host's willful misconduct as proximate cause of accident *held* for jury.

6. Automobiles 🔑238(1).

In action for injuries to guests in automobile colliding with pole, amended complaint *held* to state cause of action against host.

> Complaint alleged, in substance, that host willfully and recklessly drove automobile in such manner as to be guilty of willful misconduct, in that she so propelled automobile as to cause it to swerve from one side of highway to the other, and willfully drove automobile at high and excessive rate of speed of 50 to 60 miles per hour, and that while so driving host willfully caused automobile to run off left side of pavement and then drove back onto right-hand side of pavement and off right-hand side so as to cause automobile to collide and overturn against certain pole, violently hurling plaintiff from automobile and onto ground.

7. Automobiles 🔑238(7).

In action for injuries to automobile guests, it is sufficient to allege that certain act by host was done willfully.

8. Appeal and error 🔑193(1).

Where parties went to trial and treated pleadings as containing proper allegation of willful misconduct of defendant, defendant could not, in reviewing court for first time, claim that complaint was insufficient in such respect.

9. Appeal and error 🔑706(1).

Where record showed that motion for new trial was made on all statutory grounds, but did not show what points were made in presenting motion or any proceedings had on motion, claim that court improperly denied motion *held* not sustainable.

SPENCE, J., dissenting.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by O. B. Gibson and wife against Mame C. Easley. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Prior opinion, 30 P.(2d) 70.

Charles V. Barfield, of San Francisco, and Bohnett, Hill & Cottrell, of San Jose, for appellant.

Holstein & Jensen, of San Jose, for respondents.

STURTEVANT, Justice.

The plaintiffs, O. B. Gibson and Nell Gibson, his wife, commenced an action to recover damages for personal injuries suffered by them in an automobile accident while they were riding as the guests of the defendant, Mame C. Easley, and Richard Easley, her husband. The action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs, and the defendant has appealed.

At about 3:30 a. m. on the 8th day of May, 1932, the defendant and her husband called at the residence of the plaintiffs, awakened them, and induced them to accompany them on an automobile ride. The defendant did the driving. There was evidence that commencing at a time soon after they entered the automobile the defendant commenced to drive, and continued to drive, at a speed of from 50 to 60 miles an hour over the streets of San Jose, over intersecting streets, and passing numerous arterial stop signs without pausing. There was evidence that while so driving the defendant swerved from right to left and back again on several occasions. There was also evidence that at different times one or the other of the passengers riding with the defendant earnestly admonished her to drive more slowly and with greater care, but that the defendant replied she knew what she was doing and continued to drive in the same manner until the accident happened. Finally, when on the right-hand side of the highway and while so swerving to avoid hitting an electric light pole, the defendant attempted to swerve to the right, but the car skidded, ran into the light pole, breaking it in two, greatly damaging her car, and severely injuring all of the passengers.

[1-3] In her first point the defendant attacks several instructions as being incorrect and prejudicial to her interests. Those instructions were as follows:

"V. I instruct you that by wilful misconduct is meant the voluntary or self-determined or intentional mismanagement or unlawful behavior.

"VI. I hereby charge you that if the defendant, Mame C. Easley, at the time of the accident in question, was traveling upon a public highway, and if at said time she was wilfully driving and operating her automobile at a high and excessive rate of speed in excess of the speed limit allowed by law, and if you find that such conduct on the part of the said defendant was the proximate cause of the accident, then said defendant was guilty of wilful misconduct.

"VII. I instruct you that if the defendant, Mame C. Easley, at the time of the accident and immediately prior thereto, was either wilfully driving and operating her automobile at a high and excessive rate of speed, in excess of the speed limit allowed by law, or was wilfully causing said automobile to swerve from one side of the highway to the other side, that she was guilty of wilful misconduct in either event, and it is not necessary for the plaintiffs to show that said defendant intended to or wilfully caused the collision in this case.

"IX. I hereby charge you that if you find by the preponderance of the evidence that the defendant, Mame C. Easley, at the time of the accident either wilfully drove and operated her automobile at a high and excessive rate of speed, in excess of the speed limit allowed by law, or that she wilfully caused said automobile to swerve from one side of the highway to the other side, and that either said swerving or said speed was the proximate cause of the accident, then in either event said defendant was guilty of wilful misconduct, and it is not necessary for the plaintiffs to make any further showing of wilful misconduct to be entitled to recover."

The defendant asserts that the instructions, by their general scope, made the acts of driving too fast and of swerving her car, if done intentionally, willful misconduct. But, as she asserts, further elements should have been inserted in the instructions. She cites, among other cases, Howard v. Howard (Cal. App.) 22 P.(2d) 279, in which the Supreme Court denied a rehearing. It was decided several months after the trial in the instant case. In the Howard Case, supra, at page 281 of 22 P.(2d), the court said: "But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. *Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional* doing of an act with a wanton and reckless disregard of its *possible* result." (Italics ours.) Whatever merit there may be in the point, the defendant is in no position to present it. She asked and the trial court gave two instructions on the same subjects:

"XVIII. You are instructed that the term 'wilful misconduct' is synonymous with 'intentional misconduct' and therefore, if you find from the evidence in this case that the defendant, Mame C. Easley, did not intentionally commit any act of omission or commission which proximately caused injury to the plaintiffs, then if you so find, I instruct you that she would not be guilty of wilful misconduct and in which case your verdict must be for the defendant, Mame C. Easley.

"XIX. Wilful misconduct arises from the spontaneous action of the will, and cannot exist without purpose or design. You should not confuse wilful misconduct with negligence or gross negligence, as there is a clear distinction between the two terms. Wilful misconduct means something different from, and more than, negligence however gross, and if you should find from the evidence in this case that the defendant was not guilty of wilful misconduct, as alleged in the complaint, your verdict must be in her favor, even though you may find from the evidence that she may have been guilty of negligence, or even gross negligence."

It is patent that those instructions stated substantially the same rule as the instructions complained of. Both sets omitted the factor which we have italicized. The defendant did not ask for any other instruction on the meaning of the expression "wilful misconduct." She made a motion for a nonsuit, but she did not therein make the contention she now makes. The proceedings were as follows:

"By Mr. Barfield: May it please the court, the defendant at this time moves for a nonsuit upon the ground that the plaintiffs have failed to prove by any evidence, inference or otherwise, that the defendant in this case committed any act whatsoever intentionally or wilfully; there is no evidence of any wilful misconduct in this case * * * and further, our ground of motion is that it appears from the evidence of the plaintiffs themselves that they had been drinking liquor before this accident. It further appears that by any reasonable view that can be taken of this situation here, these plaintiffs participated in festivities and a party prior to this accident, and that they are guilty of contributory negligence. * * * Where one voluntarily participates in midnight festivities, I submit in the condition of this case the court must pass ultimately as a thirteenth juror as to whether or not there is any evidence of wilful misconduct. * * * Calling your Honor's attention to the case in Hermance v. Clemow, 111 Cal. App. page 13, 295 P. 70, the Supreme Court points out that wilful misconduct must be something in excess of even gross negligence * * * there must be evidence of intention.

"By the Court: That is a matter for the jury. There is the protesting by Mrs. Gibson, wasn't that wilful misconduct driving at such excessive speed? That is a very interesting question of fact that the jury should pass upon, not the court. We must consider everything in favor of the plaintiffs in passing on a nonsuit. I will deny the motion."

In other words, at no place in the record is it shown that she ever made the point in the trial court. She should have done so, and she may not now change her theory of the case and for the first time present her theory in a court of review. But, the defendant argues, under such an interpretation of the record the jury may have based its verdict on mere negligence or gross negligence. The trial court instructed the jury in most explicit terms that it should not do so. Defendant's Instruction No. XV. That admonition was repeated. Defendant's Instruction No. XIX. Finally, as a closing admonition, the jury was told that if the defendant was not guilty of willful misconduct, the jury should return a verdict for the defendant. In Durkee v. Chino Land & Water Co., 151 Cal. 561, at page 571, 91 P. 389, 392, the court said: "As the rule adopted by plaintiff for the measurement of damages was acquiesced in by defendant, no objection raised by it to the competency of the evidence given under it, and, as that evidence fully sustains the findings, the defendant is concluded by its conduct from raising any question of the sufficiency of the evidence when tested by some other and different rule than the one adopted and acquiesced in upon the trial. In this view, whether the rule adopted for the ascertainment of damages was the correct one or not, we are not called upon to consider. It was the one adopted and acquiesced in by both parties and followed by the court, and neither of the litigants can be heard after judgment to question its correctness, or the competency of the evidence introduced under it." (Citing cases.) In the case of Sommer v. Martin, 55 Cal. App. 603, 204 P. 33, the action was one to recover for personal injuries caused by the alleged negligence of the defendant. In the trial court the plaintiff, without objection, introduced in evidence a local traffic ordinance. Both parties tried the case on the theory that said ordinance was the governing law. After the trial and before the hearing of the case on appeal, the decision entitled Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, was handed down. Later the defendant Martin sought to change his theory of the law and attempted to rely on Ex parte Daniels, supra. This court held he could not do so and on page 610 of 55 Cal. App., 204 P. 33, 36, quoted with approval as follows: "'Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights, and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would, in most cases, be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.' Hayne, New Trial and Appeal, vol. 1, § 103. In the case of Horace F. Wood Transfer Co. v. Shelton, 180 Ind. 273, 279, 101 N. E. 718, 720, the court said: 'In attacking instructions Nos. 7, 9, 13 and 14 given by the court on its own motion, appellant seeks to question the validity of an ordinance of the city of Indianapolis providing a speed limit for automobiles within a certain prescribed territory in said city. During the progress of the trial the attorney for appellees read in evidence the ordinance in question and asked "There is no question about the validity and force of this?" To which one of the attorneys for appellant replied: "Oh, no." Later it was suggested that a subsequent attack might be made on the ordinance in case of appeal, to which the attorney stated: "That is an immaterial point. We will let it go just the way it is." It is a familiar rule that a party is restricted on appeal to the theory adopted at the trial and "when a theory is thus adopted, and acted upon below, with the concurrence of both parties, a judgment ought not be reversed because the court instructs the jury in accordance with it." ' " In Checotah v. Hardridge, 31 Okl. 742, 123 P. 846, the Supreme Court of Oklahoma was considering the record in a case involving the devolution of title to lands in that state. At page 849 of 123 P., the court said: "The case, however, seems to have been tried in the lower court upon the theory that the Creek law applied to the entire devolution, and, if so, the parties will not be permitted to change front in this court, and take a new hold on another theory. This has been the uniform holding of this court." (Citing cases.) The authorities we have cited can be multiplied many times. 2 Cal. Jur. 237; 3 C. J. 718. In the instant case, although there was a conflict in the evidence, the evidence was sufficient to support the verdict. Under these circumstances unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, the judgment should not be reversed. Const. art. 6, § 4½. We are unable to say that there has been a miscarriage of justice. That is so because there was evidence from which the jury could have found, and from its verdict it must be assumed it did find, that the defendant intentionally did the acts alleged in the complaint either with a knowledge that serious injury was a probable (as distinguished from a possible) result or with a wanton or reckless disregard of their possible result. There being evidence amply sufficient to sustain a verdict of willful misconduct when properly defined, we are of the view that in the circumstances of this case the judgment should not be reversed because of the instructions given at the request of the plaintiff. Gerdes et al. v. Pacific Gas & Electric Co. (Cal. Sup.) 27 P.(2d) 365, 90 A. L. R. 1071.

[4] The defendant attacks instructions number XII and number XIV. The attack on each is that each one in effect told the jury that the defendant was guilty of willful misconduct. This attack is based on the fact that the words "if any" were not inserted after "wilful misconduct," and therefore the trial court took from the jury the power to determine for itself whether the defendant's act was, or was not, willful misconduct. Speaking of a similar attack, in the case of Forrest v. Pickwick Stages System, 101 Cal. App. 426, at page 434, 281 P. 723, 726, Mr. Presiding Justice Koford, speaking for this court, said: "Appellants claim this instruction assumed as a fact that there was an absence of all evidence upon the subjects mentioned. If so, it is very slight and indirect and is cured by other instructions upon contributory negligence. In such instruction the expression, 'in the absence of all evidence to show' should be understood to mean 'if the jury finds an absence of all evidence,' and it is not an assumption of fact which is prohibited the trial judge. It is like defining negligence and contributory negligence. That does not assume negligence or contributory negligence to be an established fact in the case." That comment is particularly applicable to this record. That the trial court in the instant case did not assume the defendant was guilty of willful misconduct is shown in instruction XV, which immediately followed, and which, among other things, said: "You are instructed that if you find from the evidence in this case that the defendant, Mame C. Easley, was not guilty of any willful misconduct as alleged in the complaint, then I instruct you that you need consider nothing further, and if you so find your verdict must be in favor of defendant, Mame C. Easley."

[5] It is next claimed that the evidence in this case was wholly insufficient to support

the verdict. In support of the point the defendant quotes a considerable portion of the evidence. Thereupon she states: "Taking the above evidence in the light most favorable to plaintiffs and respondents, there is no evidence whatever that the defendant either committed a willful or intentional injury upon the plaintiffs or that she was guilty of a conscious failure to act to the end of averting injury, with knowledge of the peril to be apprehended from such failure." It is a sufficient reply to state that the evidence introduced contained some conflicts. For instance, the defendant, as a witness in her own behalf, claimed that immediately before the accident she made frantic efforts to avoid hitting the pole, and that she did not deliberately drive off of the highway, nor did she willfully cause injuries to the plaintiffs or the death of her husband. If in reaching its verdict the jury determined that the testimony of the defendant was insufficient to exonerate her, or if it determined that some of her testimony was not true, the jury was entirely within its rights.

[6, 7] The fourth point made by the defendant is that the amended complaint failed to state a cause of action. The amended complaint was framed in two counts. The first count was complete in itself alleging injuries sustained by Mr. Gibson. The second count was in all respects identical with the first count, excepting that it alleged the injuries sustained by Mrs. Gibson. The charging part of each count was as follows: "That on or about the 8th day of May, 1932, while the plaintiff, O. B. Gibson, was so riding in that certain automobile being driven, operated and propelled by the defendant above named in a general southerly direction on and upon that certain public highway in the county of Santa Clara, state of California, known as McLaughlan avenue, near the intersection of that certain public highway in said county and state known as Tully road, the defendant, above named, so willfully and recklessly drove, operated and propelled said automobile in such a manner as to be guilty of willful misconduct as follows to-wit: defendant so propelled said automobile as to cause the same to swerve from one side of the highway to the other side, willfully drove said automobile at a high and excessive rate of speed, to-wit: approximately fifty to sixty miles per hour and said defendant, while so driving said automobile at such high and excessive rate of speed and while causing the same to swerve from one side of the highway to the other side, willfully caused the same to run off of the left side of the pavement and onto the gravel or dirt roadway and said defendant drove and propelled said automobile back onto her right-hand side of the paved portion of said highway and off of the right-hand side of said pavement so as to cause the same to collide and overturn against a certain Pacific Gas and Electric Company pole on the westerly side of said McLaughlan avenue, violently hurling the said plaintiff, O. B. Gibson, from said automobile and onto the ground or gravel portion of said roadway. * * *" While the pleading is not a model, it may not be said to be insufficient. In principle, we think that Stein v. United Railroads, 159 Cal. 368, 113 P. 663, is in point. On page 370 of 159 Cal., 113 P. 663, 664, the court quoted with approval: "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury." While this case does not sound in negligence, it does sound in willfulness. As it is sufficient to state that a certain act was done negligently, so we think it is sufficient to state that a certain act was done willfully. In Esrey v. Southern Pacific Co., 103 Cal. 541, 37 P. 500, the plaintiff was injured in a railroad accident. In her complaint she charged that the defendant acted negligently. Later she amended her pleading by alleging that the defendant acted willfully. On appeal it was claimed that the amendment was improperly allowed. The court held otherwise. On page 546 of 103 Cal., 37 P. 500, 502, it said: "The amendment pertains wholly to the manner in which the injury was inflicted, and actual damage is all that is sought to be recovered. The gist of the action is a claim of actual damages for personal injuries inflicted by defendant's moving cars, and these are the facts found stated in the original complaint." In the case of Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 P. 738, 903, the plaintiff had charged that the act of the defendant was done "carelessly, negligently, willfully and wantonly." On appeal it was claimed that the complaint did not state a cause of action. On page 618 of 3 Cal. App., 86 P. 738, 903, 904, the court said: "The claim that there cannot be carelessness, negligence, willfulness, and wantonness at the same time cannot be maintained. It is true that carelessness does not necessarily imply wantonness, but as wantonness may exist, without intent to injure, it certainly may imply carelessness. To do an act in reckless disregard of consequences, though not intending thereby to do injury, is to do the act in a careless and negligent manner, and would also, under some circumstances, be wantonly

done. It was not necessary to sustain the action that the act of defendant be shown to have been wantonly and willfully, as well as carelessly and negligently, done. The fact that the manner of doing the act was charged in the conjunctive, did not deprive plaintiff of the right to show what happened and to recover accordingly. We violate no rule of pleading in holding that the complaint was sufficient as we understand the case of Esrey v. Southern Pacific Co., 103 Cal. 541, 37 P. 500."

[8] But the defendant's contention on this point must fall, even though it might at one time have had merit. To the amended complaint no demurrer was interposed. The parties went to trial, and both parties and the trial court treated the pleadings as containing a proper allegation of the willful misconduct of the defendant. Under all of the circumstances the defendant may not, in a court of review, for the first time present the contention which she now makes. McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Kurokawa v. Saroyan, 95 Cal. App. 772, 775, 273 P. 613; Berger v. St. Louis Storage & Commission Co., 136 Mo. App. 36, 116 S. W. 444.

[9] The last point made by the defendant is that the trial court erred in denying her motion for a new trial. The original record did not disclose that such a motion was made. When the defendant filed a petition for a rehearing, she asked to be heard on the question as to whether she had, in the trial court, presented the contention which she now makes as to the proper definition of the expression willful misconduct as the same is used in the guest statute; and she also asked permission to suggest a diminution of the record. As neither matter had been discussed in the briefs, both requests were granted. The record has now been completed by a supplemental transcript which shows that a motion for a new trial was made on each and all of the statutory grounds and that the motion was denied. What points were made in presenting the motion does not appear, nor do any other proceedings had on the motion appear. On the record as so amended it may not be said that the court erred in denying the motion.

The judgment is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice.

I dissent. The effect of the instructions given by the trial court at the request of respondents was to advise the jury that any one who voluntarily drives an automobile at a speed prohibited by law is guilty of willful misconduct within the meaning of the Guest Statute. There is no doubt that these instructions were erroneous. Forsman v. Colton (Cal. App.) 28 P.(2d) 429; Olson v. Gay (Cal. App.) 27 P.(2d) 922; Turner v. Standard Oil Co. of California (Cal. App.) 25 P. (2d) 988, 990; Walker v. Bacon (Cal. App.) 23 P.(2d) 520; Howard v. Howard (Cal. App.) 22 P.(2d) 279. The error is apparently conceded in the majority opinion, but it is there held that appellant is in no position to complain of the giving of said instructions. With this conclusion I cannot agree.

The trial of the cause was had before there had been any judicial determination of the meaning of willful misconduct as that term is employed in the Guest Statute. Throughout the trial the parties proceeded upon entirely different theories. Respondents took the position that any voluntary violation of a statute was sufficient. The trial court adopted this view. Appellant, on the other hand, claimed throughout the trial that respondents were required to show that appellant had willfully injured respondent or had willfully run off the road and into the pole. This extreme view finds some support in the minority opinion in Walker v. Bacon, supra, but neither the position taken by the respondents nor the position taken by appellant at the trial can be sustained in view of the abovementioned decisions establishing the meaning of willful misconduct as used in said statute.

In the case of Turner v. Standard Oil Company of California, supra, the court defined willful misconduct as follows: " 'Willful misconduct,' within the meaning of this statute, may then be defined as *intentionally* doing something in the operation of a motor vehicle which should not be done or *intentionally* failing to do something which should be done *under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.*" (Italics ours.) This definition appears to be sound in the light of the legislative history of the Guest Statute, and it finds approval in the other authorities above mentioned. While the intentional violation of a statute constitutes negligence and may constitute gross negligence or even willful misconduct *under certain circumstances*, willful misconduct contemplates something more than a mere intentional violation of one of our numerous statutory traffic regulations. To permit recovery on the theory of willful misconduct upon any showing short of that indicated in the approved definition would result in the complete nullification of the obvious attempt on the part of the Legislature to deny recovery to guests in cases involving mere negligence or even gross negligence. The rule may now be said to be established that even the willful or intentional violation of a statute will not suffice unless the circumstances warrant the inference that the driver knew that injury to his guest would be the probable result rather than a mere possibility. Willful misconduct, as thus defined, involves conduct which is inherently wrong because the act is *intentionally* done or the omission is *intentionally* made with *knowledge of the probability of injury to the guest* and it eliminates from its scope conduct which is wrong solely because of the violation, intentional or otherwise, of some traffic regulation. Invoking certain terms frequently employed with respect to public offenses, it may be said that willful misconduct implies conduct which is malum in se because of such intent coupled with such knowledge, rather than conduct which is merely malum prohibitum.

There can be little doubt that the giving of the erroneous instructions was prejudicial. It may be conceded that the testimony set forth in the majority opinion was sufficient to warrant a finding of willful misconduct, but the evidence was highly conflicting in every portion thereof which had any tendency to show willful misconduct. The evidence offered by appellant showed, among other things, that prior to the accident she was driving on the right side of the road at the rate of 40 to 45 miles per hour; that she did not swerve the car from one side of the road to the other; that nothing was said by any one about her speed or manner of driving; that immediately before the accident some one in the back seat said something which she turned her head to hear; that an instant later she saw the pole looming in front of her, whereupon she pulled the wheel as hard as she could to the left to avoid it, but the car skidded and the right side thereof struck the pole. It is entirely probable that the jury based its finding of willful misconduct solely upon the testimony offered by respondents relating to speed, and under these circumstances it cannot be said that the giving of the erroneous instructions was not prejudicial. In Walker v. Bacon, supra, the cause was reversed because of the instructions, and in that case the instructions were far more favorable to the defendant than were the instructions in the present case.

The majority opinion holds that appellant may not complain of the error in these instructions because she did not present the point in the trial court and may not now change her theory of the case. A reading of the record shows that appellant frequently made her point in the trial court and argued her motion for nonsuit upon the theory that there was no evidence whatever of any willful misconduct. The argument on the motion is not set forth in full, but the record shows that, after appellant made her point, argument by counsel followed. I find no change in the record or on this appeal of appellant's theory of her case. Instructions 18 and 19, proposed by appellant and given by the trial court, were purely defensive instructions, and I cannot agree with the majority opinion that said instructions were substantially the same as the instructions given at the request of respondents. As above stated, the effect of the challenged instructions was to tell the jury that, if appellant voluntarily drove at a speed prohibited by law, it was not necessary to make any further showing of willful misconduct. In other words, a showing of negligence was thereby declared sufficient to impose liability. On the other hand, the jury was told in instruction 19 that neither negligence nor even gross negligence was sufficient. The portion of instruction 19 just mentioned was a correct statement of the law and was in direct conflict with the whole tenor of the several erroneous instructions. The remaining portions of instructions 18 and 19 were not as clear as they might have been, but said portions were negative in form, and told the jury in effect that willful misconduct could not exist without intent, purpose, and design. Appellant cannot well be criticized for her failure to propose an affirmative instruction containing an accurate definition of willful misconduct when the meaning of that term, as used in the Guest Statute, was in doubt until the subsequent determination thereof by the appellate courts. Under the circumstances it seems to me that the judgment should not be permitted to stand when it is entirely probable that it resulted from the erroneous instructions which, contrary to the intention of the Legislature, made negligence rather than willful misconduct the basis of recovery.

It is no answer, as stated in the majority opinion, to point to the instructions which told the jury that it was insufficient to show mere negligence or even gross negligence on the part of appellant, and that the verdict should be in appellant's favor unless it appeared that she was guilty of willful misconduct. These instructions, when considered with the other instructions given, simply made confusion worse confounded. The jury was not guided by any correct definition of willful misconduct, but, on the contrary, the jury was told in effect in several instructions that acts which in law constitute mere negligence were sufficient to show willful misconduct, and the jury was further specifically told that it was not necessary for respondents to "make any further showing of willful misconduct to be entitled to recover."

Certain authorities are cited in the majority opinion on the subject of change of theory on appeal. I do not believe that these authorities are in point. In each of the cases cited the theory repudiated by appellant on appeal was the theory adopted and acquiesced in by both parties in the trial court. In the present case appellant did not adopt or acquiesce in the theory of respondents in the trial court, but, on the contrary, appellant strenuously argued against respondents' theory throughout the trial. The mere fact that in the trial court appellant adopted a theory in line with the views expressed in the minority opinion in Walker v. Bacon, supra, which theory was more favorable to appellant than any theory which the rules laid down in the above-mentioned authorities would permit, should not be held to preclude appellant from adopting and urging the definition of willful misconduct which has since been settled by said authorities.

Section 4½ of article 6 of the Constitution is also cited in support of the conclusion reached in the majority opinion, but I do not believe that said section can properly be applied to a case where the evidence is highly conflicting, where the instructions are irreconcilable, and where it appears probable that the judgment resulted from the giving of the erroneous instructions. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Hesler v. California Hospital Company, 178 Cal. 764, 174 P. 654; White v. Davis, 103 Cal. App. 531, 284 P. 1086; Zolkoske v. United States Farm & Land Co., 72 Cal. App. 63, 236 P. 344; Galloway v. United Railroads, 69 Cal. App. 770, 232 P. 491; Alcamisi v. Market Street Railway Company, 67 Cal. App. 710, 228 P. 410.

In my opinion the judgment should be reversed.

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138 Cal.App. 576

PEOPLE v. CONLON.

Cr. 1789.

District Court of Appeal, First District, Division 2, California.

May 17, 1934.

1. Arson ⚿37(1).

In prosecution for arson based on attempted burning of residence belonging to defendant's sister, evidence *held* to support conviction.

2. Criminal law ⚿689.

Defendant's motion to reopen case after it had gone to jury is committed to discretion of trial court.

3. Criminal law ⚿689.

In prosecution for arson based on attempted burning of residence owned by defendant's sister, denying defendant's motion to reopen case after it had gone to jury, to permit introduction of testimony showing threats against life of defendant's sister by uncle of defendant, *held* not error, where testimony was inadmissible under any theory.

◆

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Frank Conlon was convicted of arson, and he appeals.

Judgment and order denying a new trial affirmed.

Leo A. Sullivan and A. K. Whitton, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

Defendant was convicted after trial by jury of the crime of arson. He appeals from the judgment and from the order denying a new trial. The appellant presents two points: That the evidence is insufficient, and that the trial court erred in denying his motion to reopen the case after it had gone to the jury.

[1] The evidence is all circumstantial. At about 3:38 a. m. of October 11, 1933, a blazing fire was discovered at the rear porch of the home of appellant's sister. The fire department was called, the fire was extinguished, and then gasoline was found to have been spread about the porch and yard. A gasoline can was found in the yard; it was identified as one made exclusively by a garage near the premises and used by that garage in the sale of gasoline, it having a specially prepared spout to enable the purchaser to pour the gasoline into a motor tank. An employee of the garage testified that shortly before the fire, near the hour of midnight, he had sold appellant a gallon of gasoline in a can identical to the one found on the premises. Appellant had no motor vehicle and hence denied the purchase of the gasoline. Evidence was given that prior to the burning the appellant had quarreled with his sister because she had received the premises through a gift

or devise from an aunt, and that he had threatened that she would not live to enjoy the home unless she settled with him. Evidence was also given that the appellant arrived at the emergency hospital less than an hour after the fire with a badly burned hand and that he informed the doctor in charge that he spilled gasoline on the hand while fixing his automobile. At this time he gave an assumed name. The conflict in the evidence lies in appellant's attempt to prove an alibi and in his feeble effort to explain the manner in which he incurred the injury to his hand. The flat denial by the appellant of his purchase of the gasoline in face of the positive testimony of the garage employee must have weakened his testimony in the eyes of the jury. But, disregarding all conflicts, the evidence of the circumstances are sufficient to sustain the verdict.

[2, 3] After the cause had been argued to the jury, the appellant moved to reopen in order to permit him to offer testimony of an aunt who was prepared to say that, some four years prior to the burning, an uncle of the appellant had made threats against the life of appellant's sister. Such testimony was not admissible under any theory. As the granting or denial of such a motion is a matter committed to the discretion of the trial court, the appellant has failed to show error.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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138 Cal.App. 495

WRIGHT v. SNYDER et al.

Civ. 1321.

District Court of Appeal, Fourth District, California.

May 10, 1934.

1. Appeal and error ⇨957(1).
Judgment ⇨139.

Whether default shall be set aside rests largely within discretion of trial court, whose order will be reversed only for abuse of discretion (Code Civ. Proc. § 473).

2. Appeal and error ⇨935(2).

On appeal from order setting aside a default, any conflict in evidence will be assumed to have been resolved in favor of appellee (Code Civ. Proc. § 473).

3. Judgment ⇨138(3).

Order setting aside default for failure to answer amended complaint served on defendant's attorney *held* not abuse of discretion, where defendant's address was incorrectly noted by his attorney, and, when address was obtained from other sources, attorney's letter was not called to defendant's attention, and delay did not prejudice any substantial right of plaintiff, though greater diligence might have been used by defendant (Code Civ. Proc. § 473).

◆

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by A. E. Wright against Peter Nicholas Snyder and others. From an order setting aside default against named defendant, plaintiff appeals.

Affirmed.

Brittan & Mack, of Bakersfield, for appellant.

Edward West, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

A complaint was filed in this action on May 19, 1933. A demurrer, filed on June 12, 1933, was sustained. On July 20, 1933, an amended complaint was filed, service on July 19 being admitted by Edward West as attorney for defendant Peter Nicholas Snyder. The action was later dismissed as to the other defendants. The default of the defendant Peter Nicholas Snyder was entered on September 30, 1933, and on October 6, 1933, he filed a notice of motion to set aside this default, based upon the provisions of section 473 of the Code of Civil Procedure. From the order granting this motion the plaintiff has appealed.

[1] It is well settled in this state that the setting aside of a default is a matter largely within the discretion of the trial court and that such an order will not be reversed unless it clearly appears that there has been an abuse of this discretion. In Nicoll v. Weldon, 130 Cal. 666, 63 P. 63, 64, the general rules are thus summarized: "The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any

prejudice thereby. This discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. Section 473, Code Civ. Proc., is a remedial provision, and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. Buell v. Emerich, 85 Cal. 116, 24 P. 644; Harbaugh v. Honey Lake, etc., Water Co., 109 Cal. 70, 41 P. 792; Melde v. Reynolds, 129 Cal. 308, 61 P. 932. It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but, if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court will impose as the condition of granting the motion."

It appears from the affidavits considered at the hearing that the respondent is a resident of the city of San Marino; that when the original complaint was served upon him he came to Bakersfield and employed Edward West to represent him in the matter; that by mistake this attorney took down his address as 903 Atlantic boulevard, Long Beach, when the address given him was 903 Atlantic boulevard, Los Angeles; that this attorney entered into a verbal agreement with the attorneys for the appellant that an answer need not be filed until the same was demanded; that on August 9, 1913, West mailed a letter to the respondent at 903 Atlantic boulevard, Long Beach, and the letter was returned unclaimed; that on August 19, 1933, being unable to learn the respondent's address, West mailed a letter to Williamson & Musick, attorneys at Los Angeles, who had been general attorneys for the respondent, but who had not been employed in this case; that in this letter he asked them to get in touch with the respondent and have him come to Bakersfield to assist in the drawing of an answer; that these Los Angeles attorneys wrote a letter to the respondent informing him that an amended complaint had been filed, that his Bakersfield counsel had arranged for all the time he needed in which to answer, and requesting him to go to Bakersfield at his first opportunity to confer with Mr. West concerning an answer to be filed. This letter was received at the respondent's office on August 21, but the respondent was absent from his office practically all of the time from then to September 30; that on Saturday, September 30, 1933, the respondent, for the first time, saw the letter written by the Los Angeles attorneys; that on that day he called Mr. West on the telephone and was informed by him that it would be all right if he saw his Los Angeles attorneys and prepared an answer on Monday morning and had the same in Mr. West's hands on Tuesday morning; and that on Monday morning the respondent was informed by the Los Angeles attorneys that a default had been entered on Saturday. It also appears that in the meantime the attorneys for the appellant, on September 8, 1933, had written to West as follows: "Will you please file your answer within the next ten days?" That on September 29, 1933, and before the entry of the default, one of these attorneys phoned to Mr. West and asked him if an answer had been filed or was in the process of preparation; that West informed him that he had written to Williamson & Musick and that they had not yet sent up any answer although he believed they were desirous of preparing one; that thereupon this attorney informed Mr. West that their client was demanding the entry of the default and that the same would be entered that day or the next "if said client insisted upon it"; and that the default was entered the next day.

[2, 3] Other facts appear which are even more favorable to the appellant than those recited above, but any conflicts must be taken to have been resolved against the appellant by the trial court. Assuming that some of the facts indicate a neglect which was not excusable and further assuming that the trial court could, under the evidence, have decided the motion the other way, we are of the opinion that it cannot be held that an abuse of discretion is so clearly shown as to require a reversal. It appears that the respondent at all times desired to file an answer, that he was arranging to do so the very day default was entered, and that he acted promptly when the matter was finally brought to his attention. While there are a number of things to indicate that more diligence could well have been used in bringing the matter to his attention, it is also true that the mistake in recording the address of the respondent and the necessity for trying to communicate with him through other parties contributed to the delay. It appears that some-

one in the respondent's office failed to bring to his attention the letter from the Los Angeles attorneys, which arrived during his absence, because of the statement contained therein to the effect that the respondent might have all the time he needed in which to answer the amended complaint. While this statement was a little too broad, it was in part justified by the verbal understanding between the attorneys. The written demand that an answer be filed made on September 8 was not very positive in its nature and the matter was allowed to rest for some three weeks thereafter, and the final telephone conversation on September 29, in itself, contained an element of uncertainty. There is no showing that the appellant has lost any substantial right and there is no claim of injury other than the inconvenience of having the default set aside. Under all of the circumstances, the matter was within the sound discretion of the trial court and an abuse of that discretion is not clearly shown.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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138 Cal.App. 573

FREESE v. UNION AUTOMOBILE INS. CO. et al.

Civ. 8240.

District Court of Appeal, Second District, Division 2, California.
May 16, 1934.

1. Trial 🔑**163.**

Motion for nonsuit, "for the reason the testimony is wholly insufficient in law to establish a cause of action," *held* insufficient as not stating precise grounds relied on.

2. Insurance 🔑**668(1).**

Oral testimony of automobile driver and another, judgment roll in personal injury suit against former, and copy of automobile insurance policy issued to latter, *held* to raise jury questions precluding nonsuit in action against insurer for amount of judgment against driver.

◆

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Andrei G. Freese against the Union Automobile Insurance Company and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Hiram T. Kellogg, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

DESMOND, Justice.

Appeal from a judgment of nonsuit. Plaintiff in a jury trial had obtained a judgment of approximately $4,000 against Raymond Leomazzi, driver of an automobile which collided with another in which plaintiff was riding. To recover the amount of this judgment she brought suit against Union Automobile Insurance Company and others, and after resting her case defendants' attorney moved for a nonsuit "for the reason the testimony is wholly insufficient in law to establish a cause of action."

[1] In Miller v. Luco, 80 Cal. 257, 22 P. 195, 196, the ground stated for a nonsuit was very similar, namely, "that the plaintiffs had failed to prove a sufficient case," and the court there said: "It is settled law in this state that a party moving for a nonsuit should state in his motion precisely the grounds on which he relied, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case." In 9 California Jurisprudence, at page 548, we find the following: "It is the settled law that a motion for nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made. * * * When specifying the grounds of the motion it is not sufficient to state generally that there is no evidence before the court justifying it in granting any relief to the plaintiff, or that plaintiff has failed to prove a sufficient case. The motion must show wherein the plaintiff failed to prove his case or why he is not entitled to recover."

[2] Passing this well-grounded objection to the granting of the nonsuit, we have examined the transcripts and considered the briefs before us. Under the familiar rules governing the consideration of motions for nonsuit (9 Cal. Jur. 551), we feel that the evidence submitted by plaintiff, in the form of oral testimony by Raymond and Donald Leomazzi, together with the judgment roll in the damage action and copy of the insurance policy which was issued to the latter covering the operation of the automobile involved in the

collision, raised certain questions that should have gone to the jury.

Judgment reversed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

* * *

138 Cal.App. 462

In re PRICE'S ESTATE.

PRICE v. BARSKI.

Civ. 9583.

District Court of Appeal, Second District, Division 2, California.

May 8, 1934.

Hearing Denied by Supreme Court July 5, 1934.

1. **Wills** 🔑**703.**

In petition by testatrix' aunt to determine interest under will devising all property to testatrix' husband with request that he provide home for such aunt for life, evidence tending to show an oral conveyance in trust for aunt founded on a contractual obligation *held* inadmissible (Probate Code, §§ 103–106).

2. **Wills** 🔑**675.**

Devise of all property to husband with request that he provide home for testatrix' aunt for life *held* not devise for support of aunt, but unqualified devise to husband.

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge.

Petition by Ella L. Barski to determine her interest in the estate of Mollie E. Price, deceased, which was contested by Marjorie Winnifred Price. From an adverse judgment, the contestant appeals.

Reversed.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for appellant.

Denis Evarts Bowman, of Los Angeles, for respondent.

CRAIG, Justice.

In a contest by the executrix of the estate of Thomas Price, deceased, to a petition to determine interest, judgment was rendered adversely to said contest and she appeals therefrom.

[1, 2] It appearing from the proceedings in probate that the testator's wife had left a will wherein she gave to him all her property, real and personal, "with the earnest request that he provide and maintain a home for my aunt (Ella L. Barski) (who has been so like a loving mother to me) during her lifetime;" that thereafter he had remarried, leaving a will wherein his second wife was named as executrix; that a final account and petition for distribution of his estate had been filed; and that Mrs. Barski thereafter filed a petition to determine interest therein. Upon a hearing oral evidence was admitted over objections of appellant's counsel for the purpose of showing "the circumstances surrounding" the request above mentioned, which evidence consisted of statements by the testatrix to the petitioner that the former had made a will providing for her in accordance with a previous promise in consideration of companionship and care shown her by Mrs. Barski, and was handing the same to her to keep. Findings of fact and a conclusion of law were made, reciting that the latter was a dependent of the testatrix and a natural object of her bounty; that "an obligation was present to decedent's mind when she made her will and was among the circumstances under which said will was made"; and that said decedent "by the terms of her will duly admitted to probate herein left all her estate to Thomas Price in trust to provide and maintain a home for Ella L. Barski during her lifetime."

Serious exception is taken to the ruling admitting evidence tending to show an agreement or obligation, citing Probate Code, §§ 103, 104, 105, and 106. While all of the courts seem to have agreed that each instrument must be read in the light of its own language and circumstances, none seems to have extended the rule of evidence allowing the introduction of oral testimony unless, as prescribed by said sections of the Code, the language be doubtful or ambiguous as to circumstances necessary to determine interest. It was early decided that if a mere desire be expressed, without a devise for a purpose, or if a bequest so depends upon the discretion of the general devise as to be incapable of execution without superseding that discretion, there can neither be a trust or charge. Lawrence v. Cooke, 104 N. Y. 632, 11 N. E. 144. A will giving an entire estate to the wife of a testator with "request that she, my said wife, shall assist any of my brothers or sisters if they should be in need," was held a gift to the wife of absolute title which did not create a directory trust. McDuffie v. Montgomery (C. C.) 128 F. 105, citing Warner v. Bates, 98 Mass. 274, and Mills v. Newberry, 112 Ill. 123, 1 N. E. 156, 54 Am. Rep. 213. In Holmes v. Dalley, 192 Mass. 451, 78 N. E. 513, it was held that the expression following a bequest that it was the wish and desire of the testator that the devisee appoint a share to his daughter and grandchildren was merely an expression of a hope and belief, and that it did not create a trust. In Hillsdale College v. Wood, 145 Mich. 257, 108 N. W. 675, a will giving all of the testator's property to his wife, providing that she should survive him, otherwise to certain legatees, with the request that she provide by will for said legatees should she predecease him, was said to have been insufficient to create a trust.

California authorities cited by the parties do not vary from the rule announced in the foregoing cases, though the language may differ. In one of those which we deem controlling, In re Estate of Hamilton, 181 Cal. 758, 186 P. 587, 590, precedents were reviewed and the court quoted with approval from In re Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071, as follows: "The question for determination is whether the devisee or legatee is the beneficiary, or merely a trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion;" and bequest to one with request "that it be used" for a designated purpose was held made not for personal benefit but "for the purpose therein specified." And in Re Lee's Estate, 104 Cal. App. 15, 284 P. 948, 949, it was observed that the words, "Instructions to Brothers & Sisters. Take care of Brother Will," were expressed not to the executor but to a beneficiary; and In re Estate of Browne, 175 Cal. 361, 165 P. 960, was quoted to the effect that "it is the settled law in California that precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed."

By evidence purporting to show circumstances to explain an asserted doubt or ambiguity, an attempt is made in the instant proceeding to establish aliunde a verbal conveyance in trust, founded upon a contractual obligation supported by a consideration. No authority sanctioning such procedure nor authorizing such a conclusion from the same or similar language is cited. By no application of established rules or construction can this will be stated to devise or bequeath an interest for a purpose, and hence to be subject to any condition, limitation or proviso.

Judgment reversed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

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138 Cal.App. 570

PHELPS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9548.

District Court of Appeal, Second District,
Division 2, California.
May 16, 1934.

Hearing Denied by Supreme Court July 12, 1934.

1. Mandamus 🔑172.

In mandamus proceeding to require court to take jurisdiction of cause of action without amendment thereto, court should not consider merits of request, if it appeared on face of pleading that court could not help petitioner.

2. Mandamus 🔑26.

Writ of mandamus cannot be used to correct errors either in trial of law or fact.

3. Mandamus 🔑39.

Mandamus would not lie where it affirmatively appeared by petition that it sought correction of alleged error of law in court's ruling on a demurrer.

Petition by Laura B. Phelps against Superior Court in and for the County of Los Angeles and others, for writ of mandate.

Writ dismissed.

William A. Monten and Jenny H. Monten, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred Cross, Paul Otto, and Cosgrove & O'Neil, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

Petitioner brought an action in Superior Court setting up six alleged causes of action.

to which the defendant interposed demurrers to all but the first two. The court sustained the demurrer as to each cause as against which it was directed, and gave ten days to amend. Petitioner asks us to command Superior Court by mandamus to proceed to take jurisdiction of the sixth cause of action without amendment thereto.

Petitioner is the widow of a decedent whose will is in process of probate and is a beneficiary under such will, defendant being the executor of the will. The first two alleged causes of action as to which there is as yet no pleading sound in damages personal to petitioner, while the sixth alleged cause of action asks a complete accounting in the interest of the estate of the executor's stewardship, alleging extrinsic fraud on the part of the executor and the discovery of such fraud too late to appeal from an order settling an account current.

[1] Respondents submit a demurrer to the petition for mandamus; and whether there is, strictly speaking, a demurrer to a petition for the issuance of such a writ, it is obvious that we should not be justified in considering the merits of petitioner's request if it appears upon the face of the pleadings that we are in no position to help her. We think we can afford petitioner no relief for the following reasons:

[2, 3] The writ of mandamus cannot be used to correct errors either in the trial of law or fact, and it affirmatively appears by the petition herein that it seeks the correction of an alleged error of law in the court's ruling on a demurrer.

The demurrer was upon several grounds, and the court, after exhaustive argument by counsel, made a general order sustaining it. The court did not decline jurisdiction of the demurrer, but specifically took jurisdiction and ruled. It is true the court gave a written opinion as to its reasons for the rulings, in which it made comment on but one of the asserted causes for demurrer to the sixth cause of action. As to the other causes, no one but the court knows whether it considered them at all, or if it did consider them, how it viewed them. The one reason given for sustaining the demurrer to the sixth cause of action was that the pending probate proceedings exclusively embraced the subject of accounting in the estate, including an equitable inquiry into settled accounts based upon extrinsic fraud, after the time for appeal from the order of settlement had expired.

If it were here conceded that only the jurisdiction to maintain such an equitable action was before the trial court on demurrer, we would very seriously consider whether mandamus would be the proper method of testing the ruling. But it is apparent that no such situation exists.

The writ is dismissed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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138 Cal.App. 593

PEOPLE v. SANCHEZ.

Cr. 96.

District Court of Appeal, Fourth District, California.

May 21, 1934.

Rehearing Denied June 4, 1934.

Homicide ⟹248.

Evidence *held* to support conviction for murder as against defense of accidental shooting.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Jose Sanchez was convicted of murder, and he appeals.

Affirmed.

M. O. Spicer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of murder, it being alleged that he shot and killed one Leon Eckles at El Toro, in Orange county, on July 21, 1917. A jury found him guilty of murder in the first degree, recommending life imprisonment. This appeal is taken from the judgment and from an order denying a motion for a new trial. The main and practically the only point presented is that the evidence is not sufficient to sustain the judgment. The only arguments made are that most of the witnesses were unable to identify the appellant and that the statement made by him at the time of his arrest does not show that he was guilty of murder.

It appears from the evidence that on the evening of July 21, 1917, a dance was being held at El Toro which was largely attended by Mexican families. During the course of the evening a number of American young men, who had been attending a beer party nearby, came to this dance and some of them took part in the dancing. Something seems to have occurred as a result of which all of the men present went outside of the hall and a rather general fist fight followed. A shot was fired which killed Eckles and immediately thereafter a man ran away into the darkness. Practically all of the men present, Mexicans as well as Americans, started in pursuit of the fleeing person, but stopped when some one called out that he was armed and might shoot some one else.

When the appellant was taken into custody, more than sixteen years later, he denied that his name was Jose Sanchez, and denied that a picture which the officers had was a picture of himself. He later admitted his identity and that this was his picture. In a statement made to the officers he admitted that he had shot the man at El Toro but said that some one hit him on the arm and his gun went off. He further stated that he pulled the gun out of his pocket to throw it away; that another fellow pushed him and the gun went off; that he did not intend to kill any one; that it was an accident; that he did not know what happened or just how it happened; that he was scared and ran away; that he stayed that night at Santa Ana and went the next day to Los Angeles; that soon thereafter he went to Arizona, where he worked for about five years under an assumed name; that he came back to Los Angeles about 1921 and worked there for about ten years; and that since 1917 he had gone under the assumed name, except on one or two occasions. On the witness stand the appellant testified that he had the gun in his pocket when he went to the dance that night; that a friend of his had given it to him the night before in the hope that he might be able to sell it; that he made no effort to sell it that night; that he did not know whether or not it was loaded; that he was the last man to leave the dance hall; that as he went out the door some one struck him and he remained unconscious for three or four minutes; that when he came to he saw the groups fighting and that they were beating up one boy; that he took out the gun and pointed it upwards and fired a shot "to see if they would leave us alone and not continue beating us up"; that he did not point the gun at any one; that while still pointing the gun upwards some one pushed him and caused his arm to move and the pistol went off again; that he ran away because he became frightened when he saw every one else running; and that he did not know that any one had been shot until five years later when he returned to California.

The appellant's testimony was contradicted by that of a number of witnesses who testified that no one was within eight or ten feet of the man who fired the shot, that no one jostled him or pushed his arm; that the deceased was not fighting with any one at the time and was on the outer edge of the crowd; that the man who fired the shot worked his way around on the outside and back of the deceased; that no one else in the crowd had a gun; and that the man with the gun fired a shot or two into the air and then pointed the gun at the deceased and, after hesitating, pulled the trigger. While most of the witnesses were at the time of the trial unable to identify the appellant, one of the eyewitnesses testified that during the course of the fight he saw the appellant with a gun in his hand and heard him say, "If anybody wanted any trouble to come to him"; that he told the appellant to put the gun away; that the appellant said "No" and started into the crowd with the gun in his hand; that shortly thereafter he heard three shots fired; and that immediately thereafter he saw the appellant running away with the crowd after him.

It appears almost without conflict that the appellant fired the shot which killed the deceased. The defense that the shot was accidental was thoroughly discredited. Without further comment it may be said that the evidence is entirely sufficient to support the verdict.

As a second point, the appellant asserts in his brief that his trial was without due process of law. Neither argument nor authority is presented and we are not informed in what respect it is claimed such a situation exists. The only reference in the brief is to certain pages of the transcript on which appear affidavits which were presented on motion for a new trial. We are unable to discover from the transcript any failure to accord the appellant a trial with due process of law and the record fails to disclose any reversible error in connection with the order denying a new trial.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

138 Cal.App. 582

JONES et al. v. BLANCHARD et al.

Civ. 7866.

District Court of Appeal, Second District, Division 1, California.

May 18, 1934.

Appeal and error ⚿1010(1).

Trial court's findings based on substantial evidence cannot be disturbed on appeal.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by W. D. Jones and wife against W. L. Blanchard and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Carter & Webster and Wilton W. Webster, all of Pasadena, for appellants.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent Fidelity & Deposit Co. of Maryland.

Tanner, Odell & Taft, of Los Angeles, for respondent W. L. Blanchard.

HOUSER, Justice.

From the record herein it appears that one Straight and his minor son sold to the plaintiffs a certain promissory note, secured by mortgage. At no time preceding the date of said sale were the plaintiffs acquainted with the fact that a minor was a part owner of said note and mortgage. In the course of effecting an assumed transfer of the mortgage Straight and his minor son indorsed, each with his own signature, the promissory note which was the basis of the mortgage, and at the same time made an assignment of said promissory note and mortgage to plaintiffs. It is conceded that in making such assignment, in order that it might be recorded by the county recorder, it became necessary that Straight and his minor son each acknowledge his signature to such assignment before a notary public, or other public officer authorized by law to take such acknowledgment. It appears that defendant Blanchard was a notary public, before whom Straight and his minor son appeared, and thereupon each of them duly acknowledged the execution by him of the assignment to plaintiffs of said promissory note and mortgage. Approximately one and one-half years thereafter, Straight died; whereupon his said minor son disaffirmed and repudiated his act in the matter of the execution of said assignment. An action was then brought by the plaintiffs against defendant Blanchard and his bondsman, Fidelity & Deposit Company of Maryland, a corporation, for damages alleged to have ensued to the plaintiffs by reason of the fact that defendant Blanchard had violated his duty in taking the said acknowledgment of the said minor. From the resulting judgment in favor of the defendants, the plaintiffs have appealed to this court.

On the part of the appellants, no claim is made that, in taking the acknowledgment of the minor, defendant Blanchard breached any of the express provisions of any statute by which his official duty in the premises was either defined or ascertainable. However, as a basis for the action, the plaintiffs contended, and here assert, that the damages which they allege were suffered by them were caused solely by reason of the negligence of defendant Blanchard in the premises.

On the part of the respondents, in effect, it is contended that, in the absence of any violation by defendant Blanchard of any statutory duty as a notary public, no cause of action ensued in favor of the plaintiffs by reason of the failure of defendant Blanchard either to ascertain that the son of Straight was a minor; or, having ascertained such fact, either to certify thereto, or to refuse to take the acknowledgment. However, it becomes unnecessary to determine that particular question.

On the trial of the action, with reference to the issue of negligence of defendant Blanchard, the court made the following finding of fact: "That defendant W. L. Blanchard was not negligent in taking said acknowledgment of said Francis Willard Straight, or in failing to discover that said Francis Willard Straight was a minor, or in failing to refuse to take said acknowledgment on account of the minority of said Francis Willard Straight."

In that connection, an examination of the record herein reveals the fact that substantial evidence was introduced on the trial of the action upon which such finding of the trial court properly may be based; and the rule is well established that in such circumstances this court is without authority to disturb a finding made by the trial court.

Although several other questions of law are presented herein for decision by this court, including that hereinbefore suggested, to wit, of whether in any event a cause of action might be predicated upon the alleged negligent act of defendant Blanchard in the premises, in the face of that which would seem to be the legally established condition "that defendant W. L. Blanchard was not negligent in taking said acknowledgment," it becomes unnecessary to decide whether, in connection with the performance of his duties, a negligent act by a notary public, not in violation of his statutory duties, but which was incidental thereto and which negligent act resulted in damage to some person, is actionable by the latter; or to decide either or any of the other questions to which the respective parties herein have directed the attention of this court. It is manifest that, if no cause of action existed against defendant Blanchard by reason of any asserted failure on his part to perform his duty in accordance with the provisions of the statutes governing the situation, and if, as found by the trial court, he was guilty of no negligence in the premises, the inevitable result of the appeal from the judgment must be an affirmance thereof.

It is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

CITY OF LOS ANGELES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 9623.

District Court of Appeal, Second District, Division 2, California.

May 15, 1934.

Hearing Granted by Supreme Court July 12, 1934.

1. Statutes 🔑194.

Where enumeration of several classes of persons or things is immediately followed by clause including "other" persons or things, word "other" is, unless contrary intention is shown by other parts of law, read as "others of like nature."

[Ed. Note.—For other definitions of "Other," see Words & Phrases.]

2. Eminent domain 🔑149.

Statute providing that when property sought to be condemned is incumbered and indebtedness secured thereby is not due at time of entry of judgment, amount of indebtedness may be deducted from judgment, *held* not to require lien of improvements assessment attaching to property condemned after interlocutory decree to be paid by condemnor and deducted from amount of award (Code Civ. Proc. § 1248, subd. 8).

Application for writ of mandate by the City of Los Angeles, prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles, to compel such court to enter final judgment in a condemnation proceeding.

Writ discharged.

Ray L. Chesebro, F. Von Schrader, and Walter L. Bruington, all of Los Angeles, for petitioner.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, Justice.

The city of Los Angeles filed its complaint in condemnation March 16, 1926. Subsequent proceedings resulted in the court filing its decision on March 20, 1928, in which it determined the value of the parcel involved herein and belonging to one Frances A. Wright. Thereafter the interlocutory decree fixed said value as $18,153. Assessments for certain street improvements not arising from such condemnation became liens on said parcel on the 8th day of March, 1928. It is conceded that they were not liens at the date of the filing of the referees' report in the condemnation proceedings or of the exceptions thereto; they were not due at the time of the entry of judgment, nor was any provision made for their payment in the interlocutory judgment. After such judgment was signed and filed the city paid the street improvement bonds which were then liens upon the parcel but not yet due.

The sole question presented is as to the right of the city to take up and remove the liens of the street bonds and to deduct from the award the amount necessarily expended in paying such bonds. This question is directly presented by reason of said Frances A. Wright having declined to execute a full satisfaction of the judgment upon payment of the difference between the award in her favor and the balance remaining after the deduction of the amounts thus paid by appellant, and appellant having moved for entry of a final judgment upon payment into court of the award less said deduction, which motion was denied. This petition is for a writ of mandate directing that respondent court enter final judgment.

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*For subsequent opinion see 39 P.2d 401.

[1, 2] We find no authority to support the city's position, unless it be subdivision 8 of section 1248, Code of Civil Procedure. It reads as follows: "When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid." It seems clear that the rule ejusdem generis, elementary in statutory construction, applies here. That familiar canon is well stated in Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868, 869, as follows: "It is the rule of construction that, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 Cyc. 1119; 25 R. C. L. 996, 997; 2 Lewis' Sutherland, Stat. Constr. 803, 804." Where an enumeration of several classes of persons or things is immediately followed by a clause including "other" persons or things, the word "other" is, unless the intent of the Legislature is shown by other parts of the law to be otherwise, read as "others of like nature." 23 Cal. Jur. § 130; 25 R. C. L. § 240.

But it is argued that Marin, etc., Water District v. North Coast Water Company, 40 Cal. App. 260, 180 P. 620, has construed this particular subdivision of section 1248, Code of Civil Procedure, and conclusively determined the question here presented. What is there said on the point which we are now considering was not necessary to the decision of that case. The question there to be determined was whether or not, when the condemnor had paid a lien similar to the one here involved, it could recover the amount of the payment from the person whose land had been condemned. Clearly, any statement to the effect that the provisions of subdivision 8 of section 1248 give to the party taking property by eminent domain the right to retain from the sum of money to be paid for such property the amount necessary to discharge "any lien" existing thereon was obiter dictum. Such pronouncement leaves the wording of the section exactly as it was and gives us no substantial aid. We have neither been furnished with nor have we found any case not distinguishable in principle from the instant one, where the rule ejusdem generis has not been applied.

In view of this construction of the Code section involved, other points argued in the briefs need not be commented on here. We conclude that the lien of the assessments attaching to the property condemned after the entering of the interlocutory decree is not embraced within the class of lien which the condemnor may pay and deduct from the amount of the award.

The writ is discharged.

We concur: STEPHENS, P. J.; DESMOND, J.

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138 Cal.App. 578

HENAS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9365.

District Court of Appeal, First District,
Division 1, California.
May 18, 1934.

1. Master and servant 🔑417(7).
Industrial Accident Commission is sole judge of credibility of witness.

2. Master and servant 🔑405(4).
Evidence sustained finding of Industrial Accident Commission that hernia sustained by employee was not caused by injury arising out of his employment for creamery company.

◆

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Arthur Henas, employee, for injuries, opposed by the Dariglen Creameries, Limited, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurance carrier. To review an order of the Industrial Accident Commission of the State of California denying an award, the employee brings certiorari.

Affirmed.

Raymond Salisbury, of Oakland, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

KNIGHT, Justice.

The respondent commission denied petitioner's application for compensation upon the ground that the evidence before it failed to establish that the hernia for which he sought to be compensated was caused or exacerbated by an injury arising out of his employment; and subsequently petitioner's application for rehearing was denied. In the present proceeding instituted by petitioner to have the action of said commission annulled, he concedes that the single point urged by him involves only a question of fact; and after having examined the record we are convinced that the state of the evidence is such as to preclude any court interference with the commission's finding on the determinative issue.

At the time petitioner claims to have sustained the hernia he was in the employ of Dariglen Creameries, Limited, of Oakland, for whom he had been working for about two and a half years; and in his application for compensation he alleged that the injury occurred on May 5, 1933. On May 19th he was examined by Dr. Swarts for the insurance carrier, and on the same day his application for compensation was filed with the commission and heard by the referee; and it was upon his testimony given before the referee and his statements made to Dr. Swarts relating to the circumstances under which he believed he received the injury that the commission's adverse finding was based. In this regard petitioner stated that on the morning of May 5, 1933, he helped another company employee named Cheyney load an ice cream refrigerator weighing about 1,500 pounds on an automobile truck and deliver the same at the store of a customer. But he frankly admitted before the referee and to Dr. Swarts that neither while performing this work nor at any time thereafter that day or night or the next morning did he feel the slightest pain or any symptom whatever of sickness or of anything being wrong with his condition. And in so admitting he went on to say that after performing said work he went home at noon and ate his lunch as usual, after which he returned to the company's plant and put in the afternoon overhauling and repairing the company's trucks; that at the end of the day's work he went home, ate his dinner, retired at the usual time, and the next morning went to work at the customary hour, feeling all right and noticing no ill effects whatever, or anything peculiar about his condition. Between 9:30 and 10 o'clock that morning, however, so he stated, while standing at a work bench cleaning spark plugs with a wire brush, which required no exertion or strain, he felt for the first time a burning sensation in his right groin; that it continued for about an hour and then permanently disappeared; that about two days later, while undressing to go to bed, he noticed for the first time a swelling in his right groin, which he treated with some liniment; and about a week later he consulted a doctor who informed him of the existence of the hernia; but that at no time did he ever feel sick or nauseated, or suffer any pain in any region of his body. In reply to a direct question by the referee as to why he believed he was injured on May 5th, at the time of loading or unloading the truck, he replied: "Well, it is most likely, when you lift anything up that is heavy * * * [and] you go to the doctor and he says you have a hernia, * * * you go back and figure 'Well, that's what caused it.'" Such being the state of the evidence when the matter was submitted to the commission for decision, it is apparent that there is no legal ground upon which it may be held that the referee's finding, which was adopted by the commission, lacks evidentiary support.

[1, 2] Afterwards, in his petition for rehearing, petitioner materially changed his story. He there stated: "That at the time of his examination before the commission he did not remember clearly about the time he was injured but after thinking the matter over and not having been examined at any time before, felt upset and nervous. And now recollects having felt something happen at the time. And asking the engineer who was working with him at the time if he remembered it. He stated that at the time he had said to the engineer that it felt as if something had ripped inside. And that the accident did not show up that it really was an injury until later. And that there is no doubt that it happened at that time and was caused by lifting. * * *" Upon the denial of the rehearing petitioner filed an application pursuant to section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850) to reopen the case for the purpose of submitting additional evidence consisting of the report of the doctors who afterwards operated on petitioner, and the affidavit of Cheyney, the employee with whom petitioner worked in moving the refrigerator. In the doctor's report they stated among other things that they "found the hernial mass lodged in the inguinal canal just above the external ring and was not adherent to the inguinal canal as it would have been in a case of long standing"; furthermore, that "the peritoneal sac was very thin, which also confirms our di-

agnosis of recent inguinal hernia." And in Cheyney's affidavit he stated that "while lifting same [refrigerator] into the truck the said Arthur Henas complained about something tearing and a burning sensation in the lower part of his body on the right side. This happened on the uplift of said frigidaire from the sidewalk to the truck; also complained soon after that he felt sick to his stomach." It will be seen, however, that the revised statement of facts set forth in petitioner's application for rehearing would give rise only to the question of the credibility of the witness, of which the commission is sole judge; and that the additional evidence sought to be introduced on a reopening of the case, if received, could do no more than create a conflict on the issue as to the origin of the hernia; and since by the denial of the latter petition the commission in effect held that even though said new evidence were received, it would adhere to its original conclusion, it is still beyond the power of the court, by reason of such conflict, to interfere.

The decision of the commission is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

* * *

1 Cal.App.(2d) (Supp.) 768

PEOPLE v. ARTHUR et al.

Cr. A 1046.

Appellate Department, Superior Court, Los Angeles County, California.

May 11, 1934.

1. Druggists 🔑3.

Word "proprietor," within section of Pharmacy Act prohibiting "proprietor" from permitting sale of drugs in his store except by registered pharmacist or assistant pharmacist, does not include a manager (St. 1933, p. 2199, § 13).

[Ed. Note.—For other definitions of "Proprietor," see Words & Phrases.]

2. Indictment and Information 🔑59.

Mere statement in complaints that facts alleged constituted violation of specified section of Pharmacy Act *held* not to limit appellate court to such section, nor to prevent court from upholding complaints under other provisions of the act making acts charged a misdemeanor (St. 1933, pp. 2198, 2199, §§ 12, 13).

3. Druggists 🔑3.

Under section of Pharmacy Act prohibiting any person from permitting sale of drugs in "his" or "her" store or pharmacy except by registered pharmacist or assistant pharmacist, statutory prohibition applies to any store or pharmacy over which person charged has such control and authority as to enable him or her to prevent violations of the statute therein by others (St. 1933, p. 2198, § 12).

[Ed. Note.—For other definitions of "Her" and "His," see Words & Phrases.]

4. Statutes 🔑206.

Effect should be given to every part of statute if possible.

5. Druggists 🔑12.

Counts charging defendant, as "manager" of store, with permitting sale of drugs by other than registered pharmacist or assistant pharmacist, *held* sufficient under section prohibiting any person from permitting sale of drugs in "his" or "her" store by other than registered pharmacist or assistant pharmacist (St. 1933, p. 2198, § 12).

Allegations of complaint were sufficient to bring defendant within provisions of St. 1933, p. 2198, § 12; the words "his" and "her," as used in section 12, refer to control and authority, not ownership; and "manager" means managing agent, and a "managing agent" is one who has general discretionary powers of direction and control, that is, one who may direct, control, conduct, or carry on his employer's business or any part or branch thereof.

[Ed. Note.—For other definitions of "Manager" and "Managing Agent," see Words & Phrases.]

6. Druggists 🔑3.

In prosecution under State Pharmacy Act, peroxide of hydrogen *held* "drug" or "medicine" within meaning of act (St. 1933, pp. 2193, 2198, 2199, §§ 1, 12, 13).

[Ed. Note.—For other definitions of "Drug" and "Medicine," see Words & Phrases.]

7. Criminal law 🔑304(3).

Court may take judicial notice of character and common uses of peroxide of hydrogen.

8. Druggists 🔑3.

Word "medicine," as used in Pharmacy Act, *held* not limited to substances generally and popularly known as such to exclusion of those so regarded only by medical profession (St. 1933, pp. 2193, 2198, 2199, §§ 1, 12, 13).

9. Statutes 🔑195.

Exception of particular thing from general prohibition of statute strongly implies that, but for such exception, the thing excepted would have been within purview of general prohibition.

10. Criminal law 🔑1141(2).

Burden is on appellant to show error.

11. Criminal law 🔑1144(12, 13).

Where statement on appeal showed trial stipulation that evidence on both sides and court's rulings should be deemed same as in another case described only by name, and evidence and rulings were not shown, appellate court must presume that rulings were correct and evidence sufficient to support conviction.

◆

Appeal from Municipal Court of City of Los Angeles, Los Angeles County; Thomas L. Ambrose, Judge.

H. C. Arthur was convicted on three counts of a complaint charging violations of the State Pharmacy Act (St. 1905, p. 535, as amended), and he appeals.

Affirmed.

Raymond F. Body, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and John L. Bland, Deputy City Atty., both of Los Angeles, for the People.

SHAW, Presiding Judge.

This prosecution was brought under the State Pharmacy Act (Stats. 1905, p. 535; sections 1, 12, 13, and 17, as amended by Stats. 1933, p. 2192; section 16, as amended by Stats. 1929, p. 239). The complaint contains three counts, on each of which defendant was convicted, and he appeals. Count 1 charges that the defendant "did wilfully and unlawfully permit the sale of drugs and medicines, to-wit: peroxide of hydrogen, by Miss D. G. Goodwin, who was not then and there a registered pharmacist or assistant registered pharmacist, at a store or shop of which said defendant was the manager, located at 6608 Hollywood Boulevard, Los Angeles," and states that the acts charged are in violation of section 13 of the act. The other counts are in the same language except as to the salesman's name and the article sold. Section 13 contains the following provision on this subject: "Any proprietor, who shall by himself, or any other person, permit the compounding of prescriptions, or the vending of drugs, medicines or poisons, in his or her store, or place of business, except by a registered pharmacist, or registered assistant pharmacist, * * * shall be guilty of a misdemeanor."

[1, 2] The word "proprietor" does not appear in any of these counts, and it is urged that its omission makes them bad for the reason that the offense defined in section 13 can be committed only by a proprietor and that a manager is not a proprietor. If section 13 only were to be considered, this argument might have some force (except for the possible application of section 31 of the Penal Code to the case, which we do not now consider), for section 13 is limited to proprietors, and a manager cannot be classed as a proprietor. But a mere statement in the complaints that the facts alleged constitute a violation of section 13 does not limit us to that section, nor prevent us from upholding them under any other provisions of law which may make the acts charged a misdemeanor. In re Culver, 187 Cal. 437, 440, 202 P. 661; In Matter of Rogers, 160 Cal. 764, 118 P. 242; In re Murphy, 190 Cal. 286, 291, 212 P. 30; Homan v. Board of Dental Examiners, 202 Cal. 593, 597, 262 P. 324.

[3-5] In section 12 of the act we find this provision, which is clearly applicable to the case in hand: "Any person who shall permit the compounding of prescriptions of medical practitioners, or the selling of drugs and medicines in his or her store or pharmacy, except by a registered pharmacist, or registered assistant pharmacist, unless the same is expressly permitted by law, * * * shall be deemed guilty of a misdemeanor." This provision is not limited to proprietors. Instead, it uses the words "his or her store or pharmacy" to indicate the relation of the offender to the place of sale. The word "his," or its feminine, "her," does not necessarily denote ownership. It may signify simple possession, or even some other relation not that of an owner. Webster's Dictionary; Rugg v. Hoover, 28 Minn. 404, 10 N. W. 473; Jones v. State, 55 Ark. 186, 17 S. W. 719; and Commonwealth v. Hadley, 11 Metc. (Mass.) 66, 72. In the case last cited it was held that an employee or agent could be held guilty under a statute forbidding any one to sell spirituous liquor "to be used in or about his house or other buildings." The court there said: "The language of the statute is to be so construed, when it reasonably can be, as to promote, rather than defeat the obvious purposes of the legislature." We think this rule is applicable here. The purpose of the pharma-

cy act is to prevent the sale of drugs and medicines by any person not a registered pharmacist or assistant pharmacist, and to carry out this purpose a penalty is imposed both on the unregistered person who sells and on the person in authority who permits him to do so. To limit the latter provision to proprietors only would tend to defeat this purpose, for many stores are owned by corporations which are not subject to the imprisonment provided as part of the penalty; and any proprietor residing out of the state, whether individual or corporate, would be entirely beyond the reach of the statute. We avoid this result by giving to the words "his or her store or pharmacy," in section 12, a meaning signifying any store or pharmacy over which the person charged has such control and authority as to enable him or her to prevent violations of the statute therein by other persons. This is in accordance with the canon of statutory construction that effect should be given to every part of a statute, if possible, for if this provision of section 12 is limited to proprietors, it prohibits nothing not also banned by section 13.

Each of these complaints charges that the defendant was the manager of the store where the illegal sale occurred. This is sufficient to bring the defendant within the provisions of section 12. The Supreme Court has held "that 'manager' means managing agent and can mean nothing else." Pacific Coast Railway Co. v. Superior Court, 79 Cal. 103, 105, 21 P. 609. "A managing agent or a managing representative is one who has general discretionary powers of direction and control—one who may direct, control, conduct or carry on his employer's business or any part or branch thereof." Gordon v. Industrial Accident Commission, 199 Cal. 420, 427, 249 P. 849, 58 A. L. R. 1374. See, also, Messner v. Board of Dental Examiners, 87 Cal. App. 199, 204, 262 P. 58, and Bley v. Board of Dental Examiners, 87 Cal. App. 193, 196, 261 P. 1036, where a similar meaning is ascribed to the word "manager."

[6-9] Appellant argues that count 1 of the complaint is insufficient for the further reason that peroxide of hydrogen is not a drug or medicine within the meaning of the pharmacy act. We have just reviewed the meaning of those words as used in the act, in People v. Garcia, 32 P.(2d) 445. We are satisfied that they are broad enough to include peroxide of hydrogen. It is a well-known chemical substance, listed in the United States Pharmacopeia and described in all encyclopedias. It is used for bleaching purposes and also as an external antiseptic, but is not often taken internally. Its character and common uses are well within the scope of judicial notice. People v. Garcia, supra. In State v. Hanchette, 88 Kan. 864, 129 P. 1184, it was held that peroxide of hydrogen is not a medicine and hence its sale by unregistered persons was not prohibited by the Kansas Pharmacy Act. We are not disposed to follow this case in its apparent holding that the word "medicine," as used in the Pharmacy Act, is limited to substances which are generally and popularly known as such, to the exclusion of those so regarded only by the medical profession. This is altogether too narrow a meaning for the word. There may be some difficulty in applying the pharmacy act to substances which have both a medical and a nonmedical use, but in the case of peroxide of hydrogen we are aided by the provisions of section 16 of the act. This section provides by way of exception to the general provisions of the act that permits may be issued for the sale by unregistered persons in the rural districts of "simple household remedies and drugs," among which is listed peroxide of hydrogen. Such an exception gives rise to a strong implication that what is excepted would have been within the purview if it had not been excepted. San Francisco v. Pac. Tel. & Tel. Co., 166 Cal. 244, 251, 135 P. 971; Tognazzini v. Jordan, 165 Cal. 19, 23, 130 P. 879, Ann. Cas. 1914C, 655.

[10, 11] Complaint is made of rulings excluding evidence, but we have no record on which we can review them, nor can we consider the sufficiency of the evidence. The statement on appeal shows merely that at the trial it was stipulated that the evidence to be introduced by both sides and the rulings of the court should be deemed identical, "except for the difference in the items of alleged drugs which constitute the exhibits introduced by the People," with those in another case which was described only by the defendant's name. No evidence or rulings are set forth in the statement, even as to the subject-matter of the exception quoted, and we have no means of determining what they were. The burden is on an appellant to show error. This he has not done by such a record, and we must presume that the rulings were correct and the evidence sufficient in all respects.

The judgment and order appealed from are affirmed.

BISHOP and FOX, JJ., concur.

POSTAL TELEGRAPH CABLE CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. *

S. F. 15025.

Supreme Court of California.
May 17, 1934.

Rehearing Granted June 15, 1934.

1. Master and servant ⚿375(2).
Messenger boy, required to report to telegraph company for work daily with his motorcycle, for storage of which company afforded no facilities, *held* entitled to compensation for injuries received while driving machine to work.

2. Master and servant ⚿375(1).
Risk of method of transportation employee is compelled to use results from employment, so as to entitle him to compensation for injuries received while making use thereof, whether vehicle is owned or operated by employer, employee, or third party.

3. Master and servant ⚿385(17).
Cost of maintaining telegraph messenger boy's motorcycle *held* not deductible from his gross weekly earnings as special expenses paid by employer in computing compensation for injuries sustained by him (St. 1929, p. 553, § 12(b); St. 1917, p. 877, § 69(a).

In Bank.

Proceeding for compensation under the Workmen's Compensation Act by Charles Rudy Mahret, employee, opposed by the Postal Telegraph Cable Company, employer. To review an award of compensation by the Industrial Accident Commission, the employer brings certiorari.

Award affirmed.

Smith, Southwell & Smith, R. P. Wisecarver, and Sanborn H. Smith, all of San Francisco, for petitioner.

Pillsbury, Madison & Sutro, of San Francisco, and Francis R. Stark and R. H. Overbaugh, both of New York City, amici curiæ for Western Union Telegraph Co.

Arthur I. Townsend and Everett A. Corten, both of San Francisco (George Olshausen, of San Francisco, of counsel), for respondents.

PER CURIAM.

This is a petition by an employer to review an award of the Industrial Accident Commission. Charles Mahret, the injured employee, was hired as a messenger boy, to deliver telegrams for the Postal Telegraph Cable Company at its branch office at Pine street and Van Ness avenue in San Francisco. He used a motorcycle, which he owned and maintained himself. On the morning of the accident, he was driving to work in the machine, and was struck by a street car, sustaining injuries. The commission found that the accident occurred in the course of, and arose out of, the employment, and gave its award of compensation, based upon weekly earnings of $30.

[1] Petitioner attacks the award chiefly on the ground that the case is governed by the "coming and going rule," that is, that injuries sustained by an employee on his way to work, or returning from work, are not compensable. Recognizing that this rule is subject to exceptions, as where the employee is compelled to use a particular method of transportation as incident to his employment, petitioner contends that no such exception is established here. It is said that the company pays a fixed rate per message for delivery thereof, and employs foot, bicycle, and motorcycle messengers, and that it is optional with the employee whether he delivers a message on foot or uses the mechanical methods of transportation.

The record does not support this position. The testimony clearly shows that the company hires all three classes of messengers, but that, after being hired, a messenger is placed in one of the classes, and is assigned to an office where his services can be effectively used. Messengers without machines are placed in offices in the business district; motorcycle messengers are assigned to the more outlying districts. Thereafter, in the absence of some emergency, the messenger must appear equipped to do the work in the place to which he is assigned. Mahret was hired as a motorcycle messenger, and was required to report for work each day with his machine.

This fact alone would not, of course, take the case out of the "coming and going rule." But the record also establishes without conflict the fact that no facilities for storage of the machine were afforded by the company, so that Mahret was forced to make his own arrangements for garage and maintenance. The case, then, is one where the nature of the employee's work compels him to drive to and from work with the machine, unless he pushes it before him. Are injuries received during such driving compensable? We think

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 57 P.2d 441.

that they are. The risks to which the employee is subject are a result of the employment, and the situation is essentially the same as where the employer furnishes transportation and compels the employee to make use of it. It is, of course, well settled that in the latter case, that is, where the employer furnishes and controls the transportation, the injuries received are compensable. Rader v. Keeler, 129 Cal. App. 114, 18 P.(2d) 360; Trussless Roof Co. v. Industrial Accident Com., 119 Cal. App. 91, 6 P.(2d) 254; Dominguez v. Pendola, 46 Cal. App. 220, 188 P. 1025; Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S.W.(2d) 497.

[2] A factual distinction between the instant case and those cited above, which is greatly stressed by petitioner, is that in the cited decisions the employer owned the means of transportation, while in the instant case the employee was the owner. But this distinction is immaterial in determining the right to compensation. This right depends upon the existence of a risk peculiar to the employment. Where, by express directions, or with the knowledge and acquiescence of the employer, the employee is compelled to make use of a certain method of transportation, the risk involved in its use is one which results from the employment, and it can make no difference whether the vehicle is owned by the employer, the employee, or a third party; nor can it make any difference whether it was operated by the employer, the employee, or a third party.

A case directly in point is Maryland Casualty Co. v. Smith (Tex. Civ. App.) 40 S.W. (2d) 913. There the employee, hired to deliver parcels, was required to furnish his own motorcycle, but was given no place to store it, and consequently had to keep it himself. He was injured on his way to work, and the court affirmed an award of compensation. Petitioner suggests that differences in the terminology of the Texas and California Workmen's Compensation Statutes may account for the decision, but we are unable to see wherein the general language of the Texas Act (Vernon's Ann. Civ. St. Tex. art. 8309, second subd. 4), authorizing compensation when the employee is "engaged in or about the furtherance of the affairs or business of his employer," is broader than that of our own. It may be observed that the opinion in the Maryland Casualty Company Case relies for its basic governing principles upon a Minnesota decision, Novack v. Montgomery Ward & Co., 158 Minn. 495, 198 N. W. 290, and the statutory language therein considered was the same as that found in the California Act; that is, compensable injury must occur "in the course of employment" and must "arise out of it."

The Industrial Accident Commission of this state has previously indicated its approval of this exception to the "coming and going rule," even where the employee uses his own machine. Hartford Acc. & Ind. Co. v. Industrial Accident Com., 17 I. A. C. 162.

Petitioner places great reliance upon the case of Holopoff v. Industrial Accident Com., 131 Cal. App. 554, 21 P.(2d) 649. There the employee was a delivery boy using his own motorcycle, and was injured on his way to work. The commission denied compensation, and its decision was affirmed. The case bears some resemblance to the instant case, but upon full consideration we do not deem it conclusive. The main point with which the court was concerned was whether the employee had deviated from his regular route on the morning in question on an errand for his employer or for his private purposes. It appeared that he had called on a friend to deliver something to him. The court held that the deviation was for a private purpose, and that at the time the employee was not acting in the course of his employment. The court's general statement of the "coming and going rule" is not significant, for nothing appears in the opinion to suggest that the employee was compelled, by the nature of his employment, to make his own arrangements to store his machine. This element is, as we have seen, the controlling consideration in the case before us. We are satisfied that the conclusion of the commission that the injuries of Mahret were compensable finds support in the record and in the law.

[3] The only other question is whether the commission properly awarded compensation based upon Mahret's gross earnings of $30 per week, or whether it should have deducted therefrom the cost of maintaining the motorcycle, amounting to $50 per month. The statute, section 12, subdivision b (St. 1917, p. 843, as amended by St. 1929, p. 553), provides that the average weekly earnings shall not include any sum which the employer may pay to the employee "to cover any special expenses entailed on him by the nature of his employment." It seems clear that Mahret was not paid any sum as special expenses. His earnings were $30 per week, and the fact that his job required him to pay for the upkeep of a motorcycle does not mean that his employer paid him the cost of such upkeep

as "special expenses." The language of the act does not permit such deduction any more than it permits deductions for the cost of tools or clothes. This view is fully developed in Springfield Coal Mining Co. v. Industrial Commission, 291 Ill. 408, 126 N. E. 133, 22 A. L. R. 859, where, under a statute practically identical with our own, the Supreme Court of Illinois held that, where coal miners were compelled to equip themselves with drilling machines, shovels, lamps, carbide, powder, fuse, squibs, picks, wedges, sledges, and tool and supply boxes, but were paid at a certain rate per ton of coal mined, it was improper to deduct the cost of these articles from the gross earnings to determine the basis of a compensation award. There is, to be sure, a decided conflict of authority on this point. The opposite view is presented in Richards v. Central Iowa Fuel Co., 184 Iowa, 1378, 166 N. W. 1059. We are of the opinion that the rule of liberal construction in favor of compensation, declared in our statute, section 69(a) (St. 1917, p. 877), necessarily leads to the interpretation made by the commission.

The award is affirmed.

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1 Cal.(2d) 56

MITCHELL et ux. v. UNION DRILLING & PETROLEUM CO. et al.

L. A. 14014.

Supreme Court of California.
May 17, 1934.

1. Mines and minerals 🔑73½.

Oil lease provision that lease should remain in force for definite period, provided oil or gas were produced in paying quantities, *held* not to permit lessee to terminate lease at will by merely stopping production.

2. Mines and minerals 🔑78(7).

Lessors properly terminating oil lease were entitled to damages, up to date of termination of lease, for assignee's failure to protect property against drainage from wells on contiguous land.

3. Appeal and error 🔑907(2).

On appeal, court was required to assume, in support of findings and judgment, that proof was sufficient to support finding where proof was not before court.

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by James McD. Mitchell and wife against the Union Drilling & Petroleum Company and others. From a judgment for plaintiffs, the named defendant appeals.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant.

George W. Nilsson and Murphy & Doherty, all of Los Angeles (Monta W. Shirley, of Los Angeles, of counsel), for respondents.

PRESTON, Justice.

Appeal on judgment roll by defendant Union Drilling & Petroleum Company, hereinafter called the "drilling company," from judgment for plaintiffs. The facts found by the court are as follows:

Plaintiffs, owners of lots 67, 69, and 70 of tract 639, Los Angeles, on November 6, 1923, executed to one Roy W. Perkins an oil and gas lease on said property, reserving to themselves a 25 per cent. royalty of the gross production from the demised premises. On March 28, 1924, Perkins completed a producing well on lot 70. On May 21, 1924, said lessee transferred to defendant drilling company practically all of his rights under said lease. The lease contained the following clauses, material to this inquiry:

"3. This lease, subject to earlier determination as hereinafter provided, shall remain in force for * * * 20 years from and after the date of this instrument, provided oil or gas or other hydrocarbon substances are produced and saved in paying quantities, and as much longer thereafter as oil or gas or other hydrocarbon substances in paying quantities are produced from the wells on said premises."

"5. The lessee agrees to drill upon said premises not less than three * * * wells for the production of oil or gas, and to protect as far as possible the oil and gas in the said leased premises from drainage by contiguous wells. * * *"

"16. In the event of the breach by the lessee of any of the terms or conditions of this lease and failure to remedy the same within thirty * * * days after written notice of such breach, this lease and demise and all of the rights of the lessee hereunder shall thereupon and thereby, at the option of the lessors, forthwith cease and determine * * *."

On April 13, 1928, said drilling company quitclaimed to plaintiffs lot 67, leaving only lots 69 and 70 affected by this action. The drilling company operated the above-mentioned well and paid a royalty to plaintiffs on the oil and gas thereby produced until March, 1927, subsequent to which time it made no effort to produce oil or gas or to pay plaintiffs any royalty or rental. In fact, in violation of the covenants of said lease, the drilling company connived in the action of its president, who operated a well on contiguous lands, thereby draining oil from plaintiffs' property. On numerous occasions between March, 1927, and the date of filing this suit, plaintiffs requested defendant drilling company to produce the well located on their land, to protect said land against drainage and otherwise comply with the terms of the lease, or to quitclaim and return said land to them, but the drilling company refused to do either.

Finally, on March 12, 1930, plaintiffs served a notice of default on said company, giving it thirty days to remedy its conduct. Nothing was done by it and on April 30, 1930, notice of termination of the lease was served upon it. Pursuant to the lease, sixty days thereafter were allowed it to remove from the premises fixtures, improvements and personal property. This likewise was not done. Plaintiffs did not waive the default, either actually or constructively, but later brought this action.

The complaint was in six counts. The first was to quiet title. The second pleaded termination of the lease for failure to produce oil as covenanted. The third pleaded a forfeiture after failure to remedy the breach as provided by paragraph 16 of the lease. The fourth pleaded an action for damages for failure to protect plaintiffs' property against drainage from wells on contiguous lands. The fifth pleaded an action for damages for failure to produce oil from the existing well. The sixth was an action for wrongfully holding over after termination of the lease.

Defendants answered, denying the essential allegations set forth in the several causes of action and affirmatively alleging, in defense, that the lease was modified by a later agreement between the parties which relieved defendant from drilling further wells on the premises, pending the development of surrounding territory, and preserved its rights under the lease until such time as surrounding development would indicate whether additional expenditures for the development of plaintiffs' property would be justified. On issues so joined the case went to trial.

The court thereafter, on motion of defendants, granted a nonsuit as to causes of action 5 and 6. The trial, which was being conducted before the court, sitting without a jury, was continued and at the conclusion of the hearing the court found the facts to be substantially as first hereinabove related.

The court further found that although the lease provided that the lessee should drill three wells on the property, the parties, by an agreement dated April 28, 1924, relieved defendant company from drilling the two additional wells, until it was determined that a deeper sand existed, but did not relieve it from complying with any of the other terms of the lease. The court then concluded, as a matter of law, that by reason of the failure to produce or save from said well, after March, 1927, oil, gas or other hydrocarbon substances, said lease was terminated by the provisions of paragraph 3 thereof; that by reason of defendant company's failure to remedy the defaults called to its attention by plaintiffs' notice of March 12, 1930, the lease was terminated by plaintiffs, as provided in paragraph 16 thereof, by notice of termination served upon said defendant April 30, 1930; that defendants were without right or interest in the property; that plaintiffs were entitled to exclusive possession of the demised premises, together with all personal property, fixtures and improvements placed thereon by the lessee and there remaining on June 30, 1930; and, lastly, that plaintiffs were entitled to damages against defendant company in the sum of $4,513, which sum was, on motion for new trial, reduced to $2,256.50.

Judgment followed for plaintiffs, quieting their title to lots 69 and 70, declaring the lease terminated by plaintiffs as of April 30, 1930, declaring a forfeiture by defendants of all personal property remaining on the premises on June 30, 1930, and awarding plaintiffs, as damages for failure to produce oil and gas from the leased premises and to protect the oil and gas in said premises from drainage by contiguous wells from April 1, 1927, to November 1, 1931, the sum of $2,256.50, plaintiffs to also receive their costs. Defendant drilling company appealed on the judgment roll alone.

Appellant does not complain of the decree in so far as it quiets plaintiffs' title to the property. But appellant insists that that portion of the judgment awarding damages is unsupported by the findings and is contradictory thereto; that plaintiffs, having elected to treat the lease as terminated, may not, at the same time, treat it as in existence for the purpose of recovering damages thereunder. In this connection attention is called to the fact that although the judgment declares that the lease was terminated by plaintiffs on April 30, 1930, the court, in its conclusions of law, found, first, that the lease was terminated by the provisions of paragraph 3 thereof (above quoted) in March, 1927, and, secondly, that it was terminated by plaintiffs on April 30, 1930.

[1] We find no difficulty in resolving this inconsistency in support of the declaration of the judgment. To hold that the lease terminated by its own terms in March, 1927, would be to so interpret paragraph 3 thereof as to place the contract in full control of one of the parties to the injury of the other party. Obviously, it was never contemplated that the lessee might terminate the lease at will by simply stopping the production of a completed well and, in reliance upon said provision, escape all responsibility to the other party for such wrongful act. The declaration of the judgment that plaintiffs terminated the lease as of April 30, 1930, is sufficiently supported by the findings and by proper construction of the plain provisions of the lease, particularly the above-quoted paragraph 16 thereof.

[2, 3] It follows that it was proper for the court to award damages for breach of the covenants of the lease, including such damages as would naturally flow from the breach committed. Furthermore, counts III and IV of the complaint proceed on the theory that the plaintiffs suffered by reason of the failure of the defendants to "protect, as far as possible, the oil and gas in said leased premises from drainage by contiguous wells"; that the defendants continuously from March, 1927, to the time of trial, drained oil from beneath plaintiffs' property to their damage in the sum of $7,500. The court found that the plaintiffs had suffered damages as alleged in count IV in the sum of $2,256.50. Under any theory of the case the plaintiffs were entitled to damages up to April 30, 1930. It is insisted, however, that any damages awarded for a period subsequent to that date would come within the allegations of the counts as to which a nonsuit was granted. This is not necessarily so, so far as the judgment roll discloses. The allegations of count IV are broad enough to permit proof of damage to the time of trial, as the defendants remained in possession and continued to drain the plaintiffs' land up to that time. The court found the amount of damages suffered by the plaintiffs to the time of trial, and it must be assumed in support of the findings and judgment that the proof, which is not before us, was sufficient to support the finding.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.

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1 Cal.(2d) 42

SIMPSON et al. v. GILLIS et al.

L. A. 13980.

Supreme Court of California.

May 17, 1934.

1. Pleading 🔑225(2).

Granting or refusal of plaintiffs' motion for leave to amend complaint after demurrer thereto was sustained was largely in trial court's discretion.

2. Appeal and error 🔑863.

Question on appeal from judgment on order sustaining demurrer to complaint without leave to amend is whether plaintiff stated or can state cause of action against defendants under any view of facts disclosed.

3. Trusts 🔑30½(1).

Leases of lots in tract acquired by Chautauqua corporation, founders' certificates and articles of incorporation *held* not to create express trust in corporation's assets for certificate holders and other lessees on theory that corporation received only bare legal title to moneys paid by them (Civ. Code, § 649 et seq.).

The leases let lots in consideration of payments, rents, covenants, and agreements stated for renewable 99-year term, with rights to attend religious and educational meetings conducted under lessor corporation's auspices and receive deeds for lots on payment of stated additional sum if lessor discontinued work for which incorporated and disposed of tract; founders' certificates stated that corporation was to be formed to found religious and educational Chautauqua on tract, outlined plan to lease lots and stated that certificate holders were entitled to return of their money if they failed to select lots within year; founders' handbook enlarged on corporation's purposes and objects, described institutional features to be inaugurated thereby and development, financial and appraisal plans, set out form of leases with explanation of purposes of provisions therein, and articles of incorporation provided for nomination of trustees and approval of by-laws and ordinances by church conference, devotion of profits exclusively to corporation's purposes, discontinuance of institution at any time and disposition of corporation's assets by trustees as directed by conference, and trustees' nomination of advisory committee elected by conference.

4. Trusts ⚿371(2).

Facts alleged by plaintiffs in suit to impress trust on Chautauqua corporation's property *held* insufficient to constitute cause of action on theory of resulting trust as not giving rise to natural presumption that plaintiffs were real owners of property.

Facts alleged did not show that corporation's property was paid for with plaintiffs' money, but statement of project and pertinent documents showed that they paid money for interests conveyed to them.

5. Trusts ⚿91.

"Constructive trust" arises from acts of one wrongfully detaining property or obtaining it by fraud, in violation of trust or other wrongful act (Civ. Code, §§ 2217, 2223, 2224).

[Ed. Note.—For other definitions of "Constructive Trust," see Words & Phrases.]

6. Trusts ⚿95.

Chautauqua corporation having acquired both legal and beneficial title to funds paid by lessees of lots in tract purchased by it, its subsequent dealings in relation to such funds gave rise to no constructive trust for lessees (Civ. Code, §§ 2217, 2223, 2224).

7. Costs ⚿154.

Prevailing party is entitled to costs of taking adverse party's depositions, though no fact issue was joined and depositions were never used (Code Civ. Proc. § 2021).

8. Costs ⚿154.

Whether expenditure for taking plaintiffs' depositions, never used because cause proceeded no further than ruling sustaining demurrer to complaint, was necessary or incurred in good faith, was primarily for trial court in taxing costs (Code Civ. Proc. § 2021).

9. Costs ⚿154.

Order taxing costs of taking plaintiffs' depositions, not signed and directed to court clerk nor used because cause proceeded no further than ruling sustaining demurrer to complaint, *held* not erroneous (Code Civ. Proc. §§ 2021, 2032).

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by James Simpson and others, individually and as virtual representatives of all contributors to certain trust funds and their assignees, against Robert C. Gillis and others. From a judgment on an order sustaining defendants' demurrer to the first amended complaint, without leave to amend, and an order taxing costs, plaintiffs appeal.

Affirmed.

Thorwald Siegfried, Sydney Sanner, and John A. Fleming, all of Los Angeles, for appellants.

Ernest C. Carman, of Los Angeles, for respondent Robert C. Gillis.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondent Pacific Land Corporation.

Tanner, Odell & Taft, of Los Angeles, for respondent Pacific Palisades Ass'n.

Swanwick, Donnelly & Proudfit, of Los Angeles, for respondent California Trust Co.

SHENK, Justice.

The plaintiffs appealed from a judgment entered upon an order sustaining the defendants' demurrer to the first amended complaint without leave to amend, and from an order taxing costs.

By their action the plaintiffs sought to impress a trust upon certain real and personal property which it is alleged was created by virtue of the following facts appearing from said first amended complaint:

Prior to June, 1921, Huntington Beach Methodist Assembly was a subsidiary nonprofit corporation of Southern California Conference of the Methodist Episcopal Church, and was authorized by the latter to issue founders' certificates to persons who desired to invest $1,000 or more each in a tract of land whereon was to be founded a so-called Chautauqua project to be known as Pacific Palisades Association. Two hundred and seventy-five persons became purchasers of founders' certificates at $1,000 each. The certificate provided that the holder was entitled to select a lot of land of the appraised value of $1,000 from a tract of 1,068 acres situate on the ocean front near Santa Monica in Los Angeles county, "acquired under contract" by the subsidiary assembly, and to receive a leasehold interest for a renewable 99-year term, the leases to be modeled after the leases issued at Lake Chautauqua, N. Y., and Ocean Grove, N. J. It further provided "that if the certificate holder does not select a lot within one year he may surrender this certificate and upon ninety days' notice in writing shall be repaid the sum of one thousand dollars with interest at the rate of six per cent per annum from this date."

The defendant Pacific Palisades Association was incorporated on August 9, 1921, pursuant to title 17, part 4, division 1, of the Civil Code (section 649 et seq.), which provides for the incorporation of colleges and seminaries of learning. It is alleged that the assembly transferred to the association the sum of $275,000 paid by the holders of founders' certificates for the purpose of using it to acquire the 1,068-acre tract.

On January 14, 1922, designated as "Founders' Day," and thereafter, each of the 275 holders of founders' certificates selected a lot, and became a leaseholder of the lot selected by him pursuant to the terms of a lease modeled upon leases used in similar projects, and which provided for a 99-year term renewable without fee. The lease rental was the sum of $1,000 or more, depending upon the appraised valuation of the lot selected, payable upon execution and delivery of the lease, and a further sum not exceeding 1 per cent. per annum on the appraised valuation. In addition, the lessee was entitled to receive season tickets admitting him and his family to all meetings held by or under the auspices of the association. The lessee agreed to erect a dwelling house within three years, subject to certain restrictions, and upon the lessee's failure to comply with this provision the association reserved the right to cancel the lease and return the amount paid as the appraised value of the lot with interest at 7 per cent. per annum. In addition to the ordinary provisions of a lease, there appeared the particular provision that should the lessor "hereafter decide to discontinue the work for which it is incorporated or to sell or dispose of its holdings in this tract, then it will sell and convey to" the lessee the premises leased upon the further payment of $10.

Between June 1, 1921, and July 11, 1923, and thereafter more than 1,500 persons in addition to the 275 "founders" became lessees or owners of lots in lands acquired by the Pacific Palisades Association and by December, 1925, the sums paid for a total of 2,397 of such interests approximated more than $4,780,000. All or many of said persons were communicants of the Methodist Episcopal Church and entered into the religious life of the community.

The plaintiffs, thirteen in number, are some of the original holders of founders' certificates, or assignees thereof, or otherwise owners or lessees of lots in the land acquired by the Pacific Palisades Association, and sue in the action on their own behalf and on behalf of all of said 2,397 owners of similar interests.

The defendant Pacific Palisades Association on July 5, 1923, took title to the 1,068-acre tract above mentioned, for which it is alleged to have paid the sum of $660,000. On June 23, 1923, the association acquired a 32-acre tract in Los Angeles county from the defendant Robert C. Gillis for the sum of $65,000. On the same date it also acquired a tract of 825 acres in Los Angeles county, subject to an encumbrance of $150,000, for the sum of $850,000. The purchase price of said tracts, approximating a total of 1,925 acres, is stated to be $1,575,000. The payments made by the owners of leasehold interests in lots, averaging about five lots to the acre, purchased from the defendant Pacific Palisades Association, constituted the source from which payment of the purchase price of lands so acquired was made. All of the lands so acquired have been platted and designated as and are referred to in the complaint as tract 9300. It is stated that of the 1,925 acres embraced within tract 9300 there remained unsold on December 31, 1925, 1,313 acres thereof unsubdivided and 423 subdivided lots, together with 6,168 feet of ocean beach frontage.

It is alleged that sales of lots in tract 9300 showed a decline from $1,088,000 in the first six months of 1924, to $580,600 in the second six months of that year, and to less than $250,000 for the year 1925. On January 11, 1926, the association purchased 226 acres adjacent to tract 9300, called the Huntington Palisades tract, for which it paid $1,625,000. The plan was to subdivide and sell lots from this tract purely as a real estate venture, there being no intention to combine with the sale access to the religious and educational activities of the association.

The defendant Robert C. Gillis was one of the 275 original holders of founders' certificates, and became a member of the board of trustees of Pacific Palisades Association. He owned practically all of the capital stock of the defendant Santa Monica Land & Water Company. About January 11, 1926, when the Huntington Palisades tract was purchased by the defendant Pacific Palisades Association, it made a contract with Santa Monica Land & Water Company to appoint and it did appoint the latter its exclusive agent to sell lots in said Huntington Palisades for a commission to it of 25 per cent. The association made a similar contract with Santa Monica Land & Water Company to sell lots in tract 9300. The plaintiffs allege that during this period the financial affairs of the association were approaching an insolvent condition.

On April 1, 1926, the association executed a deed of trust conveying the legal title to said Huntington Palisades tract and said tract 9300 to the defendant California Trust Company to secure a $3,500,000 bond issue. On March 31, 1928, the association entered into an agreement, recorded in June, 1931, with the defendant Robert C. Gillis, whereby the association transferred to Gillis all of the property described in the trust indenture, that is, all of the real and personal property of the association with certain exceptions and reservations which comprised the portions of the property used or to be used for institutional purposes and school sites, as well as the parcels leased for 99-year terms, reserving also equipment necessary for the maintenance and operation of its buildings and grounds, certain cash reserves, and the right to conduct the educational and institutional activities of the association. Gillis agreed to pay to the association $250,000 in sums of $25,000 per annum, payable in monthly installments. Gillis was also obligated to pay to the association 25 per cent. of the net profits derived from the sales of lots from the tracts, the monthly installments to apply as a credit against such payments. Gillis agreed to discharge all the bonded and other indebtedness against the property, including the $3,500,000 bond issue, and all taxes, assessments, and other incumbrances, which, together with expenses of subdivision and commissions, except advertising and sales expenses, were allowed as a deduction against the amounts realized on sales. The plaintiffs allege that the property conveyed by said agreement had a value of $9,000,000. On April 30, 1928, Gillis assigned the agreement and property rights conveyed thereby to the defendant Pacific Land Corporation, Limited, in exchange for the capital stock of that corporation.

On December 29, 1930, the defendant California Trust Company, pursuant to the terms of the trust indenture, sold to the state of California for the sum of $1,000,000, 3,333 feet of beach land reserved to the Pacific Palisades Association in the agreement with Gillis. It is alleged that Gillis obtained the benefit of the purchase price of this frontage under his contracts as well as the benefit of balances owing on sales made on March 15, 1927, to Los Angeles Mountain Park Company of 750 acres for the sum of $1,200,000, and of the Bundy Bath House on August 18, 1927, to Will Rogers for $105,000, and a sale of another tract of 1,420 feet of ocean front to Santa Monica Land & Water Company on April 4, 1927, for $285,000 and later also sold to Will Rogers. Shortly after the transfer to Gillis and on August 4, 1928, Gillis sold to Rogers for $214,872 an additional 306 feet of ocean front, including the so-called Lighthouse, a bathing resort originally, so it is stated, intended for use as part of the development of tract 9300. There was also sold to Rogers another 100 feet adjacent to the Lighthouse for the sum of $80,000. On December 29, 1930, Gillis' alter ego, Pacific Land Corporation, entered into a contract for the sale of 2,411 feet of ocean front to the county of Los Angeles for the sum of $723,500. It is alleged that the sums realized on these sales and of other sales of lots to lessees in tract 9300, would have discharged in full the $3,500,000 bonded indebtedness. It is also shown by the complaint that the principal of said bond issue has in fact been discharged to the extent of $2,204,500.

The foregoing facts, together with many conclusions of the plaintiffs respecting the legal effect thereof, are set forth in four purported causes of action in the first amended complaint. The plaintiffs allege that a trust was created in favor of the plaintiffs and those they represent as the beneficial owners of the property acquired by the defendant Pacific Palisades Association; that the defendants have repudiated the trust; and that the transfer to Gillis was a violation of the trust and a fraud upon the plaintiffs. They seek a declaration to the foregoing effect, an accounting, and the appointment of a new trustee or corporation to be organized and known as "Tract 9300 Association" in which the owners and lessees of lots in said tract will be entitled to membership and to which the alleged trust estate shall be set over and by which it shall be administered under the direction of the court, and for judgment against any of the defendants who might be found chargeable with the receipt of any part of such alleged trust estate.

[1] The defendants' demurrer was interposed on general and special grounds and was sustained by the court without leave to amend. Subsequently the plaintiffs on notice

applied for permission to make certain amendments to the first amended complaint, which was refused by the court. By such amendment it was sought to show that the persons who became trustees of Pacific Palisades Association were the former trustees of Huntington Beach Methodist Assembly, which thereafter transacted no business; that the defendant Pacific Palisades Association conducted and continued to operate and maintain a Chautauqua assembly on a portion of said tract 9300; and other allegations which it is unnecessary to note specifically.

The plaintiffs were not entitled to have their motion granted as a matter of right. The granting or refusal thereof was a matter largely in the discretion of the court. A further review of this ruling is not necessary inasmuch as the allegations contained in the amendments sought to be made would not compel or justify a different conclusion on this appeal.

[2] The question presented is whether the plaintiffs under any view of the facts disclosed have stated or can state a cause of action for relief as against the defendants. Our conclusion that the plaintiffs have not done so and cannot do so finds support without consideration of the application of the statute of frauds, the statute of limitations, or the doctrine of laches, or of the question whether the complaint was defective as to form or parties.

[3] The theory of the plaintiffs is that the payment of the $275,000 by the original holders of founders' certificates and all moneys subsequently paid by persons who became lessees or owners of lots in tract 9300 constituted a transfer of the legal title to such funds only, and that the beneficial ownership thereof was retained or separated from the legal title so as to constitute the lessees the beneficial owners in legal contemplation of the corporate assets of Pacific Palisades Association. Unless such a trust was created by that or some other means, the plaintiffs cannot pursue the present remedy for any alleged violation of their duty or abuse of their power by the defendants. The duty in such event is, by section 651c of the Civil Code, cast upon the Attorney General.

The outcome under the theory that an express trust was created depends upon whether there was an intention on the part of the original holders of founders' certificates and the lessees to transfer and of the Pacific Palisades Association to receive only the bare legal title to the funds paid to the latter, or its predecessor Huntington Beach Methodist Assembly, and to create a beneficial or equitable estate therein in favor of the lessees.

In the first place the lot owners and lessees had no active part in the creation of the corporate existence of the defendant Pacific Palisades Association. The corporation was organized without capital stock by the former trustees of Huntington Beach Methodist Assembly, and the trustees, governing as a board, constitute its only members. The plaintiffs therefore are not suing and cannot sue as stockholders or members of the corporation. Therefore whether an express trust was in fact created depends on whether an intention to create such a trust was expressed in the instruments of transfer involved. Burling v. Newlands, 112 Cal. 476, 494, 44 P. 810.

Assuming, without deciding, that an express trust may have been created at the time in question for the objects and purposes stated by the plaintiffs, pertinent facts alleged and the instruments and documents pleaded and relied upon by the plaintiffs show not only an absence of any such intention, but, on the contrary, affirmatively indicate that an express trust for any purpose, with the plaintiffs as beneficial owners of the property, was not expressed or intended. It may be said that the memorial in which, under the facts pleaded, such intention should appear, is the instrument by which such funds were transferred by the original holders of founders' certificates and by the lessees. The lease in use, the form of which appeared in the founders' handbook issued to the holders of founders' certificates, is not complicated or misleading. It provides that the lessor lets the described lot of land to the lessee in consideration of the "payments, rents, covenants and agreements" stated therein for a renewable 99-year term. As hereinbefore noted, the only other rights and interest transferred to the lessee were the right to attend the religious and educational meetings conducted under the auspices of the association and the right to receive a deed for the property upon the payment of an additional sum of $10, in the event the lessor should decide to discontinue the work for which it was incorporated and sell and dispose of its holdings in the tract. Clearly an express trust is not created by the provisions of this instrument. The plaintiffs also rely upon the declarations and representations contained in the founders' certificate or receipt given in exchange for the initial $1,000 paid therefor by each of the 275 holders.

This certificate stated that the corporation, Pacific Palisades Association, is to be formed for the purpose of founding on the 1,068-acre tract a religious and educational center similar to that at Lake Chautauqua, N. Y.; that the land is being acquired under the authority of the Southern California Conference of the Methodist Episcopal Church. It outlined the plan to lease lots in the tract and the general terms of the lease, and stated how and when the holder might make his selection of a lot. It contained the provision hereinbefore noted that if a selection was not made within a year, the holder was entitled to the return of his money with interest. This is plain negation of any intent to create the trust alleged. The certificate or receipt represented an investment of $1,000, which could be surrendered for a lease on the terms represented [Pacific Palisades Association v. Menninger (Cal. Sup.) 26 P.(2d) 303], or for repayment of the amount with interest.

Other documents are relied upon by the plaintiffs to show the intent to create an express trust as stated. Assuming these to be pertinent for the purpose, they, too, negative the existence of any such intent. There was issued by the association a founder's handbook, in which the purposes and objects of the association were enlarged upon, especially as to its social, intellectual, and spiritual aims, the beauty of the surroundings, and high standards available to all residents and visitors, the "priceless values" of which "go with the lots." Some of the institutional features to be inaugurated, and the development, financial and appraisal plans and work were described. The form of lease was set out in full and, in addition, a summary of its salient features with a statement of the value to the prospective lessee of the permanency of the educational features which might be insured by the investment. Provisions in the lease which permitted cancellation thereof by the association on repayment, with interest, of the sum received as the cash payment, it was explained, were included for the purpose of insuring to any lessee not in sympathy with the development "a fair profit on his investment." In this summary and explanation there was specially noted the provision of the lease that a deed to the leased premises was to pass to the leaseholder in the event the institution discontinued its educational activities. The purpose of this was stated to be that, although the institution was designed to have perpetual existence, the provision was included to protect fully the rights of all in the event of its unexpected discontinuance. There is nothing in the foregoing that does not distinctly define the rights of the lessees, and the fact clearly appears that the benefits to be derived by the lessees in addition to the interest transferred to them, were the benefits specifically described, which were purely incidental to the development of the objects and purposes of the association, and the statement thereof did not constitute the lessees the beneficial owners of the property to be developed as an educational and religious institution for their "benefit."

Further negation, if any further be needed, of any existing rights of ownership or control by the lessees in the property reserved for institutional or other purposes is contained in the articles of incorporation of the Pacific Palisades Association, which the plaintiffs also rely upon and incorporate as an exhibit. The articles provided that the members of the board of trustees shall be nominated by the Southern California Conference of the Methodist Episcopal Church. The board of trustees was given power to fill vacancies by election from the nominees of the conference. The purposes, objects, and powers of the association were as permitted by section 649 et seq. of the Civil Code. It was declared in the articles that the corporation had been promoted by the conference for the purposes expressed therein and that all bylaws and ordinances necessary and proper in the exercise of the powers and to advance the interests of the corporation were to be subject to the consent and approval of the conference. They also provided that the membership of the corporation consisted of the signers of the articles and the members of the board of trustees. Dividends were not to be declared but profits were required to be devoted exclusively to the purposes of the corporation. The following specific provision appears: "Should the Board of Trustees at any time deem it wise to discontinue this institution, it may do so by and with the consent of said Conference. In such case the Board of Trustees shall dispose of the property and assets of the corporation in the manner directed by said Conference, or pay over to said Conference, the net proceeds of its assets, after payment of all its obligations. The Board of Trustees shall make an annual report of the business and condition of the corporation to said Conference." The articles also provided that the board of trustees might nominate an advisory committee, the members thereof to be elected by the conference, to consult with the board on the business and work of the corporation. The framework of the organization shows that it was intended to receive, buy, hold, and sell both the legal title and the beneficial interest in real and personal property, but, if this is not so, that the beneficial interest was to be held only by the Southern California Conference of the Methodist Episcopal Church.

[4] The plaintiffs advance the alternative claim that the facts alleged are sufficient to constitute a cause of action on the theory either that a resulting trust or a constructive trust in the property exists. The claim is not tenable on either theory. There is nothing in the facts alleged to show that the land purchased by the association was to be or was paid for with money owned by the lessees. The statement of the project and the terms of the pertinent documents show conclusively that the certificate holders and lessees paid money in return for an interest which was conveyed to them. The consideration was for the interest or investment which was received. The money then became the property of the association and was dealt with as its own. It is not necessary to note all the difficulties in an attempt to support the theory of a resulting trust. It is enough to note that the facts alleged do not give rise to the natural presumption that the certificate holders or lessees were the real owners of the property and that title was taken in the name of the corporation merely as a matter of convenience and arrangement between them. Where this natural presumption is lacking a trust does not result. Woodside v. Hewel, 109 Cal. 481, 485, 42 P. 152; Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 247, 251, 196 P. 884. The plaintiffs rely on the case of Leviston v. Tonningsen, 212 Cal. 656, 299 P. 724. But in that case the fact that title to the property in question was deeded to one without consideration merely to facilitate the redemption of the property was held to support the finding and conclusion that the title was held subject to a voluntary resulting trust.

[5, 6] A constructive trust arises by virtue of an act committed by one who wrongfully detains property or who obtains it by fraud, violation of a trust, or other wrongful act, and the holder thereupon is a trustee thereof for the true owner. Sections 2217, 2223, 2224, Civ. Code. In this respect the plaintiffs allege and contend that the acts of the defendants Pacific Palisades Association and Robert C. Gillis, hereinbefore outlined, constituted a fraud on the plaintiffs, and that this wrong or fraud and the repudiation of the alleged trust relationship have given rise to a constructive trust. It has been seen that the funds came into the possession of the defendant Pacific Palisades Association, in the first instance, as the owner of both the legal and beneficial title thereto, i. e., without being impressed with any trust in favor of the lessees as the beneficial owners thereof. Any dealings in relation to that property thereafter were, therefore, on behalf of the corporation, and, whether conformable to the powers and duties of the board of trustees of the association, or of the other defendants, they were not a fraud upon any right of the lessees and not a violation of any trust as to them. A constructive trust cannot, therefore, be said to have arisen by virtue of such acts. Nor can it be said that a constructive trust arose by virtue of the alleged repudiation of a trust which never existed.

Thus the cause of the plaintiffs in this action must stand or fall on their claim that an express trust was created. This claim they have failed to establish. The facts on the other hand are conclusive that their standing in the transactions with the defendant Pacific Palisades Association is that of purchasers of an interest in property which they have received. Inasmuch as the plaintiffs have failed to state a cause of action sufficient to impress a trust on the funds or the property on any theory, an accounting is not required.

[7-9] The plaintiffs have also appealed from an order taxing costs on the ground that the allowance of an item of some $169 representing the cost to the defendants of taking the depositions of certain of the plaintiffs was erroneous. The record shows that said plaintiffs were duly examined before a notary public, their depositions were transcribed but were not signed or used for the reason that the cause proceeded no further than the ruling on the demurrer. The plaintiffs argue that a deposition is not a deposition until it has been signed, and directed to the clerk of the court as provided by section 2032 of the Code of Civil Procedure. Section 2021 of the same Code gives the right to take the deposition of an adverse party at any time after service of summons or the appearance of the defendant. Even though no issue of fact has been joined and the depositions are never used, the prevailing party is entitled to costs thereon. California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 745, 91 P. 593; Lindy v. McChesney, 141 Cal. 351, 353, 74 P. 1034. The question whether the

expenditure was necessary or was incurred in good faith was primarily for the trial court. Murphy v. F. D. Cornell Co., 110 Cal. App. 452, 455, 294 P. 490. No showing of an abuse of the court's discretion is presented. The foregoing decisions and the decisions relied upon by the plaintiffs do not presuppose necessarily that the depositions taken had reached the finished state insisted upon before costs could be taxed in respect to them.

The judgment and the order taxing costs are, and each is, affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

* * *

220 Cal. 770

ANDERSON et al. v. DERRICK et al.

S. F. 14736.

Supreme Court of California.

May 17, 1934.

1. Corporations 🔑319(½).

In absence of statute, misfeasance or negligence of managing officers of corporation resulting in loss of its assets is injury to corporation for which it must sue.

2. Corporations 🔑320(4).

Stockholders *held* not entitled to recover damages in their individual capacity for loss resulting to themselves from asserted fraud of directors in effecting transfer of corporate assets, since cause of action was purely derivative in character.

3. Corporations 🔑312(1).

Statute making erring corporate directors answerable to stockholders for loss sustained by stockholders, and statute making directors liable to corporation and shareholders for unauthorized distribution of corporate assets, *held* not retroactive (Civ. Code, § 309, and § 363 as added by St. 1931, p. 1762).

4. Corporations 🔑617(1).

Dissolution of corporation prior to commencement of stockholders' action for asserted fraud of directors did not create individual right of action in stockholders, where two and one-half years remained in which representative suit could have been brought (Rev. Code Del. 1915, § 1954, as amended by 34 Del. Laws, c. 112, § 9).

5. Evidence 🔑35.

Supreme Court judicially knows that laws of Delaware continue corporate existence of corporations for three years after dissolution for purpose of suit by or against corporate entity (Rev. Code Del. 1915, § 1954, as amended by 34 Del. Laws, c. 112, § 9; Code Civ. Proc. § 1875, subd. 3).

6. Appeal and error 🔑882(11).

Plaintiffs who recommended findings for defendant on plaintiffs' failure to produce evidence could not on appeal object that findings so entered were unsupported.

7. Appeal and error 🔑835(2).

Stockholders who brought suit in their individual capacities for damages for fraud of directors could not on appeal urge on rehearing theory of representative or derivative character of suit.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by E. H. Anderson and others against Victory A. Derrick and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

For prior opinion, see 26 P.(2d) 463.

F. W. Sawyer and L. Seidenberg, both of San Francisco, for appellants.

Fitzgerald, Abbott & Beardsley, Carl H. Abbott, Edward B. Kelly, John L. McVey, and W. E. Rode, all of Oakland, for respondents.

WASTE, Chief Justice.

Plaintiffs instituted this action to recover damages alleged to have been suffered by them as the result of the fraudulent acts of the defendants who, as directors of the defendant Automatic Electrical Machine Company, a foreign corporation doing business in this state, are asserted to have conspired to cause, and actually did cause, the transfer of the entire corporate assets to one of their number, thereby depriving the corporation and its stockholders, among whom are plaintiffs, of everything of value. The complaint concludes with a prayer that plaintiffs be given judgment in the sum of $45,000, representing the par value of plaintiff's stock alleged to have been made valueless by the wrongful acts of the defendants.

Plaintiffs duly demanded a jury trial, contending that the action is one at law prosecuted in their individual capacities to directly recover such damages only as were suffered by them, as distinguished from the whole damage inflicted on the corporation or the stockholders as a group. The trial court concluded, in conformity with the contention of the defendants, that the primary wrong was done to the corporation and that the plaintiffs' damage, in common with that done to other stockholders, was secondary in character and resulted solely and alone from their stock ownership. This being so, the court held that the action was representative or derivative in character and cognizable only in equity, and that plaintiffs were not therefore entitled to a jury as matter of right. In the absence of a jury the plaintiffs declined to introduce any evidence, whereupon the court made findings in favor of the defendants and entered judgment accordingly. This appeal followed.

Throughout their briefs the plaintiffs repeatedly urge that they are prosecuting this action in their individual capacities and not as representatives of the corporation or of the remaining stockholders. They request that we treat as surplusage and ignore anything in the amended complaint that savors of a representative suit. They insist that a stockholder, injured in common with all other stockholders by the wrongful acts of the corporate directors, may bring an individual action, as distinguished from a representative or derivative action, to recover any damage suffered by him as the result of such wrongful acts. In their opening brief they concede that a conclusion that the action is derivative in character will be fatal to their cause and appeal.

[1, 2] In the absence of statute, it is the generally accepted rule that misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, as alleged herein, is an injury to the corporation for which it must sue. A stockholder cannot sue for damages because his stock is thereby rendered worthless. Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Niles v. New York Cent. & H. R. R. Co., 176 N. Y. 119, 68 N. E. 142, 144; Ames v. American T. & T. Co. (C. C.) 166 F. 820; 6a Cal. Jur. 804, § 456; 14 C. J. 924, § 1444. In the Niles Case, supra, as here, the stockholder sought to recover damages at law for the depreciation in the value of his stock, which depreciation, in common with the loss to other stockholders, resulted from the acts of the corporate directors. In denying such relief it is therein declared: "True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and, if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong, was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock and that of the other stockholders was in consequence of the waste and destruction of the property and franchise of the corporation." In 13 Fletcher, Cyc. Corporations, p. 227, § 5913, the principle is stated as follows: "Individual stockholders cannot sue corporate officers for damages on the ground of mismanagement, on the theory that such mismanagement has rendered their stock of less value or worthless, since the injury is not to them individually, but to the corporation, i. e., the stockholders collectively. * * * It is only where the injury sustained to one's stock is peculiar to him alone, and does not fall alike upon other stockholders, that he can recover as an individual."

Pointing out that the question is one of first impression in this state, the plaintiffs urge us to disregard the rule as announced in the above authorities. This we are not inclined to do. The rule is both reasonable and proper. Its application to the present case precludes a recovery by the plaintiffs for an examination of the amended complaint, assuming its allegations to be true, discloses that plaintiffs suffered no damage peculiar to them alone. On the contrary, they were injured by the same wrong and in common with all other stockholders in the corporation. The injury was not to them individually but to the corporation, i. e., the stockholders collectively. Under the above authorities, the plaintiffs cannot, therefore, state a cause of action for damages peculiar and individual to them. Their cause of action is purely derivative in character. This being so, the complaint fails to state a cause of action and judgment must necessarily be given for the defendants. As stated above, the plaintiffs concede that a conclusion that the action is derivative is fatal to their position herein. Our conclusion obviates the necessity of determining whether the cause of action attempted to be alleged is equitable or legal in its bearing on plaintiffs' right to a jury trial.

[3] We find nothing in our statutory law opposed to the above conclusion. At the time of the perpetration of the alleged fraudulent acts of which complaint is here made, section 309 of the Civil Code, in the absence of authority from the commissioner of corporations, prohibited the directors of a corpo-

ration from dividing, withdrawing or paying to the stockholders any part of the capital stock, for a violation of which such directors were jointly and severally liable "*to the corporation*, * * * to the full amount of the capital stock so divided, withdrawn, paid out, or reduced * * *." As it then read, the section did not purport to give to the stockholders in their individual capacities an independent and distinct cause of action for the redress of any wrong or damage suffered by them as the result of such violation. In other words, no liability was imposed on the directors in favor of the stockholders in their individual capacities. In 1929 (St. 1929, p. 1266), subsequent to the commission of the acts here complained of, the section was amended to make the erring directors answerable "to the *shareholders* of such corporation to the full amount of any loss sustained by such shareholders * * *." The section was repealed in 1931 (St. 1931, pp. 1762, 1815), and superseded by section 363, Civil Code, wherein directors causing an unauthorized division or distribution of corporate assets among the stockholders were made jointly and severally liable "to the *corporation* and to *shareholders* and *subscribers* for the full amount of any loss sustained by the corporation, the shareholders, and/or subscribers." We need not here pause to determine whether the amended section 309 or its successor, section 363, impose a liability upon erring directors in favor of stockholders in their individual capacities. Even if such liability were then created, a point we do not decide, the amendment of the old section and the enactment of the new, being subsequent in point of time to the commission of the acts upon which this suit is based, cannot, in the absence of a contrary legislative intent, be held to be retroactive. In Re Estate of Parker, 200 Cal. 132, 142, 251 P. 907, 911, 49 A. L. R. 1025, it is declared that: "A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage. 'Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions have been universally reprobated by civil and common-law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears.' "

[4, 5] The dissolution of the defendant corporation prior to the commencement of this suit did not serve to create such individual right of action in the stockholders. The defendant corporation is a Delaware corporation. We will take judicial notice of the fact (Code Civ. Proc. § 1875, subd. 3) that the laws of Delaware (chapter 65, Rev. Code of 1915, § 1954, as amended by 34 Del. Laws, c. 112, § 9) continue the corporate existence for three years after dissolution for the purpose of prosecuting or defending suits by or against the corporate entity. The present action was instituted approximately six months after dissolution and when approximately two and one-half years remained within which a representative suit could have been brought.

[6] As stated at the beginning of this opinion, the court below, upon the failure and refusal of the plaintiffs to introduce any evidence, made findings in favor of the defendant, and gave judgment accordingly. The plaintiffs now contend that the findings are unsupported by the evidence. In view of our conclusion that the complaint fails to state a cause of action, the findings are, at most, unnecessary and superfluous and can in no way detract from the propriety of the judgment entered. In the trial court the plaintiffs offered no objection to findings being made in the absence of any evidence. When the matter of findings was under consideration, counsel for plaintiffs suggested as a form of finding the following: "Counsel for the plaintiffs refused to submit evidence supporting the complaint, therefore the court finds that the allegations of the complaint are not true." The court below accordingly found the material and substantial allegations of the complaint to be untrue and it is not for the plaintiffs to now urge that the findings are unsupported by evidence.

We have examined Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704, Bee v. Cooper, 217 Cal. 96, 17 P.(2d) 740, and other authorities cited by the plaintiffs. They do not suggest a result different from that here reached. In view of the fact that our conclusion makes it unnecessary to now decide whether the cause of action attempted to be alleged is legal or equitable in nature, the two cited cases offer no difficulty. None of the California cases to which plaintiffs have referred us directly involved the question here determined. Plaintiffs necessarily admit this when, as already stated, they concede that the question is one of first impression in this state.

[7] In conclusion it should be stated that there is language in plaintiffs' "supplemental brief on rehearing" which tends to indicate a complete change of position on their part. There is language therein capable of being construed as an assertion on plaintiffs' part

that the action is "derivative" and "involves and concerns only the rights of the corporation, though commenced and prosecuted by the stockholders. * * *" Such a position, if now assumed, flies squarely in the face of plaintiffs' positive and often-repeated declaration, both in the trial court and here, that the action was commenced and prosecuted by plaintiffs in their *individual* capacities to recover damages alleged to have been suffered by them alone and was not prosecuted for and on behalf of the corporation or the stockholders thereof. Moreover, in denying the request for a jury, the trial court expressed a willingness to regard the action as a representative one instituted for and on behalf of the corporation and its stockholders, indicating to plaintiffs that appropriate relief would be granted if they proceeded on this theory and succeeded in establishing the allegations of their complaint having to do with the defendants' alleged improper disposition of the corporate assets. Plaintiffs declined to proceed on this theory. Under elementary and fundamental principles, plaintiffs cannot, upon finally discovering the weakness of their cause, completely and radically alter their theory of the case after rehearing on appeal. It is now too late for the plaintiffs, in the present proceeding, to change their position and urge the representative or derivative character of the action.

The judgment is affirmed.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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1 Cal.(2d) 17

VERDER v. AMERICAN LOAN SOC. et al.

L. A. 14385.

Supreme Court of California.
May 17, 1934.

1. Building and loan associations 🔑23(6). Corporations 🔑428(1).

Where assignor of trust deed and loan society had four officers in common and assignor procured note and trust deed from assignee for collection and had trustee reconvey property and then had record owner execute new trust deed and note to loan society, assignor and loan society were each charged with knowledge and acts of their agents gained in transacting the business.

2. Corporations 🔑560(2, 3).

Although operating receiver takes assets of corporation subject to all equities outstanding against it, liquidating receiver represents corporation as such and also its creditors and may claim rights and advance defenses not available to corporation.

3. Estoppel 🔑72.

Where assignee of trust deed had no part in fraudulent dealings whereby assignor induced assignee to deliver note and trust deed for collection and then had trustee reconvey property and had record owner execute new note and trust deed to loan society having same officers as assignor, assignee was not required to bear loss as against creditors of loan society as one of two innocent parties, since assignee was not negligent.

4. Mortgages 🔑240.

Right of assignee to rescind indorsement and delivery of note secured by trust deed to assignor for collection would not be denied merely because of assignor corporation's insolvency.

5. Building and loan associations 🔑42(7).

Where assignor of note and trust deed induced assignee to deliver them for collection and assignor then had trustee reconvey property and later had record owner execute new note and trust deed to loan society having same officers as assignor, neither creditors of loan society nor building and loan commissioner as receiver of loan society were entitled in equity to hold property free of assignee's trust deed.

6. Election of remedies 🔑7(3).

Where assignor of note and trust deed induced assignee to deliver them for collection and assignor had trustee reconvey property and had record owner execute new note and trust deed to loan society having same officers as assignor, assignee, by filing claim with receiver of assignor, did not elect remedy which would preclude her from suing to annul deed of reconveyance by trustee where until assignee filed her claim, assignor repeatedly represented that note was not yet collected, and filing of claim was in ordinary course of receivership proceedings, and equivalent only to demand for securities, and not an election of remedies.

7. Election of remedies 🔑3(1).

To constitute bar by election of remedies, two remedies must be inconsistent on same state of facts and knowledge of existence of facts must be present.

8. Election of remedies 🔑2.

Doctrine of election of remedies applies only where remedy first sought is real remedy available to plaintiff.

9. Mortgages 🔑240.

Where assignee of trust deed delivered trust deed to assignor for collection and assignor had trustee reconvey property, and had record owner execute new note and trust deed to loan society having same officers as assignor and loan society's receiver enforced trust deed, assignee had no claim to rents.

10. Mortgages 🔑240.

Where assignee of trust deed delivered trust deed to assignor for collection and assignor had trustee reconvey property, and had record owner execute new note and trust deed to loan society having same officers as assignor, and loan society's receiver enforced trust deed, and made repairs and improvements, receiver was not entitled to amount expended for repairs and improvements, on cancellation of trustee's deed of reconveyance.

11. Building and loan associations 🔑42(16).

Where assignor of note and trust deed induced assignee to deliver them for collection and assignor then had trustee reconvey property and had record owner execute new note and mortgage to loan society having same officers as assignor, demand of assignee to have trustee's deed of reconveyance annulled was not "claim" which must be first presented to building and loan commissioner as receiver of loan society before action could be founded on it (Gen. Laws 1931, Act 986, § 13.16).

[Ed. Note.—For other definitions of "Claim," see Words & Phrases.]

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Helen T. Verder against American Loan Society and others. From a judgment for plaintiff, defendant Friend W. Richardson, as building and loan commissioner of the state of California, appeals.

Affirmed.

Roscoe C. Andrews, of Los Angeles, Roland Tognazzini, of San Mateo, and Jean Wunderlich, of Los Angeles, for appellant.

MacDonald & Thompson and Kimball Fletcher, all of Los Angeles, for respondent.

PRESTON, Justice.

In this cause, tried upon an agreed statement of facts, Hon. Henry M. Willis, the learned trial judge, filed, as the basis for his judgment, a written opinion which exhaustively, and we think correctly, treats the material questions presented by the record. We hereby make it the basis of our order affirming the judgment:

"This is an action to annul a deed of reconveyance by the trustee in a trust deed, and to restore to their former force and effect a note and trust deed securing the same belonging to plaintiff. The facts are stipulated in writing by plaintiff and defendant Friend W. Richardson as Building and Loan Commissioner of the State of California, in charge and control of the assets and business of defendant American Loan Society, pursuant to the Statutes of California relating to Building and Loan Associations. None of the other defendants have appeared herein but service of summons has been made on the Mortgage Company's receiver, the American Loan Society by its receiver, and the Title Guarantee and Trust Co.

"The essential facts for the purpose of decision herein are as follows: On March 12, 1930, plaintiff was the owner of a note for $12,000.00, secured by mortgage on Lot 16, Block 1, Lafayette Square, in the city of Los Angeles, executed by one Harold L. Shaw to American Mortgage Co. on May 13, 1925, and which note and mortgage had been sold and assigned by American Mortgage Co. to plaintiff and her husband on May 15, 1925. On March 12, 1930, plaintiff released said mortgage, and surrendered said note to the Mortgage Co., and in exchange therefor on March 14, 1930, received from American Mortgage Co. a note for $10,000.00, secured by a trust deed of the same property, executed on March 13, 1930, by the then record owner, A. W. Kundert, in favor of the Mortgage Co., and by said Mortgage Co. assigned and delivered to plaintiff without recourse. The record owner, A. W. Kundert, was an employee of the Mortgage Co. and the property in question had been deeded to him by the Mortgage Co. on March 13, 1930, to be held by him in trust for the Mortgage Co., title having been acquired by the Mortgage Co. previously by trustee's deed upon a sale under a trust deed executed by the former owner, Shaw, but which was second and subordinate to the mortgage which had passed to the ownership of plaintiff.

"On January 9, 1931, Roy H. Fish, as Secretary and Treasurer of the Mortgage Co., requested plaintiff in writing to bring to the office of the company the said $10,000.00 note and all papers connected with the

Kundert loan for repayment, and in response to which plaintiff, on January 12, 1931, delivered to the Mortgage Co. the Kundert note and trust deed for collection. and received a written receipt of the Company, signed by Roy H. Fish as Secretary-Treasurer, acknowledging receipt thereof 'for collection'.

"On January 15, 1931, the Mortgage Co. produced the note and the trust deed to the trustee named therein, viz., Title Guarantee and Trust Company, a defendant herein, and requested a reconveyance, and such trustee did, without plaintiff's knowledge or consent, on January 16, 1931, execute and deliver a reconveyance which was thereafter recorded on January 19, 1931.

"In the meantime, and prior to December 15, 1930, the American Loan Society had paid over and delivered to the Mortgage Co. as and for the purchase of mortgages and deeds of trust, a sum of money in excess of $400,000.00, for which, on such date, no mortgages or deeds of trust had been delivered. On this date, Kundert, who, on March 13, 1930, had become record owner of the property in question by deed from the Mortgage Co., but who held title in trust for the Mortgage Co., made application to the Loan Society for a loan of $10,000.00 on this property, which application was approved, and on December 15, 1930, he made and delivered to the Loan Society, his note for $10,000.00 with his deed of trust on this property to secure the same, which deed was recorded on January 14, 1931, two days prior to the execution and five days prior to the recordation of the reconveyance under the former deed of trust owned by plaintiff and recently delivered to the Mortgage Co. for collection. No part of the plaintiff's note was paid by the maker, Kundert, nor by the Mortgage Co., but previously on October 30, 1930, the Mortgage Co. had placed on its books a purported credit in favor of plaintiff for the principal sum of her note and trust deed, without her knowledge or consent. Previously, on March 14, 1930, being the day following the date of conveyance of the title by the Mortgage Co. to him, Kundert made and delivered to the Mortgage Co. his deed conveying the title to said property, but which deed was not recorded, but held in the Mortgage Company's files until discovered by the Receiver for that Company, subsequently appointed on April 7, 1931, by the United States District Court.

"On October 2, 1931, the Loan Society filed its notice of default on the note and trust deed, last executed by Kundert in its favor on December 15, 1930, and thereafter a sale under such trust deed was had at which a deed was issued by the trustee to the Loan Society and recorded on February 8, 1932, in whom the record title still is vested, subject only to the official taking of all its assets and business by the Building and Loan Commissioner, defendant herein, on April 6, 1931, and who, without previous knowledge of any claim to the property by plaintiff has, since receiving such deed, expended in repairing, operating and protecting the property the sum of $1,830.55. It is further made to appear from the stipulation of facts that when plaintiff delivered her note and trust deed to the Mortgage Co., said Roy H. Fish informed her it would be some time before collection could be had, and that frequently thereafter she made inquiries of him concerning the collection, to which his reply was that the money had not been collected but was expected soon. That prior to the receivership proceedings of April, 1931, she reposed great faith and complete confidence in Roy H. Fish and in the Mortgage Co., and relied confidently on Fish's representations, and that prior to August 20, 1932, she had neither knowledge nor notice that Kundert was not the bona fide owner of the property, nor that the Mortgage Co. held Kundert's unrecorded deed of the property, nor that the Mortgage Co. had credited her on its books with any amount on account of her delivery to it of her note and trust deed, nor that Kundert had executed the note and trust deed to the Loan Society, nor that a reconveyance had been made by the trustee under her trust deed.

"It further appears that numerous investors had become owners of various forms of investments, credits or instruments, issued to them by the Loan Society, in good faith and in confidence in the integrity of the Loan Society, prior to the taking over by the Commissioner. And that exclusive of about $9,000.00 in investments held by directors of the Loan Society, all members are creditors of the Loan Society in good faith and in no way responsible for anything done in the management or control of the Loan Society.

"It is further made to appear by the stipulation that at the time plaintiff delivered her note and trust deed to the Mortgage Co. for collection, and when the application by Kundert for the loan, and his deed to the Loan Society were made, and when the reconveyance under plaintiff's trust deed was made and recorded, the Mortgage Co. and the Loan Society had four officers in common as to person, viz., Frank N. Fish, President of both; Roy H. Fish, Secretary and Treasurer of both; George X. Hickerson, First Vice President of both, and A. O. Kelliher, Second Vice President of both companies; and that the said Hickerson acted and signed as appraiser on Kundert's application for said loan, and that George X. Hickerson, First Vice President of both companies, together with Frank N. Fish, President of both companies, A. O. Kelliher, Second Vice President of both companies, Roy H. Fish, Secretary-Treasurer of both companies, O. S. Holmes, Director of the Loan Society, Alexander Patterson and Chris Koch, Directors of both companies, all signed approval of said application.

"It also is made to appear that during all times here involved, the stock of the Loan Society comprised 1,000 shares, of which the Mortgage Co. owned 828 shares, the remaining 172 shares being held by the wife of George X. Hickerson, the Estate of Robert J. Gardner, deceased, and O. S. Holmes; and that all the directors of the Loan Society were also directors of the Mortgage Co., except that after October 8, 1930, Frank N. Gregory was a director of the Mortgage Co. only, and O. S. Holmes of the Loan Society only.

"Bearing in mind that the Mortgage Co. was under obligation to supply the Loan Society with $400,000.00 worth of mortgages on trust deeds, and that on October 20, 1930, the Mortgage Co. had made a false credit entry of $10,000.00 on plaintiff's account, it is significant that when these officers and directors, common to both companies, on December 15, 1930, approved Kundert's application for a loan of $10,000.00 on this property, they also approved the following condition in such application, viz., 'The money is to be paid out subject to the above conditions, as follows: The entire net proceeds of this loan to be used in repayment of present encumbrances now of record against the property herein described and held by the A. M. Co. of Calif.'

"On that date the trust deed of plaintiff was the encumbrance on record, and on that date Kundert made and delivered to the Loan Society his note for $10,000.00 secured by trust deed, pursuant to the approved loan agreement. Following which, on January 9, 1931, the Mortgage Co. called in plaintiff's note and trust deed for payment, and on January 12, 1931, received and receipted for the same for collection. On January 14, 1931, the new Kundert trust deed to the Loan Society was recorded and on January 9, 1931, the reconveyance under plaintiff's trust deed was recorded. Plaintiff's note, endorsed by her, together with her trust deed, was on January 15, 1931, delivered by the Mortgage Co. to the trustee, Title Guarantee and Trust Co., a defendant herein, when request for reconveyance was requested. This leads to the conclusion that the note of plaintiff is still in the possession of the Title Co. as trustee, and that it is not paid, and is a subsisting obligation of its maker, but with its original security, the trust deed, wiped out on the record by the reconveyance. Instead of plaintiff having record security for her Kundert note of $10,000.00, in the form of a trust deed on the lot in question, the Loan Society received a trust deed on such lot to secure its Kundert note of $10,000.00, which trust deed it has caused to be enforced for default, resulting in legal title to the lot becoming vested in the Loan Society, free of any record encumbrance in favor of plaintiff.

"Another significant fact stipulated, and emphasized in argument by defendant, is that after the Federal Receiver was appointed for the Mortgage Co. in April, 1931, plaintiff, on November 18, 1931, filed a claim with said Receiver, as part of which she included this Kundert note and trust deed in an item reading: 'Securities delivered for collection on which payment has not been made * * * $10,000.00,' with a description thereof and a copy of the receipt therefor given her by the Mortgage Co.

"Finally it is stipulated that both the Mortgage Co. and the Loan Society are insolvent, and their assets, respectively, not sufficient to pay their debts, the Mortgage Company's assets being in the hands of a Federal Receiver, and the Loan Society's assets in the hands of the Building and Loan Commissioner, as a statutory receiver for liquidation under the state law.

"Upon this state of facts plaintiff claims that 'basically plaintiff's case rests upon the theory that the owner may always recover stolen property.' It is argued that the knowledge of the Mortgage Co. was knowledge of the Loan Society through the unity of the officials and directorate of the two companies; and that by the fraudulent acts of such common officers, plaintiff was deprived of her security, and the Loan Society enabled to acquire its substitute or successor security, which later was transformed into record title in fee by process of trustee's sale.

"Defendant, the Building and Loan Commissioner, concedes the general rule that the owner may recover from innocent third parties property which has been transferred by an agent in violation of his duty to his principal, but claims an exception to the general rule in favor of the innocent third party in cases where the agent is invested with apparent authority to dispose of the property, and held out by the principal as possessing such authority, in which cases, upon wrongful transfer to an innocent party, redress will be denied the owner against such innocent party, notwithstanding the agent's wrongful act, for the reason that 'where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.' (Civ. Code, § 3543.)

"That neither the rule stated by plaintiff nor its exception as stated by defendant are applicable in this case is manifest under the facts. Neither the note nor trust deed of plaintiff was transferred by the Mortgage Co. to another, nor has the Loan Society ever received the same. The Mortgage Co. wrongfully caused a reconveyance under the trust deed to be made and recorded, and delivered the note to the trustee with the trust deed, solely for the purpose of reconveyance, and such trustee, Title Guarantee and Trust Co., defendant herein, presumably still has possession of both. What the Loan Society received was another and different note and trust deed, the only thing in common to the two items of property being the real property described in each trust deed.

"Whatever of relief plaintiff may be entitled to under these facts must be predicated on broader grounds of equity and upon the establishment of what may well be called a conspiracy to defraud her of her property, participated in by both the Mortgage Co. and the Loan Society as voluntary actors with knowledge of the wrongful purpose and joint participation in the acts committed to accomplish such purpose.

[1] "That there was such a conspiracy chargeable against both companies, as legal entities, there can be no doubt after consideration of all the facts. The knowledge of its agents acquired while acting for and on behalf of the Mortgage Co. must be imputed to that company. Likewise the knowledge of its agents acquired while acting in its behalf, must be imputed to the Loan Society. The agents of each company being the same, acting at the same instant in dual capacities in the transaction of their principals' business inter sese, were carriers of such knowledge to both principals synchronously, with the result that each company principal is charged with all the knowledge and acts of its agents, gained or performed in transacting the business of the respective companies. McKenney v. Ellsworth, 165 Cal. 326, 132 P. 75; Williams v. Hasshagen, 166 Cal. 386, 393, 137 P. 9; National Bank of San Mateo v. Whitney, 40 Cal. App. 276, 180 P. 845; Live Oak Cemetery Ass'n v. Adamson, 106 Cal. App. (Supp.) 783, 288 P. 29.

"The state of facts does not present a case where an agent gains knowledge in the commission of acts in which he has an interest hostile and adverse to his principal, which furnishes basis for an exception to the general rule, announced in the above-cited cases, but clearly herein all the acts of the common agents of both companies were conceived, arranged and performed for the benefit of the respective companies—not for the agent himself—and each company derived and retained the benefit of the acts in question. The Mortgage Co. received a credit of $10,000.00 on its $400,000.00 advance, and the Loan Society received a note for $10,000.00, secured by a trust deed on the property, of which plaintiff was deprived as security.

"From the foregoing it follows that in so far as the Mortgage Co. and the Loan Society, as corporate entities, are concerned, both had knowledge of the fraud perpetrated on plaintiff, both were recipients of benefit therefrom, and both, by their legal and corporate agents, participated therein.

"If the Loan Society were free and doing business under the law and in regular course, this conclusion would determine the rights and duties of the parties herein, but, it appears that subsequent to the time when this fraud was accomplished, the Loan Society was taken over under the law by the defendant Commissioner for liquidation, and he now claims such a change of status in the affairs affecting the rights and duties previously existing between plaintiff and the Loan Society has occurred in the eyes of the law, that notwithstanding the culpability of the Loan Society, the investors therein, as creditors thereof, have in turn become innocent third parties in respect to plaintiff and her claims; that the Commissioner, as a liquidating receiver, took the assets of the Loan Society, including the property here involved, under the law which operated as an equitable attachment, fixing and determining the rights of all persons claiming to share in such assets as of the date of taking. And that having so taken prior to the commencement of an action herein by plaintiff, the rights of innocent creditors of the Loan Society are paramount to those of plaintiff, and may be asserted by such receiver, even though they would not be available to the Loan Society. And here again, the defendant Commissioner claims that there attaches and becomes operative in favor of the creditors of the Loan Society, whom he represents as receiver, the rule or maxim in equity that if one of two innocent parties must suffer through the fault of a third, he, by whose conduct the fraud was made possible, should bear the loss.

[2] "It seems to be established by the weight of authority, that while an operating receiver takes the assets of a corporation subject to all equities outstanding against it, a liquidating receiver acts in the dual capacity of representing the corporation, as such, and also its creditors, and that in the latter capacity, he may claim rights and advance defenses, not available to the corporation.

"The authorities, however, do not extend this claim to include all cases where a loss will be sustained by creditors if a third party's claim is allowed against the insolvent, but only to include such cases as where the dealings of the insolvent were in fraud of the creditor's rights, or where the dealings in question were had directly between the third party claimant and the insolvent corporation. All of the authorities cited by defendant on this phase of the case fall into one or the other of such classes. All deal with positive acts either of the insolvent in fraud of its creditors, or in direct dealings with the claimant, and in them it is announced that the receiver may interpose defenses, such as illegality, estoppel, laches and other equitable defenses, or assert claims on behalf of the innocent creditors, as against such third party, which the corporation he represents may not be permitted to do.

[3] "In the case at bar, plaintiff had no part in the fraudulent dealings. She was innocent of knowledge of their transaction or existence until August 20, 1932. Nothing can be charged to her by way of act or conduct in fraud of the creditors. By the fraud here in question, her note has been delivered into the hands of the Trustee named in her trust deed, and her trust deed security has been destroyed by a reconveyance by that Trustee. She seeks to recover nothing from the assets of the Loan Society, but from the Trustee she seeks her note and trust deed, and from the court a decree annulling the deed of reconveyance by that Trustee, and a reinstating of her trust deed to its former status, both as a subsisting instrument and on the record. It is true if such is done, the title now held by the Loan Society will become burdened with such trust deed, and to that extent, its creditors will suffer a prospective loss. This loss, however, would not be direct but consequential, and therefore could not be made amenable to the rule in equity relating to allocation of loss between two equally innocent parties, first, because plaintiff's rights cannot be denied simply because some third party will suffer consequentially by a judgment against one who has violated such rights, and second, because it cannot be said that plaintiff in any wise was at fault or negligent in leaving her note and trust deed with the Mortgage Co. for collection.

"In connection with this latter proposition, it is claimed by defendant that plaintiff was guilty of negligence in endorsing and delivering her note to the Mortgage Co. for collection, thus furnishing that Company with the indicia of title upon which a purchaser in good faith or other innocent third party might rely, with the result of an estoppel arising against plaintiff. Upon examining the Kundert application for a loan, which in fact was the Mortgage Company's application by proxy, it is found recited therein in section 34 that the Loan Society is 'ordered to pay full amount of the A. M. Co. of Calif.'s demand to release present encumbrances now of record against the above described property and charge this loan account.' And in section 44 it is recited that the proceeds of the loan are to be used 'in repayment of present encumbrances now of record against the property herein described and held by the A. M. Co. of Calif.'

"The officers and directors of the Mortgage Co. knew that the plaintiff held the encumbrance, and knew of the loan account. The same officers as officers and directors of the Loan Society, who examined and passed on this loan application, knew the same things, and therefore the Loan Society knew them, and when the loan was approved and the note and trust deed accepted, the Loan Society was charged with full knowledge of the true status of the plaintiff's note and trust deed, and that it was then owned by plaintiff. Furthermore, when the Loan Society trust deed was recorded, the former trust deed of plaintiff was still of record. While it may be claimed that plaintiff by endorsing and delivering the note to the Mortgage Co. for collection made it possible for the Mortgage Co. to commit fraud, nevertheless it must also be determined that the Loan Society was aware of plaintiff's ownership of the note and trust deed and that it was superior to its newly recorded trust deed. And by directing that such previous loan should be released and charged to the Mortgage Company's loan account, it knew that no money was to be passed by the Loan Society to the Mortgage Co. with which to discharge plaintiff's note.

"In respect to the defendant's claim that the maxim in equity above referred to enlarges the field of defense over that defined by section 3543 of the Civil Code wherein the basis of the defense is negligence of the plaintiff—not that plaintiff made it possible for the fraud to be committed, in all the cases cited from California, negligence of plaintiff is found as the basis of the estoppel and the ground of denying relief.

[4] "It is also claimed by defendant that plaintiff, by her action herein, is in effect, seeking to rescind the endorsement and delivery of the note to the Mortgage Co., and that such can not be done after insolvency of the Mortgage Co., and cites many cases in support of its claim. It is sufficient to say, after examining all the authorities cited, that, while there is some conflict among authorities, it is the declared law in California that the right to rescind is not to be denied on the mere fact of insolvency of the corporation but for the reason that the party seeking rescission has participated in the management of the insolvent corporation, or for some other particular cause such as would create an estoppel, or some other doctrine analogous to equitable doctrine of laches. People v. California, etc., Trust Co., 19 Cal. App. 414, 418, 126 P. 516, 520. Plaintiff herein falls within neither of these classes. [Burningham v. Burke, 67 Utah, 90, 245 P. 977, 46 A. L. R., page 466—this authority inserted by this court.]

[5] "As creditors of the Loan Society, the investors whom the defendant Building and Loan Commissioner represents, and for whom he claims a status of innocent third parties, were all creditors prior to the date of the perpetration of the fraud herein. There is no evidence in the stipulation of facts from which it could even be inferred that any one of them became an investor after January 19, 1931, the date of recordation of the reconveyance under plaintiff's trust deed. The Mortgage Co. went into the hands of a Federal Receiver on April 7, 1931, and the Loan Society was taken over by the statutory receiver on April 6, 1931. It must be concluded then that none of these creditors parted with anything upon the assumption that the Loan Society was the owner of the new note and trust deed, and that it constituted part of the assets of the Loan Society. On the contrary, it appears that these creditors have at present the benefits of the fraud by which plaintiff lost her security, and by which the Loan Society gained the property in question, and that they suffered no detriment by reason of reliance upon any acts of plaintiff in endorsing and delivering her note to the Mortgage Co. The Building and Loan Commissioner holds property free and clear of plaintiff's trust deed, under a state of facts which neither he, as receiver, nor the creditors of the Loan Society are entitled in equity or good conscience to hold and keep free and clear and as against the burden of plaintiff's trust deed. Dox v. R. E. Lomax Co., 29 Cal. App. 718, 721, 722, 156 P. 874.

[6-8] "Defendant also claims that by filing her claim with the receiver of the Mortgage Co. covering the amount of the note she delivered to that Company for collection, plaintiff has elected her remedy and should be now precluded from claiming this, a different one.

"The Federal Receiver was appointed on April 7, 1931, within three months after plaintiff delivered her note for collection. During these months, it was repeatedly represented to her that the note was not yet collected. Without any knowledge that her note had been delivered to the Trustee and that the Trustee had reconveyed, she presented a claim to the Mortgage Co. receiver on November 18, 1931, for $21,000.00, comprising items, among which she recites: 'Securities delivered for collection on which payment has not been made * * * $10,000.00', accompanied by a copy of the Mortgage Company's receipt. It was not until August 20, 1932, that she learned of the delivery of her note to the Trustee and of the reconveyance and its attendant fraud. On September 28, 1932, she commenced this action. The filing of the claim was in the ordinary course of receivership proceedings, and was equivalent only to a demand for the securities, and can not be held in law to be an election of remedy which would preclude the party from subsequently asserting another. To constitute a bar, the two remedies must be inconsistent on the same state of facts, and knowledge of the existence of the facts must be present. Furthermore, the doctrine of election of remedies is applicable only where the remedy first sought is a real remedy available to the plaintiff. If the plaintiff is mistaken and undertakes to avail herself of a remedy to which she is not entitled, she is not prevented from subsequently availing herself of the one to which she is entitled under the facts of the case. The doctrine is generally regarded as an application or extension of the law of estoppel, and to make it applicable there must be present a showing of such inconsistency of position on a given and known set of facts as to afford a bar by the election of one over the other in the first instance. 10 Cal. Jur., Election of Remedies.

[9, 10] "Since taking title to the property here in question, the Commissioner has expended a substantial sum of the Loan Society's money in repairs and betterments, besides the money expended in acquiring title through the enforcement of the trust deed. This is asserted as an additional equitable reason why plaintiff should be denied relief, with suggestion that such amount should be repaid should plaintiff prevail. Plaintiff opposes this and demands an accounting for rents collected by the Receiver. It seems clear that neither contention is sound. What defendant expended was as owner on its own property for its own benefit, and in return it has received the rents from the property. Plaintiff certainly has no claim whatever over the rents, nor is there any method created by law, nor any scheme in equity by which plaintiff's rights or interest in the property may be subjected to this claim. It did not arise through plaintiff's fault, and cannot be made a lien against the trust deed interest of plaintiff nor upon the property. If there exists any loss after crediting the rents against the cost of maintenance and repair by the defendant, it must of necessity be borne by defendant.

"From the foregoing it follows that plaintiff is entitled to recover possession of her note and trust deed from the Title Company upon demand therefor, and for a decree annulling the request for reconveyance and the reconveyance executed by the Title Company and recorded in the office of the County Recorder, and for a decree establishing plaintiff's note as a valid and subsisting obligation, and that the trust deed securing said note is a valid and subsisting encumbrance upon the real property described therein, and is prior and superior to the trust deed encumbrance in favor of the Loan Society and to the Trustee's deed conveying title to the Loan Society, and superior to all title or interest of the Loan Society in and to said property."

[11] The demand of plaintiff is not such a "claim" that it must be first presented to the commissioner pursuant to section 13.16 of the California Building and Loan Act (Deering's General Laws, vol. 1, pp. 509, 510, Act 986), before an action may be founded upon it. See Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Newport v. Hatton, 195 Cal. 132, 231 P. 987, and Wahlefeld's Estate, 105 Cal. App. 770, 288 P. 870.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.

McCONNELL v. HERBERT et al. *

Civ. 9312.

District Court of Appeal, First District,
Division 2, California.
May 18, 1934.

Rehearing Denied June 16, 1934.

Hearing Granted by Supreme Court July 16, 1934.

1. Corporations 🔑248.

Under agreement whereby mortgagee promised to forbear foreclosure of trust deed securing payment of note for $36,000 in consideration of corporate mortgagor's promise to pay interest and payments of $1,000 and $9,000 on principal at specified times, and payment of $9,000 should be covered by note of stockholders, and interest and principal paid in the meantime on either note should be credited on other note, stockholders *held* discharged of liability on their $9,000 note by payment of $3,006.12 in cash thereon and by $28,000, price for which mortgagee bid in mortgaged property at foreclosure sale.

2. Contracts 🔑155.

Ambiguous agreement to forbear foreclosure of trust deed must be construed against mortgagee who wrote agreement.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action by Etta M. McConnell, an incompetent person, by Creed Wachman, her guardian, against F. W. Herbert, F. R. Cyriacks, and another. From a judgment in favor of plaintiff, the second named defendant appeals.

Reversed, with directions.

W. I. Gilbert, of Los Angeles, for appellant.

Hinsdale, Otis & Johnson, of Sacramento, and Moote & Longcroft, of Los Angeles (Rob-

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*For subsequent opinion see 38 P.2d 781.

ert W. Jennings, of Sacramento, of counsel), for respondent.

STURTEVANT, Justice.

In an action to recover the amount due on a promissory note the trial court rendered its judgment against the makers, one of whom has appealed. The plaintiff's complaint was in the ordinary form. It alleged the execution of a note in favor of the plaintiff on July 1, 1926, for the principal sum of $9,000, payable July 1, 1927, and bearing interest at 7 per cent. In their answers the defendants set up certain facts which they claimed discharged them. The findings are long and it is unnecessary to quote them in full. A substantial summary is as follows: The Auburn Creek Farms Company, hereinafter called the corporation, owned property in Placer county. The defendants in this action were the directors and only stockholders thereof. On July 10, 1922, the corporation borrowed from the plaintiff $36,000 on its promissory note. By the terms of that note it was payable three years after date, together with interest at 7 per cent per annum. To secure the payment of the note the corporation, as trustor, executed a trust deed to C. F. Dillman and F. H. Pierce, as trustees, in favor of the plaintiff, as beneficiary. Among other provisions of the trust deed there was incorporated the power to sell in the event of a default. On May 27, 1926, the trustor was in default in the payment of its interest and foreclosure proceedings had been commenced. On that date the plaintiff through her attorneys wrote a letter to the corporation as follows:

"Gentlemen: In reference to the note and deed of trust which I hold against you, dated July 10th, 1922, and recorded July 24th, 1922, in Book 187 of Trust Deeds at Page 418 Placer County Records, would say—

"If you will pay on or before July 1st, 1926, the interest up to July 10th, 1926, and $1,000 on the principal, I will not proceed with the foreclosure of the Deed of Trust unless you make default in one of the following payments, that is to say: that you pay the semiannual installment of interest due January 10th, 1927, on or before January 1st, 1927, and that on or before July 1st, 1927, you pay $9,000 on the principal and the interest up to July 10th, 1927. In the meantime the $9,000 payment of July 1st, 1927, is to be covered by an individual joint and several promissory note of Mr. Herbert, Mr. Elliot and Mr. Cyriacks, three of your stockholders, due on or before July 1st, 1927, with interest at 7%, payable at maturity, and any payments made on the note to be credited on your indebtedness to me. Any payments made on the principal or interest on your indebtedness to me in the meantime, to be credited on the note of these three stockholders, except the July 1st, 1926, payment, and except that the interest of January 1st, 1927, if paid by you will pay interest on the $9,000 up to January 10th, 1927. If the $9,000 is paid on the principal and the interest paid on your notes on or before July 1st, 1927, then I will not enforce the foreclosure of said Deed of Trust before July 1st, 1928, unless you fail to pay the interest due in January, 1928.

"In other words—I am offering to allow the note to stand without foreclosure if you pay $1,000 on the principal by July 1st, 1926, $9,000 on the principal on or before July 1st, 1927, and keep up the interest until July 1st, 1928, at which latter date I will expect the balance of the principal and interest.

"In the meantime you should pay my attorneys on account of services and costs in connection with the above matter."

In pursuance of that offer the corporation did, on July 10, 1926, pay the sum of $1,000 on the principal of the note and at the same time the defendants executed the above-mentioned note for $9,000. Afterwards the corporation paid the interest on the $36,000 note to January 1, 1929. By the contract of the parties the payment last mentioned was to be considered as a payment of the interest to January 1, 1929, on the note sued on in this action. On August 2, 1928, there was paid on the principal of the note in suit $3,006.12, which sum was credited on the $36,000 note also.

The consideration for making the note in suit was that the plaintiff would forbear foreclosure proceedings until after July 1, 1928. After that date the plaintiff commenced proceedings to foreclose the trust deed. She did so by giving notice on November 12, 1929, and causing the trustees under the terms of the deed to sell the properties described in the deed. At the time of the sale there was due $36,791.02. The plaintiff bid in the property for $28,000. The deficiency was $8,791.02. After making its findings of fact the court drew conclusions of law that the plaintiff is entitled to judgment against the defendants for the sum of $9,000, together with interest at 7 per cent. per annum from January 10, 1927, to August 2, 1928, less the sum of $3,006.12 paid on that date. It further directed that said payment be applied first to the payment of interest due and the balance applied to the principal. In its judgment it computed the balance to be $8,291.95.

[1] After reciting the foregoing facts, the defendant Cyriacks says: "We believe it obvious that the $9,000 note was executed merely to cover the corresponding payment in that amount to be made by Auburn Creek Farms Company on the $36,000 note under the terms of the extension agreement." We think that contention must be sustained. In her letter quoted above, the plaintiff stated: "In the meantime the $9,000 payment of July 1, 1927, is to be covered by an individual joint and several promissory note of Mr. Herbert, Mr. Elliot, and Mr. Cyriacks, three of your stockholders, due on or before July 1, 1927, with interest at seven per cent, payable at maturity, and any payments made on the note ($9,000 note) to be credited on your indebtedness ($36,000 note) to me. Any payments made on the principal or interest on your indebtedness ($36,000 note) to me in the meantime, to be credited on the note ($9,000) of these three stockholders; except the July 1, 1926, payment and except that the interest of January 1, 1927, if paid by you will pay interest on the $9,000 up to January 10, 1927." (All of the parentheses are ours.) However, the context contains expressions which clearly justify the parenthetical expressions. In the first place it is perfectly clear that the $36,000 note and the $9,000 note were different pieces of evidence of one indebtedness. Down to January 10, 1929, the interest was paid on the $36,000 note. According to the plaintiff's letter, interest paid on either note after July 1, 1926, was to be credited as interest on the other note. On August 3, 1928, $3,006.12 was paid as principal and was credited on the $36,000 note. By the same letter principal paid on one note was to be credited on the other. When at the sale held pursuant to the terms of the trust deed the plaintiff bid in the property for $28,000, the effect of the bid was the same as though she had received $28,000 in cash. John P. Mills Organization v. Unger, 215 Cal. 308, 9 P.(2d) 833, 82 A. L. R. 758. Taking up the transaction by its four corners, it is perfectly clear that on the 27th day of May, 1926, the plaintiff sought to compel a payment of $10,000 on the $36,000 note. To accomplish that result she required that Auburn Creek Farms Company pay $1,000 on or before July 1, 1926, and $9,000 on or before July 1, 1927. If at any time the $9,000, in principal, had been paid before the foreclosure of a trust deed manifestly it would have entirely discharged and paid the $9,000 note. The mere fact that it was not paid in cash and that the plaintiff foreclosed and bid in the property at $28,000 in no manner changed the payment from being one on the principal.

[2] As stated above, the main object of the plaintiff was to force a payment on the principal of $1,000 and another payment on the principal of $9,000. In her letter dated May 27, 1926, it was provided that the $9,000 be paid on or before July 1, 1927. That payments made before the principal was so reduced would be credited two ways was a general expression. It may be said that some doubt arises by use of the expression "in the meantime." Possibly so. But if any doubt does so arise it must be resolved in favor of the defendant Cyriacks. The plaintiff wrote the letter. Its provisions will therefore be construed against her. There was nothing in the letter, nor in the acts of the parties, showing or tending to show that it was only such moneys as were paid on or before July 1, 1927, which should be credited on both notes. That the parties so understood the language of the letter is evidenced by at least one of their subsequent acts. On May 2, 1927, the plaintiff gave an extension of time. It was a formal document. It contained no words limiting the double application of payments, but granted the extension regarding both notes. Furthermore, it recited the fact that both notes were part of the same indebtedness.

At the time of the sale the principal of the $36,000 note had been reduced to $32,000. But there was owing in principal, interest and costs $36,791.02. When the $28,000, the proceeds of plaintiff's bid, was applied, it paid $1,897.71 in accrued interest, $2,893.25 in accumulated charges and costs, and $23,208.98 on the principal. The evidence is clear that the proceeds were so applied. It follows that, under the terms of the plaintiff's letter, the $28,000 payment was to be applied on both notes just the same as any other payments and, being so applied, it is clear that the $9,000 note has been paid, both principal and interest.

The judgment is reversed, and the trial court is directed to reframe its findings and enter a judgment in accord with the views herein expressed.

We concur: NOURSE, P. J.; SPENCE, J.

138 Cal.App. 540

RASMUSSEN v. FRESNO TRACTION CO. et al.

Civ. 1280.

District Court of Appeal, Fourth District, California.

May 15, 1934.

Hearing Denied by Supreme Court July 12, 1934.

1. **Railroads 🔑327(1).**
Person approaching crossing of suburban railroad must stop, look, and listen for approaching trains or cars and yield right of way.

2. **Railroads 🔑320.**
Engineer or motorman in charge of suburban train, when approaching highway crossing, may presume that person approaching crossing will stop, look, and listen and yield right of way.

3. **Railroads 🔑333(1).**
Motorist crossing track of suburban railroad in front of car which he saw approaching was contributorily negligent.

4. **Evidence 🔑588.**
In determining question of last clear chance in collision between automobile and electric car, jury is not bound to accept evidence of motorman that he did not realize motorist's position of danger until too late to avoid collision, where other evidence might justify contrary conclusion.

5. **Negligence 🔑83.**
General rule is that injured party cannot invoke last clear chance doctrine, if by using ordinary care he could have extricated himself from dangerous position, if there was concurrent and contemporaneous negligence by injured party and one causing injury, or if injured person was guilty of negligence which at moment of collision actively contributed to injury.

6. **Negligence 🔑83.**
"Last clear chance doctrine" presupposes plaintiff's negligence as result of which he is in dangerous situation from which he cannot escape by ordinary care, and that defendant knowing of plaintiff's dangerous situation and inability to escape has last clear chance to avoid injury by exercise of ordinary care and fails to avail himself of opportunity so presented.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

7. **Appeal and error 🔑1170(9).**
Trial 🔑253(4).
In action for injury at suburban railway crossing, instruction on last clear chance omitting element that injuring party is only liable where he can avoid injury by exercise of ordinary care *held* prejudicially erroneous, where defendant's liability arose solely under last clear chance doctrine (Const. art. 6, § 4½).

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Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by H. B. Rasmussen against the Fresno Traction Company and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellants.

David E. Peckinpah, of Fresno, for respondent.

MARKS, Justice.

This action grew out of a collision between an automobile driven by respondent and a street car of the Fresno Traction Company, operated by W. E. Zoerb. The accident occurred shortly before 12 o'clock noon on the 22d day of February, 1932, at the crossing of West avenue by the street car tracks, just outside the city limits of the city of Fresno. West avenue runs in a northerly and southerly direction. It is intersected at right angles by the double tracks of the Fresno Traction Company, which occupy its private right of way both east and west of the intersection.

Respondent was seriously injured in the accident, and a judgment of $2,000 was rendered in his favor. Appellants urge that respondent was guilty of contributory negligence as a matter of law in the operation of his automobile, and that the trial court erroneously instructed the jury upon the doctrine of the last clear chance.

The evidence is conflicting in but two particulars, namely, the descriptions given by respondent and Zoerb concerning the happening of the accident.

Respondent testified that he lived on a chicken ranch about a mile north of the intersection; that at about 11:30 o'clock on the morning of February 22d he left his home in his automobile to deliver half a case of eggs to a customer on Belmont avenue, a short distance southerly from the intersection; that the eggs were in a packing case resting on the floor between the front and rear seats of the automobile; that he had traveled over the intersection a great many times and was familiar with it; that he drove southerly on

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West avenue at a speed of about 15 miles an hour; that, when he was at a point about 10 feet northerly from the southerly tracks, he brought his automobile almost to a stop and shifted into second gear; that he looked in both directions for approaching cars; that none was approaching from the east, but that the car involved in the accident was about 300 feet westerly from the intersection and traveling easterly on the southerly tracks; that he did not know the speed at which the street car was traveling; that, believing he could cross safely, he proceeded at a speed of about 5 miles per hour without again looking at the approaching street car; that, while traveling in second gear at a speed of 5 miles an hour, he could have stopped his automobile almost instantly; that the crossing was rough and he continued at the rate of 5 miles an hour in order to keep from breaking the eggs; that the street car struck the rear of his automobile, practically demolishing it and seriously injuring him. The forward 8 feet of the automobile were not injured in the collision.

Zoerb testified that he was proceeding in an easterly direction on the southerly tracks of the traction company's right of way at a speed of 20 miles an hour; that he was making change for a passenger; that, when this was completed, he was about 75 feet from the crossing; that he then looked ahead and saw respondent's automobile traveling southerly on West avenue at a point about 125 feet from the intersection and at a speed of from 30 to 35 miles per hour; that he proceeded on his way, and, when the street car was about 30 feet from the oiled portion of the intersection, the automobile was traveling southerly without reducing its speed; that he then for the first time realized that respondent was intending to proceed across the intersection and that a collision was imminent; that he applied his air brakes, rang the gong of the street car, but could not stop, and the collision ensued; that the street car traveled 40 feet after it came into contact with the automobile.

The trial judge gave the following instruction to the jury. Appellants maintain it is reversible error.

"Even though you find from the evidence that plaintiff was negligent in the beginning and that by reason of his negligence placed himself in a dangerous position from which he was unable to extricate himself by the use of ordinary care then if the defendant W. E. Zoerb discovered the plaintiff's peril and neglected to do some act within his power, which if done would have prevented the injury, you must find for the plaintiff and against the defendants. In other words if plaintiff negligently started his automobile across the track of the defendant Fresno Traction Company in the path of the oncoming car being driven by defendant W. E. Zoerb, and was thereafter by the use of ordinary care, unable to avoid a collision with said street car, then if you find that the defendant W. E. Zoerb discovered plaintiff's peril in time to avoid a collision by some act and that he neglected to do that act, then you must find for the plaintiff."

[1, 2] In approaching the question of the contributory negligence of respondent and the applicability of the doctrine of the last clear chance, which involves the correctness of the challenged instruction, we must determine the reciprocal duties which the law requires of the driver of an automobile approaching a crossing, and of the operator of the street car also approaching a crossing while traveling on the private right of way of the traction company outside of an incorporated city. They are clearly defined in the case of Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992, 994, where it is said:

"In the recent case of New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, it was declared that the rule governing the duty of a person approaching a suburban electric railroad track at a crossing was the same as that required of a person approaching or crossing the tracks of a steam railway, citing Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 P. 16; Heitman v. Pacific Electric Ry. Co., 10 Cal. App. 397, 102 P. 15; Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 115 P. 320; Phillips v. Washington & R. R. Co., 104 Md. 455, 65 A. 422, 10 Ann. Cas. 334. In the foregoing cases and in others yet to be cited the rule is that it is the duty of a person approaching the crossing of a suburban railroad being operated outside of the limits of cities, whether the same are steam or electric railroads or are railroads upon which motor cars propelled by gasoline are being used, to stop and look and listen for such approaching trains or cars and to yield the right of way to such trains or cars. Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 P. 926; Murray v. Southern Pac. Co., 177 Cal. 1, 169 P. 675; Herbert v. Southern Pac. Co., 121 Cal. 227, 53 P. 651; Griffin v. San Pedro, L. A. & S. L. R. Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 P. 21; Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359; Simoneau v. Pacific Elec. Co., 159 Cal. 494, 115

P. 320; Loftus v. Pacific Elec. Ry. Co., 166 Cal. 464, 137 P. 34; Heitman v. Pacific Elec. Ry. Co., 10 Cal. App. 397, 102 P. 15; Baker v. Southern Pac. Co., 184 Cal. 357, 193 P. 765; Young v. Southern Pac. Co., 189 Cal. 746, 210 P. 259, 262. In the case last above cited the court, in applying the foregoing rule to the facts of that case, said: 'The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track to look and listen for a possible approaching train. And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent.' And upon a former appeal of the same case this court, upon the same facts, held that such a person would be negligent as a matter of law. Young v. Southern Pac. Co., 182 Cal. 369, 190 P. 36.

"Turning from the right and duty of persons approaching upon a highway at its intersection with a suburban railroad to the right and duty of the engineer or motorman in charge of such suburban train or car in approaching such intersection, this court has held in numerous and uniform cases that such engineer and motorman has the right to presume that a person thus approaching the crossing of a suburban railway will perform the duty which the law imposes upon him under the foregoing authorities, and in the reasonable exercise of his faculties of observation and caution, will not essay such crossing until the danger due to the approaching train or car has passed, and it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard. In the case of Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359, the rule is thus stated: 'When a person is approaching a place of danger, and all the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue in his approach until he gets into the very place of danger, when it is obvious that he could * * * with the least care, stop and avoid it.' "

[3] Appellants contend that respondent was guilty of negligence as a matter of law in driving onto the street car tracks in front of a street car which he saw approaching on the private right of way of the traction company. This case is factually similar to New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, 73, except that here the street car tracks were level and there is no showing that the street car was coasting or was being propelled at an excessive rate of speed. In that case, in holding the driver of the motor vehicle guilty of contributory negligence as a matter of law, the Supreme Court said:

"There is no escape from the conclusion, it seems to us, from the uncontradicted evidence as above outlined, that the driver of the truck, although fully aware of the approach of the car, closed his eyes to the danger necessarily involved in any attempt to cross the track, and blindly drove his truck into the path of the oncoming car, and was, therefore, guilty of contributory negligence as a matter of law. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 P. 16.

"Admittedly the driver of the truck, not only could see, but actually did see, the car as it came down the descent at an excessive rate of speed. And if he could, as the evidence shows without contradiction, have stopped his truck at any time prior to the collision within a distance of 3 feet, then surely his failure to do so under the shown circumstances of an obvious and imminent danger was a failure to exercise that ordinary care which a reasonably prudent man is required by the law to exercise in such a situation. The failure of the driver of the truck to come to a stop upon the approach of the car is attempted to be justified by the admitted fact that he did not note the speed of the car, but relied upon the assumption that the car was going at its 'regular rate of speed,' and that therefore he had time to safely cross. It was the duty of the driver of the truck upon approaching the crossing to give way to the car, if necessary, to avoid a collision. Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 1, 5, 164 P. 798. * * * It was the duty of the driver of the truck to note the speed at which the electric car was approaching the crossing, and if, when the driver of the truck last looked at the approaching car, it was within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, it was undoubtedly negligence on the part of the driver to attempt to make the crossing. Martz v. Pacific Electric Ry. Co., supra.

"It is the rule in this state that, where the physical facts shown by the undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which was plainly open to his view, he is, as a matter of law, guilty of contributory negligence."

[4] Respondent, while not admitting his contributory negligence, urges that, if he be held guilty thereof, Zoerb had the last clear chance to avoid the injury and that the judgment must be affirmed. Appellants reply that the doctrine of the last clear chance does not apply to the facts before us, but that, if it be held to apply, the instruction given does not correctly state the law of that doctrine. The argument that the doctrine is not applicable may be divided into three heads: (1) That the undisputed testimony of Zoerb is to the effect that he did not realize the dangerous position of respondent until the street car was within 30 feet of the intersection, and that it was then impossible to avoid the collision; (2) that, had respondent used ordinary care, he would have extricated himself from his position of danger; (3) that the negligence of respondent continued up to the moment of the impact and actively contributed to his injury. The last two contentions are so closely related that they will be considered together.

It is true that the motorman testified that he did not realize the position of danger of respondent until the street car was within 30 feet of the intersection, and no witness contradicted this evidence by any direct testimony. However, it seems to be the rule that the jury is not bound to accept the evidence of the motorman upon this question, where there is other evidence in the record, either direct or circumstantial, from which the conclusion might be reached or the reasonable inference drawn that the motorman saw and realized the dangerous position of the injured party at a place where, by the use of ordinary care, he could have avoided the accident. Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Rocha v. Garcia, 203 Cal. 167, 263 P. 238; Zerbo v. Electrical Products Corp., 212 Cal. 733, 300 P. 825; Smith v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690, 691; Handley v. Lombardi, 122 Cal. App. 22, 9 P.(2d) 867, 868. In the last-cited case it was said: "The court instructed the jury on the last clear chance doctrine and appellant claims error on that ground. The case is on all fours with Smith v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690, 691, wherein it was held that the jury was properly instructed on the doctrine of last clear chance. * * * Specifically, appellant claims that since appellant testified, that he did not see the truck until he was almost upon it, there was no evidence from which the jury could find that he had actual knowledge of the danger of collision before it was too late to avoid it. A similar claim was disposed of in the Smith Case in the following language: 'The motorman testified that he did not see plaintiff on the tracks until the car was within some 30 feet of the wagon, and that the horses were then upon the track. It is contended that there is no other evidence in the record which would justify a contrary finding. The track, for some blocks leading to Third street, was straight; one could see for several blocks; the motorman himself admitted he could see for some 150 feet ahead. He was sitting on his chair at the front of the car, with his hand on the control, for several hundred feet while approaching the scene of the injury. The wagon was moving at the very slow speed of 3 miles per hour. The car was moving about eight times as fast, or some 25 miles per hour. The wagon had proceeded some 12 feet into the path of danger before being struck. Under all the circumstances * * the jury might have found that the motorman saw plaintiff in time to have avoided the injury, and while plaintiff was actually in peril.' The same inference could have been drawn in the case in hand."

In the instant case the motorman stopped his car within 70 feet from the place where he said he first realized the danger. In view of the conflicting evidence as to the position on the road of respondent and the evidence of Zoerb that he saw him when the street car was 75 feet from the intersection, the jury might have concluded that Zoerb then saw and realized that a collision was imminent and that respondent could not extricate himself when the street car was 75 feet from the point of collision, and that Zoerb could have applied his brakes immediately and stopped the street car before it came into contact with the automobile.

[5] As a general rule, it may be considered well established in this state that, if the in-

jured party by the use of ordinary care could have extricated himself from his dangerous position, or, if there was concurrent and contemporaneous negligence on the part of the injured and the one causing the injury, or, if the injured person was guilty of negligence which at the moment of the collision actively contributed to his injury, he cannot invoke the doctrine of the last clear chance. There are circumstances which either constitute an exception to this rule or to which it does not apply in all its strictness. The instant case seems to fall within those circumstances. The cases of Smith v. Los Angeles Ry., supra, and Handley v. Lombardi, supra, are factually similar to the instant case in so far as the applicability of the doctrine of the last clear chance is concerned. As petitions to have both causes heard in the Supreme Court were denied, we feel constrained to follow them on the question we are considering. In the Smith Case it was said: "Another situation which appellant contends should bar plaintiff from the benefit of the rule is where the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury. Young v. Southern Pac. Co., 189 Cal. 754, 210 P. 259. The law is well settled in this state that the rule cannot be applied to a situation where the negligence of the deceased continued to the moment of the impact and actively contributed to his own injury. The injured party being actively and contemporaneously at fault until the moment of the collision, he is barred from the right to recover for any act up to that time. Green v. Los Angeles T. Ry. Co., 143 Cal. 31, 41, 76 P. 719, 101 Am. St. Rep. 68. The liability is placed upon the party inflicting the injury only if, immediately before the actual infliction of the injury, the injured party was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care to extricate himself, and vigilance on his part would not have averted the injury. Young v. Southern Pac. Co., supra. In other words, the 'last clear chance' must be solely upon the part of the person inflicting the injury. If both parties have that chance it cannot be said that there is any 'last clear chance' at all. However, if plaintiff was oblivious to or unconscious of this position of danger, the question of his duty to extricate himself does not arise, and the doctrine is applicable. * * * We are satisfied that there is evidence in the record from which a jury could reasonably conclude that although plaintiff realized he was in a dangerous position, extrication was physically impossible, or they could have found that plaintiff was oblivious to or unconscious of his position of peril."

[6, 7] Appellants contend that the instruction which we have quoted on the doctrine of the last clear chance is not a correct statement of the law. The elements of the doctrine necessary for our measuring the sufficiency of this instruction are clearly stated in Bagwill v. Pacific Electric Ry. Co., 90 Cal. App. 114, 265 P. 517, 519, where it is said: "This doctrine presupposes that the plaintiff has been negligent; that as a result thereof he is in a situation of danger from which he cannot escape by the exercise of ordinary care; that the defendant is aware of plaintiff's dangerous situation under such circumstances that he realizes or ought to realize his inability to escape therefrom; that the defendant then has a clear chance to avoid injuring the plaintiff by the exercise of ordinary care and fails to avail himself of the opportunity so presented."

It should be observed that the injuring party cannot be held liable unless he can avoid the injury by the exercise of ordinary care. This rule is supported by practically all the cases we have already cited, and it is unnecessary to repeat them here. The instruction given entirely omitted this element of the doctrine. In that respect it was erroneous. We believe it was prejudicially erroneous with the provisions of section 4½ of article 6 of the Constitution in mind. The liability of the appellants arose solely under the doctrine of the last clear chance. That being the case, they were entitled to have the jury properly instructed as to its elements so that their liability could be intelligently determined by that body. The evidence shows that the motorman applied his air brake in his effort to stop the street car, but did not apply the emergency brake. Although a witness testified that the stop was made as quickly with the air brake as could have been done with the other or both, still the instruction required Zoerb to do everything possible to stop his car. The jury might have concluded that under the instruction he was required to apply both brakes, while, if a proper instruction had been given, they might have concluded that his application of the air brake alone was the exercise of ordinary care by him.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

138 Cal.App. 618

Ex parte DAVIS.

Cr. 1807.

District Court of Appeal, First District,
Division 2, California.
May 23, 1934.

1. Habeas corpus 🔑21.

One held under order of commitment of magistrate can obtain discharge by habeas corpus where there was no legal evidence of commission of crime or of prisoner's guilt.

2. Habeas corpus 🔑85(1).

One committed to answer charge of murder *held* entitled under evidence to discharge in habeas corpus proceeding on ground of want of jurisdiction of committing magistrate.

3. Habeas corpus 🔑85(1).

That accused when arrested was absent from city in which shooting occurred several years before *held* not evidence of flight which would sustain magistrate's jurisdiction to commit him on murder charge, where there was no evidence that accused knew of charge before his arrest.

◆

Application by George Davis, alias Pat McCormack, for writ of habeas corpus to procure discharge of petitioner held under commitment charging petitioner with the crime of murder.

Prisoner discharged.

Brown, McDonnell, Mackin & Brown and Alfred J. Hennessy, all of San Francisco, for petitioner.

Leo A. Cunningham and John J. McMahon, Asst. Dist. Atty., both of San Francisco, for respondent William J. Fitzgerald, Sheriff of City and County of San Francisco.

STURTEVANT, Justice.

This is an application for a writ of habeas corpus. The application was based on the claim that Davis has been held, without reasonable or probable cause, for trial in the superior court on a charge of murder.

To the petition there are attached as an exhibit the depositions taken before the committing magistrate. From the record the following facts appear: On July 8, 1930, George Davis was in George Riley's night club at Precita and Mission streets in San Francisco at about 2:30 a. m. George Riley was engaged in bootlegging. His place of business consisted of an L-shaped room. At the further end of the room was a piano which was being played, and Davis was in that part of the house. During the evening one Thomas Fayne, accompanied by Ryan, Burns, and Craig, entered the other portion of the room. They had been drinking all day. There is evidence that after they entered the house they were served with drinks, but there is no evidence that Davis had any conversation with any one of them. Some time after midnight Fayne and his associates left the house and started towards Twenty-fifth and Mission. After they had gone a block or so, a shooting occurred. One or more shots were fired. Ryan testified that thereupon Fayne dropped down on the sidewalk. His companions endeavored to get an automobile to take him to a hospital. When the ambulance arrived, Fayne was dead. Ryan testified that it was very dark; that he did not see where the shots came from; and that he did not see any other person in that immediate neighborhood. After Fayne and his associates left Riley's place, Davis went out, but there is not a particle of evidence where he went. Shortly after the shooting, officers arrived and arrested Fayne's associates and they were taken back to the night club. They arrived there about ten minutes after they had left. There is evidence that the night club was closed the following day and that Davis was not seen by Officer Allen McGinn until he arrested him about four years thereafter. There is some evidence to the effect that between the date of the shooting and the date of the arrest that Davis had been in Seattle and in Los Angeles. There is also some hearsay evidence that at some time, date not shown, another person went to Davis' residence and obtained the latter's clothes.

[1, 2] Having called attention to the foregoing facts, Davis claims he is being held without reasonable or probable cause and that he should be discharged. We think the contention must be sustained. In 12 Ruling Case Law, at page 1188, the author states: "After a prisoner has been committed by a magistrate to answer for a crime, he is entitled to test the jurisdiction of such magistrate to commit him, by a writ of habeas corpus; and it has frequently been held that in the absence of any legal evidence whatever that a crime has been committed, or that the prisoner was guilty thereof, the magistrate is without jurisdiction to issue an order of commitment, and the prisoner is entitled to the writ of habeas corpus to ascertain such facts and to obtain his discharge."

Measuring the evidence in the instant case with the rule as quoted, it does not appear whether the shot that killed Fayne was accidental, self-inflicted, or the act of another. If it was the act of another, there is not a particle of evidence which connects George Davis therewith, nor that connects any one of the several other persons who were present at the scene of the homicide.

[3] However, the respondent states that flight was evidence of guilt. In the first place, there was no evidence of flight. As to what time, with relation to the shooting, Davis was at Seattle or Los Angeles does not appear. It does appear that at some time within the four years following the shooting he was in one or the other of those places. There is not a particle of evidence that Davis knew he was accused of the homicide before he was arrested. Under those circumstances absence from San Francisco was not evidence of flight. People v. Jones, 160 Cal. 358, 117 P. 176.

The prisoner is discharged.

We concur: NOURSE, P. J.; SPENCE, J.

PEOPLE v. DORLAND.*

Cr. 265.

District Court of Appeal, Fourth District, California.

May 21, 1934.

Rehearing Denied June 4, 1934.

Hearing Granted by Supreme Court June 19, 1934.

1. Criminal law 🔑1159(2).

Although verdict may be set aside where entire evidence is so improbable and incredible as to amount to no evidence, such improbability must amount to incredibility and must very clearly appear to justify reversal.

2. Criminal law 🔑742(1).

Inconsistencies in testimony of witness are for jury.

3. Assault and battery 🔑92.
Infants 🔑20.

Evidence *held* to support conviction for assault with deadly weapon upon person of boy and for violation of Juvenile Court Law by doing acts tending to cause boy to become a delinquent person.

4. Witnesses 🔑374(2).

In prosecution for assault upon boy and for violating Juvenile Court Law, evidence of conversation between wife of defendant and father of boy in which defendant's wife asked boy's father to drop charges and intimated that defendant's family would take care of defendant by putting him into asylum, or in some other manner, *held* admissible as affecting interest or bias of witness.

5. Criminal law 🔑1169(2).

In prosecution for assault upon boy and for violating Juvenile Court Law, error, if any, in admitting evidence of conversation between defendant's wife and boy's father, in which defendant's wife asked boy's father to drop charges and intimated that defendant's family would take care of him by putting him into asylum, or in some other manner, *held* harmless, in view of entire evidence.

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Robert E. Dorland was convicted of assault with a deadly weapon and of a violation of the Juvenile Court Law, and he appeals.

Affirmed.

Edgar A. Luce, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and John T. Holt, Deputy Dist. Atty., both of San Diego, for the People.

BARNARD, Presiding Justice.

The defendant was charged with an assault with a deadly weapon upon the person of Elmer Perigo and, in a second count, with a violation of the Juvenile Court Law alleged to have been committed by doing certain acts with the said Elmer Perigo, a boy of the age of 14 years, and causing him to do certain acts which would cause and manifestly tend to cause him to become a delinquent person. He was found guilty by a jury on both counts and was sentenced to serve a year in the county jail on each count, the sentences to run concurrently. This appeal is from the judgment and from an order denying a motion for a new trial.

The appellant, who was about 35 years old, lived on a homestead which he was improving near Temecula, in Riverside county. His wife taught music in San Diego and in Pasadena and usually spent about two days of each week at the homestead. On Tuesday, October 31, 1933, the appellant drove to Temecula for some supplies, returning about noon.

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*For subsequent opinion see 40 P.2d 474.

His wife missed certain things which she had ordered and searched the car for them without success. At his wife's request the appellant started to Temecula about 2:30 p. m. to secure the missing supplies. As additional reasons for the trip the appellant testified that he desired to take a ride, since his wife was gone with the car during most of the week, that he wanted to look for a homestead for a man named Newman, who was employed by him, and for which they had both made a search a week before, and that he desired to locate a road which ran into Temecula canyon.

The testimony of the appellant and of the prosecuting witness is in agreement as to the following: Shortly after 3:30 on that afternoon, while he was driving south along a paved road that runs between Temecula and Fallbrook, the appellant came upon the boy, Elmer Perigo, who was on his way home from school. The boy got into appellant's automobile and they proceeded south toward Fallbrook. Somewhere from 400 to 700 feet south of the point where the boy entered the car a dirt road leads off to the left and up over a hill, there being an oil station at the point where this road leaves the paved highway. The boy lived over the hill on this road and about a mile and a half from the oil station. The appellant turned to the left on this dirt road and, in so doing, passed within a few feet of the oil station. When he had proceeded about 400 feet along this dirt road leading uphill to the boy's home, the appellant turned to the right and went down an old stage road which had long been overgrown but which had recently been cleared off by the "C C boys." The appellant had gone down this old stage road with Newman about a week before when they had searched, without success, for a homestead. On the occasion here in question the appellant drove down this road a distance of about three miles, turned around and came back to the beginning of this road, and then turned to the right toward the boy's home. This road was narrow and upgrade and the boy got out of the car at a point which he told the appellant was about a half mile from his own home. The appellant turned around by entering a driveway which led to a house and then backing into the road. He then proceeded back to the paved highway and went on toward Fallbrook.

The boy testified that he looked at the license number as the car turned around, that he wrote the number on the ground two or three times so that he would not forget it, and that he then put the number down on a piece of pasteboard which he found by the roadside. Although his father scolded him when he returned home for being in the car, the boy told his father nothing at that time of what had occurred and did not tell any one until the next Friday. The next Friday afternoon he reported the incident to a traffic officer, without giving any details, and that night he told the full story to his brother and to his father, and later to deputies from the sheriff's office. His story as related on these occasions was essentially the same as that related on the witness stand. He gave the officers the number of the appellant's automobile, described the appellant and how he was dressed, and described the gun which he said had been used. He first described this gun as having a white barrel and a black handle and then as one that was nickel-plated with a black handle. A revolver answering this general description was later found in the appellant's house on the homestead. The appellant was arrested on the night of November 10, and later that night was confronted with the boy, whose story was repeated to him.

While the appellant admits giving the boy a ride on this occasion and agrees with the boy's statement as to where they went and where the boy got out of the car, their testimony is directly conflicting as to what occurred at the time the boy got into the car and what occurred on the old stage road at the point where the appellant turned around. The boy testified that shortly after 3:30 o'clock on this afternoon he walked from the schoolhouse to the paved highway with another boy named Robert Boren; that as they arrived at the highway Boren started north and he started south; that almost immediately after he left Boren the appellant came along in his car and stopped; that the appellant asked him if he knew where a man named Alexander lived; that he walked over to the side of the car and replied that he did not know any one around there by that name; that the appellant immediately stuck a gun in his face and told him to get in the car or he would shoot him; that he had the gun in his right hand but did not reach outside of the car, although he held it above the door; that he did not see a gun when the appellant first spoke to him and that he must have had it lying on the seat; that when he got into the car he saw the gun in the appellant's left hip pocket; that as the appellant turned to the left around the oil station and onto the dirt road, he saw the man who ran the oil station, whom he knew well, and perhaps another man or two; that he did not see his father there; that as they proceeded down the old stage road they passed a boy whom he knew and also saw a man whom he knew working near a house; that he was frightened and afraid that the appellant would shoot him, but that he did not cry out or ask for help from any of the people he saw; and that as they turned around, the boy testified that the appellant made some immoral statements which need not be here repeated. With reference to the place on this road where the appellant turned around, the boy testified that the appellant stopped for what he thought was about twenty minutes. It would serve no useful purpose to recite the boy's story of what there occurred. It is sufficient here to say that the acts thus charged to the appellant, if committed by him, were entirely sufficient to justify his conviction upon the second count of the information. In this connection the boy testified that the appellant threatened to shoot him if he did not do as he was told, that he then saw the gun in the appellant's left hip pocket, and that at all times he was afraid the appellant would shoot him if he did not do as he demanded.

The appellant testified that the boy made some remarks of an immoral nature to him as they were going down the old stage road, denied that he had made any to the boy, denied all of the boy's statements as to what occurred at the point where they turned around, and testified that he turned his car around without stopping and proceeded back and to the point where the boy got out of the car. He denied the boy's statements about the use of a gun at the time the boy got into the car and testified that he did not have a gun with him on this occasion and that he had never carried one with him.

There was evidence that the boy's father was at the oil station when the appellant's car went by, that he recognized his son, although the boy did not see him, that he asked the station operator who it was the boy was with, that the station operator replied that he did not know, that he then asked two school children who came along, that they replied that it might have been the scout master, and that he gave the matter no further thought. There was also evidence that the boy attended a party at the schoolhouse that night, but told no one there about these occurrences. The boy's father testified that during that night the boy talked in his sleep, that when he went into the room the boy was saying, "Oh don't kill me, don't kill me," that when he came in the boy roused and said he was all right, and that such a thing had never occurred before. The appellant sees in this only evidence that the boy had eaten too much at the party.

[1] The main contention here made is that the evidence is legally insufficient to support the verdict, in that the boy's statements are so inconsistent and his evidence so inherently improbable as to be unworthy of any belief. While it is conceded that the testimony of the prosecuting witness, if believed, is sufficient to support the verdict, it is contended that the same is without corroboration and is in itself so improbable as to furnish no support therefor. While it has been held that a verdict may be set aside where the entire evidence is so improbable and incredible as to amount to no evidence at all, the rule is that such improbability must amount to incredibility and must very clearly appear in order to justify a reversal. People v. Weaver, 123 Cal. App. 347, 11 P.(2d) 69; People v. Niino, 183 Cal. 126, 190 P. 626; People v. Willard, 150 Cal. 543, 89 P. 124; People v. Fleming, 166 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881; 8 Cal. Jur. 590, and cases there cited.

[2, 3] It is argued that it is improbable and unbelievable that an educated man of good family with previous good reputation, and who is happily married, would do the acts attributed to him by the boy; that such a man would use a gun in daylight in such proximity to an oil station where there were other people at the time; that such a man would, after doing such acts, drive toward the boy's home instead of fleeing at once; that a boy would, under such circumstances, refuse to do the first thing requested of him and then accede to the second command; and that a boy of that age, after such an experience, would not immediately report the matter to his parents. It is further urged that the boy's story was definitely proved false by the fact that he testified that he did not see a scar on the appellant's body when a photograph, which was introduced in evidence, shows a scar on the appellant's groin. Not only was this last matter one for the jury, but the photograph rather clearly indicates that this scar would probably not be seen under the circumstances narrated by the boy. While it is always hard to believe that a man of previous good standing will commit such an act, experience demonstrates that this, in itself, cannot be taken as conclusive. It is entirely possible and not improbable that such a person might consider that he was taking less chance of being reported by taking his victim to the vicinity of his home than

by leaving him several miles away. There are many reasons which might impel a boy, under such circumstances, to be slow in reporting such a matter to his elders, and the records of such cases show that this frequently happens. The most improbable part of the boy's story is that portion relating to the use of a gun at the time he entered the appellant's automobile and in the fact that he did not appeal for help as they passed the oil station and as they passed near to other people. While this portion of the story contains an element of improbability it is not impossible that some such thing could occur. Under the circumstances as related by the boy the gun could not have been seen by any one else. A boy of fourteen might not realize how easy it would be to get help at the oil station and he might be too frightened to think and act quickly. There is one piece of evidence, which need not here be mentioned, which indicates that the boy was badly frightened while down on the old stage road. His talk in his sleep that night, though not conclusive, may well have been the result of a severe fright. The boy described the gun he said was used and one of that description was found in the appellant's home. While it may be true, as argued, that many people have guns of this general description, the fact is not without its significance and the appellant, after his arrest, expressed particular interest in whether the boy could identify the gun. The boy's story as told to the officers, as told in the presence of the appellant after his arrest, and as told on the witness stand, was clear cut and, in the main, unshaken by a most thorough and grueling cross-examination at the hands of exceedingly able counsel. It is true that the boy testified at the trial that as he passed the oil station in the appellant's car he saw the station operator and another man in an automobile, that he first reported the occurrence to a traffic officer and that, in telling of what occurred on the stage road, he told of the appellant using the contents of a cold cream jar, while at the preliminary hearing he had referred to this as a cold cream bottle, had said that he first told his brother and had testified that he saw no one at the oil station except a boy. These were the only inconsistencies which were developed in the boy's direct testimony, filling fifteen pages of the transcript, and in a cross-examination covering eighty-six pages thereof. Variances in statements as given at different times may indicate honest intentions on the part of the witness rather than the contrary, and the inconsistencies here pointed out were matters to be weighed by the jury and are far from sufficient to enable a reviewing court to upset the findings of a jury.

Not only was the boy's story unshaken in its essentials, but it finds support and some corroboration in other portions of the evidence. Before the defendant was located the boy described him to the officer, described the clothes he wore, described the gun, and gave the number of his automobile. While no good reason appears for the boy making up such a story about a man whom he had never seen before and who had merely given him a ride, it is argued that the boy had heard other stories of this nature, that his father undoubtedly severely reprimanded him for riding with a stranger, and that the boy undoubtedly exercised his imagination for the purpose of justifying such an action. Had he desired to thus justify himself, it would seem likely that he would have told the story at the time and not after the incident was presumably forgotten, and it is to be noted that he took down the number of the appellant's car immediately after he alighted therefrom, a matter which is most unusual and in no way explained on the theory that the appellant had merely given him a ride. We think some corroboration of the boy's story is also to be found in the inconsistent and improbable story told by the appellant and in his conduct when confronted by the boy.

A deputy sheriff testified that when he questioned the appellant about the boy's charges the appellant first stated that the boy hailed him and later that he stopped the boy and asked him where a certain person lived. Whether the boy hailed him first or whether he first stopped the boy, he insists that the boy asked him for a ride. He was headed south on the paved highway leading to Fallbrook and the boy would have no reason to believe that he was intending to leave that highway. It was only a few hundred feet to the oil station where a dirt road led off to the left and uphill to the boy's home. It seems unreasonable that the boy would expect him to take that narrow uphill road or that he would ask for a ride for those few hundred feet to the oil station. The appellant testified that he had intended going toward Fallbrook as he was looking for a road that led off to Temecula canyon and that when the boy asked him for a ride he told him he could not take him far and that the boy said he would get out when they came to his road. If the boy could have guessed that the appellant would leave the highway and then leave the dirt road within four hundred feet from the oil station, it seems unreasonable that he should have asked for a ride for this short distance, that when they arrived at that point and the appellant turned onto the stage road the boy would say nothing about leaving the road to his home, and that the appellant would not discover that this had occurred until he was on his way back and had again arrived at that point. Although the appellant says he had warned the boy he could take him only a short distance he left the highway almost immediately, left the other road almost immediately thereafter, and proceeded along an old little-used road without asking the boy whether or not he wished to continue in that direction. Why he left the highway and why he later left the other dirt road and took the old stage road is not satisfactorily explained anywhere in the evidence. The only explanation given seems so improbable as to add considerable support to the boy's story. He said that he was looking for a homestead for his employee Newman, for which they had looked the preceding week. Not only had he testified that his main purpose was looking for a road to Temecula canyon and that he intended going on toward Fallbrook in looking for this road, but he admits that he had driven down this old stage road with Newman the week before, at which time they were unable to find any homestead. There is evidence that that very morning he had seen maps and other information which disclosed that the homestead in which Newman was interested was not in that direction. He further testified that when he went down that road on this occasion he did not stop anywhere or make any inquiry as to any homestead. It is not a little strange that the appellant should stop this boy and inquire about certain parties who were supposed to know about this homestead and then, without making any inquiries elsewhere in the neighborhood, should proceed at once to this road which he had already learned did not lead to the desired homestead, and which he also knew was not the road to Temecula canyon of which he was in search when he met the boy. Under the circumstances, his explanation of why he took the boy on this side trip on this lonely road, over which he had gone the week before, is most unsatisfactory. It also seems strange that after telling the boy he could not take him far, he would not only take him farther from home, but upon returning to the point of digression would again go out of his way to take the boy nearly, but not quite, to his home. He explains his leaving the boy at this point by saying that the road was getting narrow and he desired to turn by going into a private driveway and backing into the road. No reason appears why he could not have made a turn in a similar way at the boy's home or why any possible desire to aid the boy in escaping punishment for tardiness could not have been better accomplished by taking him the rest of the way. There is also evidence that the boy did not get home until one and one-half hours after the appellant picked him up on the highway and that the boy's father had walked more than one and one-half miles during less than the time in which the appellant says he drove seven miles without stopping. While the latter is possible, it may be added to the other improbabilities appearing in the story as told by the appellant.

It further appears that while the appellant denied the boy's charges when first informed of them by the officers and again after a conference at which the boy was present, he had nothing to say when confronted by the boy and the boy's story in the presence of the officers and the boy's father. One of the officers testified that immediately following this incident he took the boy and the appellant into a separate room and there suggested that the appellant question the boy about his story, and that the only question then asked by the appellant was as to whether the boy could identify the gun. With reference to this occurrence, the appellant testified as follows: "After that, Mr. Macomber took me into the sheriff's room with the boy alone, and at that time there was just the three of us in the room, Mr. Macomber, the boy and myself, and he asked me to question the boy, and I said, 'Well, how do you mean?' 'Well,' he said, 'Go ahead and ask him questions.' And I said, 'Well I couldn't do that, it was not my place.' He said, 'All right, I give you permission to ask the boy questions.' And I hesitated, and felt that it wasn't my place to question the boy. It wouldn't do any good anyhow obviously, although I did ask him one question, I forget what it was, whether he was a city boy or not, but then I felt it wasn't my place to ask the boy any further and I told him I wouldn't question him any further. We then went out of the sheriff's room. Both before and after that I had denied several times that that thing had happened in any way."

We cannot help but conclude that any doubt that may have been left in the minds of the jurors by the testimony of the complaining witness must have been removed by the corroborating circumstances, by the improbabilities and inconsistencies in the appellant's account of his admitted trip with the boy, and by his conduct when brought into the presence of the boy after his arrest. The verdict is amply supported by evidence the credibility of which was for the jury and not to be determined as a matter of law. While there is an element of improbability in connection with the use of a gun in so public a place and with the failure of the boy to call for help, there is some corroborating evidence and it cannot be held that the incident is so impossible that the jury could not have believed it occurred, especially when considered in connection with the entire evidence. Since the sentences were made concurrent, no additional prejudice has resulted and the evidence is sufficient to support the verdict in its entirety.

It is next contended that the court erred in permitting certain questions to be asked of the appellant while on the witness stand with reference to a conversation between him and Newman which occurred the week before, while they were on the trip in search of a homestead. The appellant had testified in chief as to certain things that were said in this conversation and, on cross-examination, the court permitted more of the conversation to be brought out. Not only does no error appear, but the court sustained an objection to some of the questions asked and the matters permitted to be received in evidence could not reasonably be expected to have affected the result.

[4, 5] Error is assigned in the admission of evidence of a conversation between the wife of the appellant and the father of the complaining witness which occurred on the night after the appellant was arrested, in which the wife of the appellant asked the father of the complaining witness to drop the charges and intimated that the family of the appellant would take care of him by putting him into an asylum, or in some other manner, so that he could not further molest the boy. The witness testified that she had talked over the matter referred to in the conversation with the whole family, which would naturally include her husband. In any event, the evidence was received only as affecting the interest or bias of the witness and the court fully instructed the jury that the evidence was not received for the purpose of determining the opinion of the witness in the matter nor for the purpose of showing the truth of the particular facts stated in the conversation, but that it was limited to the matter of interest or bias which the witness might have in the case and that it was to be considered by them only for that purpose and only as affecting the credibility of the witness. We are of the opinion that the evidence was admissible for the limited purpose stated. People v. Mack, 14 Cal. App. 12, 110 P. 967; People v. Lee Ah Chuck, 66 Cal. 662, 6 P. 859; People v. Wong Chuey, 117 Cal. 624, 49 P. 833. It may be added that if the court's ruling were to be held erroneous it could not be held sufficiently prejudicial to require a reversal after a reading of the entire evidence.

The only other point raised is a claim of prejudicial misconduct on the part of the district attorney during his argument to the jury. Most of the matters complained of were well within the freedom of argument permitted under established rules. In others, the court instructed the jury to disregard the statements made. Nothing in this regard approaching reversible error is brought to our attention.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

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138 Cal.App. 621

LE STRANGE v. NEBEKER.

Civ. 7974.

District Court of Appeal, Second District,
Division 1, California.
May 23, 1934.

Appeal and error 🔑1010(1).

Judgment on trial court's fact findings, supported by evidence, must be affirmed.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by William Le Strange against Farrell D. Nebeker. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hiram T. Kellogg, of Los Angeles, for appellant.

H. Y. Romayne, of Los Angeles, for respondent.

PER CURIAM.

Appeal from a judgment in favor of plaintiff for the sum of $3,808.15, rendered by the court sitting without a jury, as damages suffered by the plaintiff as result of injuries he received when struck by an automobile being driven by defendant.

The only grounds urged by appellant for a reversal of the judgment are that certain findings of fact are not sustained by the evidence.

Appellant concedes in his brief that there is a conflict in the evidence bearing upon the points urged. Indeed, the record would justify the assertion that the evidence well supports the findings complained of. There is no occasion for us to discuss the points raised by appellant, as, under the circumstances, we are bound to affirm the judgment.

This appeal is so devoid of any merit that we are constrained to conclude that it was taken for the purpose of delay. It is therefore ordered that appellant pay to respondent the sum of $250 as damages, to be added to the costs as part of the judgment.

The judgment is affirmed.

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138 Cal.App. 664

EINZIG et al. v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 9555.

District Court of Appeal, Second Appellate District, Division 2, California.

May 24, 1934.

1. Municipal corporations ⚷621.

Finding of city board of police commissioners that game is in violation of statutes is not reviewable by court on certiorari to review revocation of permits to conduct such game if supported by evidence (Pen. Code §§ 319, 330).

2. Gaming ⚷68(½).

Evidence in certiorari proceeding to review revocation of permits to conduct game of "tango" or "skill ball" by city board of police commissioners *held* sufficient to support board's finding that game was in violation of statute as one of chance (Pen. Code, § 319).

Proceeding by Ben Einzig and others for certiorari to review the action of the Board of Police Commissioners of the City of Los Angeles and James C. Davis, as Chief of Police thereof, in revoking permits to conduct a certain game.

Motion to quash granted, and proceeding dismissed.

Guy Richards Crump and Roy W. Colegate, both of Los Angeles, for petitioners.

Ray L. Chesebro, Ernest K. Maine, John L. Bland, and Bourke Jones, all of Los Angeles, for respondents.

Newlin & Ashburn, of Los Angeles (Gurney E. Newlin, of Los Angeles, of counsel), amici curiæ.

ARCHBALD, Justice pro tem.

The sole question involved in this proceeding is: Did respondent board act in excess of its jurisdiction in revoking permits theretofore issued to petitioners authorizing them to conduct the game called "Tango" or "Skill Ball?" The authority of the board to revoke permits issued under the ordinance authorizing them is not questioned, "if said board becomes satisfied that the conduct of such games does not or will not comport with the public welfare for any reason, or that the same has been conducted in an illegal, improper or disorderly manner * * * [or] where the proprietor or person or persons in charge thereof violates or permits any infraction of * * * any law of the State of California, or any ordinance of the City of Los Angeles."

[1] It is the contention of petitioners that there is no support in the evidence for the finding made by the board that the game is "in violation of section 319 and section 330 of the Penal Code." If there is no such support in the evidence, the decision of the board is subject to review. Otherwise not.

[2] The evidence shows that the game in question is one played by a group of persons. Before each game begins, the attendant announces what the prize is to be, "whether it was two, three or four dollars in merchandise," and some announced that "the next game will be a five dollar game" or "a ten dollar game" or "a fifteen dollar game." Those desiring to participate would then seat themselves around a counter on the opposite side of which, about four feet from the outer edge thereof, were several boxes so spaced that each player would be adjacent to some one of them. Such boxes were "square," "with glass

sides," and had "seventy-five compartments" in the bottom thereof, in five rows, numbered from 1 to 15 in the first, 16 to 30 in the second, etc. An attendant then passes around on the opposite side from the players and gives to each player one or more cards, for which he collects 10 cents each. Each player is then given a ball, called a "skill ball." An attendant then "starts around" with what is called a "game ball" of a different color, and each player in turn tosses such ball into the box adjacent to him. When the ball settles in one of the seventy-five compartments the number thereof is indicated on a "chart" which is visible to all players, and each of the players having such number so displayed on his card or cards places a marker over such number thereon. Each card has twenty-five small squares, in five vertical columns of five squares each, each square, with the exception of the center one, being numbered. Such center square is marked "free." The squares in the first column contain numbers ranging from 1 to 15, the second from 16 to 30, the third from 31 to 45, the fourth, 46 to 60, and the fifth, 61 to 75, and each card has an arrangement of such numbers different from every other card. The game ends when some player secures a straight line of markers across his card, either laterally, diagonally, or vertically, or four markers in any line of which the "free" square is the center. Such player receives the prize. The skill ball is used by a player at any time he deems appropriate, and the number of the compartment into which such ball finally falls is marked on such player's card only, if his card has such number on it. A rubber ball is used, and "as a rule it would bounce around and finally settle down into a hole." If more than one completes a line at the same time, the prize is divided between them. The prizes which the witnesses saw distributed were merchandise of some value.

It will be seen from the description of the manner of playing the game that chance plays a very large part in selecting the numbers, and that the part skill could play is extremely small. If the player at the end of the line is lucky, he could win the prize before his turn to throw the game ball came. It is evident that even if a player who throws the game ball used also his skill ball, and was skillful or lucky enough not to miss a shot, he would still be dependent upon the chance that other players would be able to settle the ball into compartments with the numbers required to complete two out of four squares in the "free-square" lines, or three out of five in any other line. In our opinion the evidence supports the implied finding of the board that the game is one of chance and not of skill.

A game similar to that played under the permit here mentioned was held to be a gambling game under an Oregon statute almost identical with section 330 of our Penal Code (State v. Randall, 121 Or. 545, 256 P. 393), regardless of the fact that the element of skill might be present in some small degree.

Petitioners urge that "in determining the extent to which chance must have a part to render a game a lottery we are confined to the law as it exists in this state," and point to the case of Ex parte Shobert, 70 Cal. 632, 11 P. 786, 59 Am. Rep. 432, which held a transaction not to be a lottery under section 319 of the Penal Code, which the United States Supreme Court condemned as such. Horner v. United States, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237. In the Shobert Case the supposed lottery ticket was one of a large series of bonds issued by the city of Brussels, which provided for repayment of principal, with interest. The only element of chance involved was in the system of determining by an annual drawing the numbers of the respective bonds which should be paid that year. It was also provided that the holders of bonds bearing the first forty numbers drawn should be paid premiums ranging from 25,000 francs for the first drawn to 200 francs for the last. It will be seen that the purchaser of such a bond obtained value for his money. The chance was given him, if lucky in the drawing, to get a return of his principal and interest in a short time, and also to participate in a special prize. Of this latter, the court said that it was no doubt an inducement to make the purchase, "but it did not constitute the main feature and substance of the transaction between the government and the purchaser of the bond. It was a mere appendage and an incident to its main purpose, by means of which the holder might by chance receive a larger sum than the principal and interest which the bond provided." We see no parallel between such a bond and the card purchased here for 10 cents. With the first, the purchaser takes simply the ordinary business risk present to some degree in any investment he makes, so far as his principal and a fair return are concerned. In the other, he either gets a prize or nothing. We find no case which holds that where chance is the main factor in determining the right to a prize in group playing it becomes a legal method of awarding the same, just because the element of skill may also be present in some small degree.

In our opinion, therefore, there is substantial support in the evidence for the finding of the board that the game is in violation of section 319 of the Penal Code. Hence its decision upon that question is conclusive. It is not necessary for us to consider whether it is also prohibited by section 330 of the same Code.

A demurrer was interposed to the petition herein, but inasmuch as we have considered the case on its merits, any ruling in regard thereto becomes unnecessary.

The motion to quash is granted and the proceeding dismissed.

We concur: STEPHENS, P. J.; CRAIG, J.

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138 Cal.App. 481

GOLDEN WEST CREDIT & ADJUSTMENT CO., LIMITED, v. PEARDON et al.

Civ. 5058.

District Court of Appeal, Third District, California.

May 9, 1934.

Hearing Denied by Supreme Court July 5, 1934.

Appeal and error ⚷170(1).

Bond prepared by sureties and given for release of attachment in action brought against several defendants could not on appeal be construed as executed in behalf of single defendant, where that issue was not presented below (Code Civ. Proc., § 540; Civ. Code, § 1654).

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by the Golden West Credit & Adjustment Co., Limited, against Fred Peardon and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ray Manwell and Rich, Weis & Carlin, all of Marysville, for appellants.

Jesse A. Mueller, of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment in favor of plaintiff and against defendants as sureties on a bond for the release of an attachment. It will not be necessary to recite the facts out of which this appeal arises as the matter was recently before this court upon an appeal from a judgment of dismissal in favor of defendants following an order sustaining a demurrer to the complaint, wherein the facts were set forth in considerable detail. Golden West Credit & Adjustment Co., Ltd., a corporation, v. Peardon et al., 130 Cal. App. 186, 19 P.(2d) 817, 819.

The trial court in its ruling upon the demurrer in that proceeding held the bond was a statutory undertaking given under the provisions of section 540 of the Code of Civil Procedure, and inasmuch as the complaint did not allege that a stay bond had been given in accordance with the provisions of section 946 of the Code of Civil Procedure, after a judgment in favor of one of the principals in the bond, the complaint failed to state a cause of action. This court in reversing that judgment held the section in question did not require that the plaintiff must obtain a judgment against all of the defendants in an action in order to keep an attachment in force or to keep alive a bond given to a sheriff to release attached property. Defendants thereupon answered admitting the filing of the complaint, the issuance of the writ of attachment, the levy by the sheriff, the execution and delivery of the bond sued upon, and the acceptance by the sheriff, the trial and judgment and issuance of writ of execution. Upon information and belief defendants denied the failure of the defendants in the original action to deliver to the sheriff the property attached and also disputed the amount due upon the judgment. In a separate defense defendants also claimed that by a certain order the court discharged the attachment in Yuba county, but the trial court found against defendants upon that issue, which finding is fully sustained by the evidence.

The principal contention of appellants made upon this appeal is that the undertaking in the case at bar is a statutory bond executed by them solely upon behalf of defendant Verne S. Wilson to release the attachment on property belonging to him.

It appears from the instruments themselves that the action is entitled "Golden West Credit & Adjustment Co. Ltd., a corporation, v. Verne S. Wilson, George D. Karsch, Jone Doe and Richard Roe, individually, and as co-partners," etc., but no pleading on the part of defendants herein was framed to pre-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

sent the issue that the obligation was on behalf of any particular defendant and therefore there was no finding to that effect nor in the absence of such pleading could there have been a finding that the use of the word "defendant" in the singular meant any particular defendant. As this court said in Golden West Credit & Adjustment Co., Ltd., a corporation, v. Peardon et al., supra:

"If the property attached belongs to a particular defendant, and the bond given for the release of the property provides specifically that, if judgment goes in favor of the plaintiff as against that particular defendant, then and in that case the sureties will not be bound, and the bond will be released if judgment goes in favor of the particular defendant, and, if an appeal is prosecuted therefrom, then an undertaking must be given by the plaintiff in order to continue the attachment in force and hold the sureties on the bond as specified in section 946, Code of Civil Procedure."

If there were any ambiguity in the bond or undertaking, such uncertainty must be interpreted most strongly against the party who caused such uncertainty to exist. Section 1654, Civ. Code. It appears the bond was prepared entirely by appellants and they are now in no position to take advantage of any ambiguity or uncertainty if such there be.

The judgment therefore must be affirmed and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

138 Cal.App. 691

FENSTERMACHER v. JOHNSON.

Civ. 4906.

District Court of Appeal, Third District, California.
May 25, 1934.

1. Automobiles 🔑6.

Statute precluding recovery against owner or driver of automobile for injuries sustained by, or death of, guest unless intoxication or willful misconduct of owner or driver was proximate cause of such injuries or death, *held* not to defeat existing cause of action for damages for death of guest because of driver's gross negligence which occurred prior to effective date of statute (St. 1931, p. 1693, § 141¾).

2. Automobiles 🔑242(2).

Where automobile overturned for no apparent reason on straight, level, and dry highway while under control of defendant, doctrine of res ipsa loquitur *held* applicable.

3. Automobiles 🔑244(20).

In action for death of guest riding in rumble seat of automobile, evidence showing that automobile overturned on straight, level, and dry highway when driver attempted to return automobile, while traveling from 40 to 45 miles per hour, from dirt shoulder to paved portion of highway, resulting in left front wheel's twisting or buckling and causing tire to blow out, or wheel to collapse, *held* to support verdict based on implied finding of gross negligence.

4. Automobiles 🔑240(2).

Evidence relating to presence of broken bottle smelling of alcohol at scene of automobile accident, tending to show that driver of automobile had been drinking, *held* admissible under general allegation of gross negligence.

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Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by W. A. Fenstermacher against W. E. Johnson, Jr. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

E. H. Martinelli, of San Francisco, and George R. Freeman, of Willows, for appellant.

Jesse W. Carter and Sullivan, Roche, Johnson & Barry, all of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from a judgment awarding plaintiff damages for the death of his daughter who was killed in an automobile accident which occurred in March, 1931. On the day in question defendant, accompanied by three companions, all being students of the University of Oregon, were on their way from Eugene, Ore., to Berkeley and San Francisco. They had left Eugene about 3 o'clock in the afternoon the day before in the Ford roadster of defendant; defendant and W. C. Reed occupying the front seat and Helen C. Fenstermacher and Bernice Williamson occupying the rumble seat.

They had, according to their plans, driven all night and about sunrise were proceeding southerly along the Pacific highway about 3 miles south of Corning, when the car turned over, resulting in the death of Miss Fenstermacher, daughter of plaintiff herein.

At the point of the accident the highway was straight and level for several miles in both directions. The paved portion of the highway was approximately 15 feet in width with gravel shoulders approximately 15 feet wide on each side. There was a slight elevation of an inch or two where the pavement rested upon the gravel shoulder. At the time of the accident the pavement was dry and there was no other traffic in the immediate vicinity. When the party had reached this point south of Corning, the car was driven entirely off to the right of the pavement onto the gravel shoulder and traveled about 500 feet along this shoulder at a speed of from 40 to 45 miles per hour and was then turned to the left to return to the pavement when the left front wheel twisted or buckled and the tire, after dragging along the pavement, apparently blew out, or the wheel collapsed causing the frame to drop, whereupon the car turned over once or more and came to rest on its side on the left of the highway. The occupants were thrown from the car and Miss Fenstermacher received injuries resulting in her death very soon thereafter.

Some evidence was introduced in an attempt to show that Reed, one of the passengers, had been drinking. There was no substantial evidence of this nor of liquor being found in the car. The smell of alcohol about the automobile seemed to have been successfully explained by the presence of an antifreeze mixture in a can or bottle in the car which had been drained from the radiator of the car by defendant preparatory to making the trip to Berkeley.

[1] For reversal of the judgment founded upon the verdict of the jury in favor of plaintiff, appellant urged that by the amendment to section 141¾ of the California Vehicle Act (St. 1923, p. 517 as added by St. 1929, p. 1580 amended by St. 1931, p. 1693), at a time subsequent to the accident and prior to the trial of the action, an action based upon gross negligence had been taken away and the only ground upon which a guest, or in case of death the representative, could recover, was for intoxication or willful misconduct; this contention, however, has been definitely determined by the Supreme Court in the case of Stotts v. Blickle, 30 P.(2d) 392, contrary to this contention which held that the amendment to section 141¾ of the California Vehicle Act did not abolish an existing right or cause of action for damages for the death of a guest because of the gross negligence of the driver, which had occurred prior to the effective date of the amendment.

[2, 3] Appellant next urges that the evidence is insufficient to support the verdict because it failed to establish gross negligence. We believe, however, the jury was justified in their implied finding of the presence of gross negligence, although we must concede that it is a close question. It was shown without contradiction it was daylight at the time the accident occurred and that the road was straight and level for at least 2 miles north of the point where the accident happened and for 10 miles south; the highway was dry and there was but little, if any, traffic. It further appeared that for no apparent reason defendant drove off the paved portion and onto the dirt shoulder on the right side of the highway and continued to operate his automobile along the dirt shoulder for a distance of approximately 500 feet at a rate of speed varying from 40 to 45 miles an hour, and then apparently without slackening that speed, clearly excessive under the conditions, he attempted to return to the paved portion of the highway.

One witness to the accident declared the car was going "very fast" even after her attention was attracted by the sound of the application of the brakes. This witness also testified that the car continued to proceed at the same high rate of speed until it finally turned over and came to rest. It was in evidence that the defendant could have stopped his car within 200 feet even if he had been operating it at the rate of 40 or 45 miles an hour. It has been held also that the doctrine of res ipsa loquitur applies in a case where it is merely shown that an automobile under the control of defendant overturned on an open highway for no apparent reason. Crooks v. White, 107 Cal. App. 304, 290 P. 497; Ireland v. Marsden, 108 Cal. App. 633, 291 P. 912. We must therefore conclude under the circumstances the driver was guilty of so slight a degree of care as to justify the belief of the jury that there was an indifference to the things and well-being of others.

[4] Appellant also claims the court erred in permitting evidence to be given relating to the presence of a broken bottle smelling of alcohol at the scene of the accident. It is well established, however, that evidence of

facts and circumstances tending to show that a defendant had been drinking are admissible under a general allegation of gross negligence. Craig v. Boyes, 123 Cal. App. 592, 11 P.(2d) 673.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

138 Cal.App. 674

PEOPLE v. ABREW.

Cr. 1785.

District Court of Appeal, First District, Division 2, California.
May 25, 1934.

1. Robbery 🔑24(3).

Evidence sustained conviction of robbery as against claim that identification by complaining witness was insufficient.

2. Criminal law 🔑695(2).

In prosecution for robbery, letter written by defendant to mother admitting commission of crime charged *held* admissible as against objection that it was incompetent, irrelevant, and immaterial.

3. Criminal law 🔑1043(3).

In prosecution for robbery, objection to admission of letter, written by defendant to mother admitting commission of crime charged, on ground that it contained admission that defendant had been guilty of another offense, could not be made for first time on appeal.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

John Abrew was convicted of robbery, and he appeals.

Affirmed.

Leo A. Sullivan and A. K. Whitton, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

Appellant was tried before a jury and convicted of the crime of robbery. His appeal is taken from the judgment and from the order denying his motion for a new trial.

The evidence of the complaining witness is that as she left her car at a service station in the city of Oakland she saw the defendant walking toward her with a gun in his hand; that she started to run but tripped and fell, losing her purse; that the defendant picked up the purse and ran to an automobile which she identified as one which the defendant had been driving. The defendant admitted that he had been driving the particular car during the evening, but denied that he was at the place of the robbery. Two girl companions were brought to the stand to testify in the defendant's behalf that they were spending the evening with him at a bootlegging place at the time the robbery is said to have occurred.

[1] The first point urged by the appellant is that his identification by the complaining witness was insufficient because the light was dim at the place where the robbery occurred and also because her designation of the appellant at the time of the police lineup might have been suggested by police officers. These objections go to the weight which the jury might give to the testimony of the witnesses and they present no possible ground for even an argument on appeal.

The second point suggested by the appellant is that he was unduly restricted in his cross-examination of the complaining witness. The argument on this point is that when she first complained to the police of the robbery this witness said that the party accosting her looked like appellant's brother, but that when she saw appellant in the police lineup she positively identified him as her assailant. In his cross-examination of this witness the appellant had shown that she had had some measurements made of the distance between the place where her car was parked and an air pump so that she could testify regarding the distance the appellant stood from her when his face was reflected in the light of a nearby street lamp. All that was in any manner essential to this inquiry was brought out either by the state on direct examination or by the appellant on his cross-examination. The only questions to which objections were sustained in this part of the case were so trivial that no possible prejudice could be assigned to the ruling.

[2, 3] Finally, it is suggested that the trial court committed error in admitting in evidence a letter written by the appellant to

his mother. The writing of the letter was admitted. It contains a damaging admission by appellant of his commission of the crime charged. When it was offered in evidence the appellant made a general objection declaring it incompetent, irrelevant, and immaterial. The objection was not good and the letter was properly admitted. Now for the first time, the appellant argues that there is found in the letter an admission that the appellant had been guilty of another offense. The objection to that portion of the letter should have been made on that ground at the time it was offered.

There is no error in the record.

The judgment and order denying a new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

◆

138 Cal.App. 670

STRUCK v. WOLFE et al.

Civ. 9631.

District Court of Appeal, Second District, Division 2, California.

May 24, 1934.

Rehearing Denied June 22, 1934.

Hearing Denied by Supreme Court July 23, 1934.

Appeal and error 🔑628(1).

Where trial court had terminated proceeding for preparation of appeal record and there was pending defendant's motion for relief from such order because of mistake, inadvertence, and excusable neglect, involving issues of fact, and pending prohibition proceeding to restrain trial court from hearing such motion depended on principles of law yet to be determined, plaintiff's motion to dismiss defendants' appeal because record had not been prepared or filed, was denied (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Mary A. Struck against V. E. Wolfe and others. From a judgment in favor of plaintiff, defendants appeal. On motion to dismiss the appeal.

Motion denied.

See, also, 32 P.(2d) 1110.

A. W. Brunton, of Los Angeles, for appellants.

Ben F. Griffith and Malcolm Archbald, both of Los Angeles, for respondent.

CRAIG, Justice.

The defendants having appealed from a judgment in favor of the plaintiff in an action for damages in the superior court, the latter filed a motion to dismiss said appeal upon the ground that the record has not been prepared or filed as required by the Code of Civil Procedure, that there is no proceeding pending in the superior court for settlement of the record and that proceedings to procure such record have been dismissed. Defendants simultaneously moved that they be relieved from default in filing their transcript upon the ground that through the mistake, inadvertence, and excusable neglect of a former attorney the reporter had been prevented from completing the same, but that the transcripts were since ready for certification and filing.

Appellants' present counsel swore that he had no knowledge of the proceedings below until informed of respondent's motion to terminate proceedings for preparing the reporter's transcript; that the latter had been paid therefor; and that the same was ready for filing when certified. The reporter swore that the delay had been caused by the necessity of getting out other emergency transcripts and reporting in court, and that no delay had been caused by neglect of the defendants prior to January 16, 1934.

Cases are cited wherein appeals were dismissed in the absence of any legal excuse sufficient to meet the requirements of section 473 of the Code of Civil Procedure. Proceedings admittedly are pending below and in this court involving issues of fact in that respect over which the superior court, plaintiff alleges, will, unless restrained, exercise its judicial discretion. The proceeding in prohibition depends upon principles of law yet to be determined. It has been settled that until final determination of a motion in the trial court to terminate proceedings for procuring the transcript a reviewing court will not dismiss an appeal. Engstrom v. Atkins, 102 Cal. App. 393, 283 P. 79.

The motion to dismiss is denied.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

138 Cal.App. 672

STRUCK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9670.

District Court of Appeal, Second District, Division 2, California.

May 24, 1934.

Rehearing Denied June 22, 1934.

Hearing Denied by Supreme Court July 23, 1934.

1. Motions 🔑59(2).

Superior Court has jurisdiction to modify or set aside its orders.

2. Appeal and error 🔑82(1).

Orders relating to preparation and approval of records in trial court for purposes of appeal are appealable as "special orders made after final judgment" (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

3. Prohibition 🔑3(2).

Where error may be corrected by appeal, prohibition will not lie, because petitioner has plain, speedy, and adequate remedy at law.

4. Prohibition 🔑3(3).

Prohibition *held* not to lie to restrain Superior Court from hearing defendants' motion to vacate, on ground of mistake, inadvertence, surprise, or excusable neglect, a prior order terminating preparation of appeal record, since order on such motion would be appealable as "special order made after final judgment" (Code Civ. Proc. § 963).

◆

Proceeding in prohibition by Mary A. Struck against the Superior Court in and for Los Angeles County and Minor Moore, judge thereof, to restrain the hearing of a certain motion.

Alternative writ discharged, and writ denied.

See, also, 32 P.(2d) 1109.

Ben F. Griffith and Malcolm Archbald, both of Los Angeles, for petitioner.

Everett W. Mattoon, F. M. Cross, and A. W. Brunton, all of Los Angeles, for respondents.

CRAIG, Justice.

Defendants in a civil action having appealed from a judgment in the Superior Court, the plaintiff, after delay in filing the transcript, presented therein a motion for an order to terminate its preparation, which motion was denied without prejudice. Thereafter said motion was renewed, whereupon a stipulation of the parties was entered in the minutes that it be denied on condition that the transcript be filed within thirty days, otherwise that it should be granted. Upon ex parte motion and without the defendants' knowledge that said transcript had not been filed, an order was entered terminating the preparation of the record on appeal. Thereafter another attorney was instructed to move the trial court that said order be vacated on the ground of mistake, inadvertence, surprise, or excusable neglect, in accordance with the provisions of section 473 of the Code of Civil Procedure. The plaintiff thereupon instituted the instant proceeding in prohibition, seeking to restrain the hearing of such motion, asserting upon information and belief that if heard it will be granted and if granted she will have no plain, speedy, or adequate remedy at law. The allegations of the petition herein are denied, and defendants insist that the right of appeal from an order such as prayed below is afforded by section 963 of the Code of Civil Procedure.

[1-4] That the Superior Court was invested with jurisdiction to make an order terminating proceedings to procure the record for appeal is unquestioned, and it must be conceded that it has jurisdiction over its orders and power to modify or set them aside. Templeton v. District Court, 47 Cal. 70; Estate of Stevens, 83 Cal. 322, 23 P. 379, 17 Am. St. Rep. 252; City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298. Orders relating to the preparation and approval of records in a trial court for purposes of appeal are special orders made after final judgment. W. J. Somers Co. v. Smith, 45 Cal. App. 703, 188 P. 311. From such orders, the parties aggrieved may appeal. Code Civ. Proc., § 963. Where the right of appeal exists and error, if any, may so be corrected, an application for prohibition will be denied upon the ground that the petitioner has a plain, speedy, and adequate remedy at law. City of San Bruno v. Superior Court, 171 Cal. 272, 152 P. 731; Bullard v. Superior Court, 106 Cal. App. 513, 288 P. 629.

The alternative writ of prohibition is discharged, and the writ denied.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

138 Cal.App. 596

CHAMBERLIN S. S. CO., Limited, v. WOODCOCK.

Civ. 5020.

District Court of Appeal, Third District, California.
May 22, 1934.

Rehearing Denied June 21, 1934.

Assignments ⚷137.

Evidence *held* to show that seller's accounts were not purchased with business; hence buyer could not maintain action for alleged failure of employee to account for moneys collected while employed by seller.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Chamberlin Steamship Company, Limited, against W. T. Woodcock, who filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Esmond Schapiro, of San Francisco, for appellant.

Arthur W. Hill, of Eureka, and Arthur W. Hill, Jr., of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to collect from the defendant the sum of $1,784.76, alleged to be due the plaintiff for and on account of money received by the defendant for the uses and purposes of the plaintiff. The answer of the defendant denies indebtedness to the plaintiff, and by way of cross-complaint alleges that the plaintiff was indebted to the defendant in the sum of $99.81. The defendant had judgment for the sum of $99.81, and also to the effect that the defendant was not indebted to the plaintiff in any sum whatsoever. From this judgment the plaintiff appeals.

The record shows that for several years the defendant acted as agent for one Houda, as agent for the Nelson Steamship Company from the year 1922 to August, 1929, upon a commission basis for two years and upon a salary basis of $250 per month for five years of that time.

It also appears that from August, 1929, to July 16, 1930, the defendant had worked for one Houda at a salary of $250 per month. There is testimony to the effect that at the time of the beginning of this employment the defendant and Houda had a conversation in which the defendant stated to Houda that he was then drawing a salary of $250 per month, and that if he quit the Nelson Steamship Company and went to work for Houda, who was then managing the Coast Steamship Company, he would have to have a salary of at least $350 per month, and that it was agreed that the defendant should work for a commission of 7½ per cent., with a guaranty that the commissions should amount to at least $250 per month. This employment continued until about the first of the year 1931. The commissions did not aggregate the sum of $250 per month, and the defendant retained out of the collections made by him for the Coast Steamship Company the sum of $1,784.76, alleged as the balance due him as salary on account of his employment.

The record shows that just preceding January 1, 1931, the Coast Steamship Company transferred its business to the Chamberlin Steamship Company, Limited. The terms of employment, related by the defendant, with Houda as agent of the Coast Steamship Company, are stated definitely by Houda.

The court found that the defendant was not indebted to the plaintiff in any sum whatsoever, and irrespective of the terms of the employment under which the defendant was working for the Coast Steamship Company, the judgment of the trial court must be sustained.

This action was begun by the Chamberlin Steamship Company, Limited, a corporation, for which the respondent was not an employee during any of the time preceding January 1, 1931. From January 1, 1931, all the accounts between the plaintiff and the defendant were settled, save and except that the plaintiff, at the time of the beginning of the action, was indebted to the defendant for his services in the sum heretofore stated.

At the time of acquiring of the business of the Coast Steamship Company by the plaintiff, it did not take over and did not become the owner of any of the accounts or moneys owing to the Coast Steamship Company. The testimony of E. A. Chamberlin, vice president of the Chamberlin Steamship Company, Limited, a corporation, after relating something of the business of the company, is as follows: "Q. And the Chamberlin Steamship Co., Ltd., acquired all of the business property and assets of the Coast Steamship Co., at that time? A. No, there was no assets or anything of that kind. The Chamberlin Steamship Co., Ltd., acquired whatever the Coast Steamship Company had in the line of their business, but none of their ac-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

counts or anything like that." The testimony then goes on to state that Mr. Houda joined the Chamberlin Steamship Company, Limited. This testimony shows conclusively that the plaintiff had no cause of action against the defendant. Whatever indebtedness, if any, existed between the defendant and the Coast Steamship Company was a matter to be litigated between that company and the respondent, there having been no assignment of any claims held by the Coast Steamship Company against the defendant.

The testimony quoted above showing that the plaintiff had and has no cause of action against the defendant by reason of any claimed indebtedness of the defendant to the Coast Steamship Company, it is unnecessary to discuss any of the points urged for reversal upon this appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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138 Cal.App. 565

KRESSLY v. DISTRICT BOND CO.

Civ. 8234.

District Court of Appeal, Second District, Division 2, California.

May 16, 1934.

1. Banks and banking 🔑315(1).

Evidence sustained finding of existence of contract whereby investment company, which had sold bonds, agreed to repay buyer in consideration of buyer's refraining from rescinding or instituting legal proceedings after default in interest payments.

2. Appeal and error 🔑1010(1).

Sufficiency of evidence to establish given fact is primarily for trial court, and finding supported by substantial evidence is not reviewable on appeal.

3. Contracts 🔑71(3).

Bondholder's withholding of legal action to recover purchase price or withholding exercise of his right to rescind bond purchase contract on ground of misrepresentations *held* sufficient consideration for agreement of seller of bonds to repay purchase price and interest.

4. Banks and banking 🔑315(1).

Action by buyer of bonds for investment company's breach of contract to repay purchase price and interest *held* not premature, where prior to commencement of action two interest installments were defaulted, the seller failed to issue new bonds and expressly repudiated liability for interest or principal.

5. Contracts 🔑329.

Action by aggrieved party to enforce his rights is not premature where there had been repudiation and breach of contract.

6. Frauds, statute of 🔑49.

Contract, which may by its terms be performed within year, is not within statute of frauds (Civ. Code, § 1624).

7. Frauds, statute of 🔑49.

Agreement of seller to repay buyer purchase price and interest on bonds on or before due date *held* not within statute of frauds, though bonds did not mature for ten years (Civ. Code, § 1624).

8. Frauds, statute of 🔑119(2).

Seller of bonds *held* estopped to set up statute of frauds to defeat buyer's recovery on seller's agreement to repay purchase price and interest, where buyer, in reliance on seller's agreement, gave up right to rescind or recover for fraud (Civ. Code, § 1624).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Paul E. Kressly against the District Bond Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Dryer, Castle & Richards, of Los Angeles, for appellant.

Chase, Barnes & Chase, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendant appeals from a judgment for plaintiff in an action for damages for breach of contract.

Prior to January 18, 1923, appellant corporation, being engaged in the business of buying and selling bonds for investment purposes, purchased a number of bonds of the Sunnyside irrigation district of Washington county, Idaho, and offered same to respondent for sale. About January 18, 1923, respondent purchased from appellant four $1,000 6 per cent. bonds of said district maturing February 1, 1933, interest payable semiannually on February 1 and August 1, paying therefor $3,906.77. On February 1, 1923, twelve days after they were purchased by respondent, said bonds defaulted in payment of interest.

The trial court found that appellant made certain representations to respondent to induce him to purchase said bonds, which were untrue and not warranted by the information of appellant, but which were relied on by respondent, and that in truth said bonds were then worthless; that appellant offered, if respondent would not rescind the sale or litigate any claim therefor, to repay respondent, on or before the due date of the bonds, the purchase price and to pay the interest when due; that thereupon respondent accepted said offer and took no legal action; that from February 1, 1923, to and including February 1, 1929, appellant paid the interest coupons when due; that appellant refused to pay the interest coupons when due on August 1, 1929, and denied the existence of an agreement, notifying respondent that it would not pay either the price of said bonds or interest at any time. On February 25, 1930, this action was instituted, and judgment for respondent for the purchase price of said bonds and accrued interest was thereafter rendered.

Appellant contends that the evidence does not support the findings either as to the existence of an agreement to repay respondent's loss or as to any consideration for such an agreement; that the action was prematurely brought, and that the agreement, if any, was barred by the statute of frauds.

There is substantial evidence to support the findings of the trial court as to the existence of an agreement and a consideration therefor. From the evidence it appears that respondent, after the default in the interest payment on the bonds twelve days following his purchase thereof, demanded that appellant take the bonds back and return his money; that thereupon various officials of the corporation told him he "had nothing to fear about the bonds," that the District Bond Company would protect him and the company "would take care of the interest and also of the principal of these bonds," that he "would not have anything to worry about, that the District Bond Company would take care of those bonds," and that "the District Bond Company is paying your interest when the coupons are due and we will also take care of the principal." B. L. Hames, who was sales manager and later vice president of the corporation, and who sold the bonds to respondent, testified in effect that the bonds were acquired in a trade for some bonds "we wanted to get rid of" and were sold to respondent on representations by Hames based on a descriptive circular (which was introduced in evidence); that the bonds were then found to be "in trouble," so the company cashed the interest coupons then due and told respondent "the thing would be rectified right away" or the bonds would be taken up; that respondent "was very firm if he didn't get some new bonds he would take action to protect his interests," and Hames assured him "that the directors had acted and had said if those bonds were not made good after a reasonable time I had orders to take those bonds up." Hames further testified that he tried to get respondent's money for him from the company, but that he was unable to do so because he "wasn't the boss," and that Harry Lee Martin, a director and executive of the company, told him that "Kressly has nothing to worry about; we are paying his interest, and by the time the bonds are due we will pay it"; that in the meantime "it is six per cent money and is cheap for us."

[1] The evidence supports the finding that there was an offer of appellant to pay the interest and repay the principal to respondent if he would not rescind the purchase or institute legal proceedings against it. The conduct and words of respondent, and the inferences reasonably drawn therefrom by the trial court, support a finding that there was an immediate consent by respondent to this offer. In addition to the conversations referred to, the interest coupons were at once presented to appellant for payment and were paid by them, and in lieu of instituting hostile legal proceedings respondent continued as a valuable friend and customer of appellant, investing seventy-five or a hundred thousand dollars through them, but made repeated demands that appellant carry out its part of the contract to make good the bonds.

[2, 3] "The sufficiency of the evidence to establish a given fact, even where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court, * * * and, if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal." Steinberger v. Young, 175 Cal. 81, 84, 165 P. 432, 434. The consideration for the agreement was sufficient if respondent withheld legal action to recover his money or withheld the exercise of his right to rescind the contract on the ground of misrepresentation. A benefit to appellant or a detriment to respondent was sufficient to support the agreement. As the court said in Fairchild v. Cartwright, 39 Cal. App. 118, 121, 178 P. 333, 335: "The appellant wanted to avoid trouble, lawsuits, and unenviable notoriety in

reference to the company in which he had such an interest, and the consideration was therefore beneficial to him. * * * The compromise of even a doubtful right is a sufficient foundation for a promise to pay money."

[4, 5] The record does not support appellant's contention that the action was prematurely brought. It does not appear that the parties agreed that the exchange of the bonds or payment of the principal should be deferred until the due date of the bonds, but it is not disputed that prior to the commencement of the action there had been the nonpayment of two interest installments, the failure of appellant to issue new bonds, and the express repudiation by it of any liability to pay either interest or principal to respondent. Where there has been a repudiation and breach of a contract, an action by the aggrieved party to enforce his rights is not premature. 6 Cal. Jur. 459; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356.

[6, 7] Whether the agreement is invalid under the statute of frauds (Civ. Code, § 1624), as urged by appellant, may be determined by the test laid down in McKeany v. Black, 117 Cal. 587, 592, 49 P. 710, as follows: "If the contract, by its terms, is not to be performed within a year, it is void; but if it may, 'by its terms,' be performed within a year, it is not, even though it may not be performed, or is not likely to be performed, within that time." "The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year." Hellings v. Wright, 29 Cal. App. 649, 655, 156 P. 365, 368. It cannot be said that the agreement of the parties herein was not to be performed within the year, nor that it was their intention that it should not be so performed. It might reasonably be inferred that the delay beyond that time was allowed by respondent due to his confidence in appellant's integrity and in the latter's repeated assurances and promises to carry out its agreement.

[8] The trial court found upon ample evidence that respondent changed his position to his detriment in reliance upon appellant's agreement and promises, giving up his right to rescind and his action for fraud. Appellant is therefore estopped to set up the statute of frauds to defeat respondent's right to recover in this action. "It is a general equitable principle * * * 'that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.'" Seymour v. Oelrichs, 156 Cal. 782, 795, 106 P. 88, 94, 134 Am. St. Rep. 154; Fleming v. Dolfin, 214 Cal. 269, 4 P.(2d) 776, 78 A. L. R. 585; Needham v. Abbot Kinney Co., 217 Cal. 72, 17 P.(2d) 109.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

138 Cal.App. 677

JONAS v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9426.

District Court of Appeal, First District, Division 2, California.

May 25, 1934.

Hearing Denied by Supreme Court July 23, 1934.

Depositions 🔑32.

Superior court had jurisdiction to issue order for taking of deposition of an expectant party defendant upon compliance with statutory requirements, notwithstanding no reason for perpetuation of testimony was shown, and notwithstanding applicant could obtain full relief by commencing his action (Code Civ. Proc. § 2083 et seq.).

Original proceeding in certiorari by Milton Jonas to review an order of the Superior Court of the State of California in and for the City and County of San Francisco directing petitioner to appear before the Commissioner designated for purpose of taking petitioner's deposition.

Order affirmed.

Silverstein & Silverstein, of Oakland, for petitioner.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

This is an original proceeding in certiorari to review an order of the superior court directing the petitioner to appear before a commissioner designated for the purpose of taking his deposition. The application for the commission alleged that the applicant expected to be a party to an action which he intended to commence against the petitioner herein. The burden of petitioner's attack upon the order is that the provisions of the Code of Civil Procedure, section 2083 et seq., covering the method of proceedings to perpetuate testimony, and under which the commission herein was issued, are not sufficient to include the petitioner, who was designated in the proceedings as an expectant defendant. The argument is that under the common-law rule for the taking of depositions in the nature of a discovery as well as for the perpetuation of testimony it was necessary for the applicant to show some reason which in equity would justify an order of the court directing the deposition to be taken; that in the decisions following the common-law rule it has been uniformly held that before a commission for the perpetuation of testimony may issue the applicant should be required to show his inability to bring the action immediately and thus put the subject-matter of the controversy in litigation; and also that he should show that there was some danger of the evidence being lost unless perpetuated in the testimony sought to be taken in the deposition. There can be no quarrel with petitioner's statement of the common-law rule nor with his citation of the authorities from other jurisdictions recognizing the equity features required by those decisions to be shown incident to the right to take the testimony.

The question whether the sections of our Code permit the deposition to be taken of an expectant party defendant where no reason for the perpetuation of the testimony is shown and where the applicant can obtain full relief by commencing his action has not been passed on directly in this state. All the authorities from other jurisdictions which have been cited to us are based either upon special statutes expressly requiring the reason and necessity for the perpetuation to be shown or they come from jurisdictions recognizing the equitable requirements necessary to the granting of the commission which have heretofore been referred to.

These authorities, though persuasive as to the equity of the practice generally, are not controlling in view of the ruling in Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 345, 298 P. 1001, where it was held that the right to perpetuate testimony in this state is statutory and that nothing further need be shown in the application than the statutory requirements, citing Christ v. Superior Court, 211 Cal. 593, 296 P. 612; S. F. Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann. Cas. 933, and Doyle v. Superior Court, 100 Cal. App. 652, 280 P. 992.

In Irving v. Superior Court, 79 Cal. App. 361, 249 P. 236, the equity practice of other jurisdictions was followed in holding that the application should show the materiality of the evidence sought to some pending or contemplated controversy; but the decision to that extent was not approved by the Supreme Court in the Kutner Case. In the Christ Case it is emphasized that the right to the subpœna is a statutory right which the superior court is without discretion to deny, hence, that the motive of the applicant is immaterial. In the Doyle Case it was held that the provisions of section 2084, Code of Civil Procedure, present a complete plan of procedure for the perpetuation of testimony of a witness and that a compliance with the terms of that section is all that is necessary.

In all the cases cited the testimony was sought of a witness who was not named as a party expectant to the proposed litigation. The practice of using these proceedings in evident bad faith to harass and embarrass an expectant party or to discover facts which would enable the applicant to frame the complaint has been frequently condemned in the decisions from other jurisdictions. Matter of Schlotterer, 105 App. Div. 115, 93 N. Y. S. 895, Matter of Dain's Sons Co., 204 N. Y. 623, 97 N. E. 1110. But in view of the cases interpreting the sections of our Code the compliance with those sections is sufficient to give the superior court jurisdiction to make the order. It should be borne in mind, however, that we are here considering this question of jurisdiction to issue the commission only, and that nothing said herein is applicable to the question of the rights of the witness after he has been summoned to appear and testify.

For the reasons given, the order under review is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

138 Cal.App. 622

VAN EPS v. AUFDEMKAMP.

Civ. 7911.

District Court of Appeal, Second District, Division 1, California.

May 23, 1934.

Bankruptcy 🔑424.

Unlawful conversion of certificates of stock by defendant to his own use resulting in damage to plaintiff constitutes "willful and malicious injury," so that judgment based thereon is not released by discharge in bankruptcy; such conversion being "willful" because voluntary, and "malicious" because intentional (Bankr. Act § 17 [11 USCA § 35]).

[Ed. Note.—For other definitions of "Malicious," "Willful; Willfully" and "Willful and Malicious Injury," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Cora A. Van Eps against Henry Aufdemkamp. From orders denying defendant's motion to quash the writ of execution and for relief from default, defendant appeals.

Affirmed.

W. C. Dalzell, of Los Angeles, for appellant.

Combs & Combs, of Los Angeles, for respondent.

YORK, Justice.

Defendant appeals to this court from an order denying motion to quash writ of execution and from the order denying his motion for relief from default under section 473, Code of Civil Procedure.

By complaint in conversion it was alleged by the plaintiff:

"That on or about April 2, 1927, the plaintiff was the owner of 34 shares of the preferred stock of Hollywood Mortgage and Finance Corporation, * * * the same being then and there evidenced by certificates of stock of said corporation.

"That on or about said April 2, 1927, at the City of Los Angeles, County of Los Angeles, State of California, the defendant then being in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff in the sum of $1700.00."

On January 12, 1928, plaintiff recovered a judgment by default for the sum of $1,700, and on December 2, 1930, alias execution was issued, and certain property of defendant was levied upon. Thereupon, defendant moved the court to quash the writ of execution on the ground that since recovery of the judgment by default, defendant had been discharged in bankruptcy, and that the judgment was listed in the bankrupt schedule. This motion was by the court denied.

Appellant maintains that the discharge in bankruptcy had the effect of releasing him from the judgment, while respondent, on the other hand, contends that the judgment, being for a willful and malicious injury to the personal property of another, is not released by the discharge in bankruptcy.

Section 17 of the Bankruptcy Act provides as follows: "*Debts not affected by a discharge.* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, *except such as* * * * (second) *are liabilities* for obtaining property by false pretenses or false representations, or *for willful and malicious injuries to the person or property of another.*" Section 35, tit. 11, Bankruptcy, U. S. Code Annotated, p. 150.

The question now before this court is whether or not an unlawful conversion of certificates of stock by defendant to his own use, which resulted in damage to the plaintiff, constitutes a willful and malicious injury. In McIntyre v. Kavanaugh, 242 U. S. 138, 37 S. Ct. 38, 61 L. Ed. 205, where the unauthorized sale of certificates of stock held by a firm of brokers as collateral and the appropriation of the proceeds to their own use was held to be a willful and malicious injury to property within the meaning of the exception outlined in section 17, supra, the court (242 U. S. 138, 37 S. Ct. 38, 40, 61 L. Ed. at page 207), quoting from Tinker v. Colwell, 193 U. S. 473, 24 S. Ct. 505, 48 L. Ed. 754, said: "A wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. Com. v. Williams, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged." So, too, in Smith v. Ladrie (1925) 98 Vt. 429, 129 A. 302, 303 (for conversion of flour), it was held: "But when the conversion is the result of a deliberate and intentional disregard of another's legal rights, it is a willful and malicious injury to his property. It is willful, because it is voluntary (Webster's New Internat. Dict.), and it is malicious, because it is intentional." Citing cases.

Respondent in the case now before us did not see fit to interpose a defense to the action, thereby admitting that while in possession of the certificates of stock, he unlawfully converted and disposed of the stock to his own use, to the damage of the plaintiff in the sum of $1,700. In line with Smith v. Ladrie, supra, we are of the opinion that such conversion was willful, because it was voluntary, and malicious, because it was intentional, and that the judgment based upon such injury is not released by the discharge in bankruptcy.

The orders appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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138 Cal.App. 660

Ex parte FRIDAY.

Cr. 2530.

District Court of Appeal, Second District,
Division 2, California.
May 24, 1934.

1. Contempt 🔑6, 54(1).

Attorney's filing document containing contemptuous language with clerk of court wherein related matter is pending is contempt in face of court, and contempt may be summarily charged and tried without filing accusatory affidavit (Code Civ. Proc. § 1211).

2. Habeas corpus 🔑94.

On habeas corpus, court looks to whole record, including evidence when necessary to determine jurisdiction.

3. Contempt 🔑30.

Judge may properly protect his reputation from groundless attacks on judicial integrity, and has duty to protect integrity of court by punishing for contempt.

4. Contempt 🔑8.

Attorney filing with clerk exceptions and objections charging, without reasonable basis, that judge secretly consulted opposing counsel, *held* guilty of contempt.

5. Contempt 🔑72.

Where attorney unjustifiably charged that judge secretly consulted opposing counsel, $200 fine or one day's imprisonment for each $2 thereof *held* not excessive for contempt.

6. Contempt 🔑63(5).

Modification of attorney's sentence for contempt *held* exclusively within trial judge's sound discretion.

◆

Application by R. C. W. Friday for a writ of habeas corpus against the sheriff of Los Angeles County.

Writ discharged, and petitioner remanded.

Ira A. Gwin, George Lester, and R. C. W. Friday, all of Los Angeles for petitioner.

Everett W. Mattoon, Co. Counsel, and Earl O. Lippold, Deputy Co. Counsel, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

An action was pending in the superior court in which a motion was filed by the plaintiff, through her attorney, the petitioner herein, R. C. W. Friday. The motion was presented and submitted to Hon. William S. Baird, Judge of said court on March 7, 1934, and thereafter said judge denied the relief asked for, to wit, attorney's fees, court costs, support and maintenance pendente lite.

[1] On the 16th of March, 1934, said Friday, in his capacity of attorney at law for plaintiff, filed with the clerk of the superior court certain "exceptions and objections" to the said ruling, and the following language was used therein: "* * * And by irregularity of allowing opposing Counsel, Wm. M. Morse, Jr., thereafter, and on March 7th, 1934, some five or more minutes prior to calling within matter, * * * of said February 7th, 1934, Order to Show Cause, at about 2:00 p. m. of said March 7th, 1934, allowed Wm. M. Morse, Jr., unethically to visit said Judge presiding in said Department -10-, privately and personally in Chambers; which conduct of the court, and of opposing counsel, is hereby designated in good faith, and on record herein, as Misconduct of the Court and learned Counsel in arriving at decision herein, and/or Order De-

nying Attorney Fees, Etc. herein which does amount to abuse of discretion by the Hon. Court by which plaintiff was prevented from having a fair trial."

Subsequently, and on March 27, 1934, petitioner, Friday, was in court presenting a motion in the same case before the same judge, and at the conclusion of the proceedings the judge summarily charged the said Friday with contempt of court and ordered him to show cause, if any he had, why he should not be found guilty of and be punished for contempt of court because of the use of the above-quoted part of the "exceptions and objections." Friday objected thereto, claiming that he had a right to have written charges made before trial, and that he had a right to time to prepare therefor, and that, if the matter constituted contempt, such contempt was not direct and was not committed in the presence of the court. Such objections were overruled, and the court proceeded. The said Friday did not show cause why he should not be found guilty of, or why he should not be punished for, contempt of court. The evidence established without conflict that the attorney who went into the judge's chambers went in upon the suggestion of the court's bailiff to get an advance sheet of a California court decision, for use in the courtroom, and that he did not communicate, or attempt to communicate, with the judge while in his chambers in any manner except to state his mission. The judge was busy on some other matter in conference with another man and merely gave his consent to the attorney to get the advance sheet. Petitioner claimed and still claims that he used the language objected to in good faith. At the conclusion of the hearing the court found Friday in contempt of court and pronounced judgment therefor of $200 fine or one day imprisonment for every $2 thereof. Petitioner now sues out this writ for relief.

The filing by an attorney of a document containing contemptuous language with the clerk of the court in which a related matter is pending is a contempt in the face of the court, and proceedings to initiate a hearing in contempt therefor do not require the filing of an accusatory affidavit and may be summarily tried. Section 1211, Code Civ. Proc.; Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619; Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A. L. R. 482.

[2] Upon habeas corpus, courts of appeal will look to the whole record, including the evidence where necessary to determine jurisdiction. In re Lake, 65 Cal. App. 420, 224 P. 126.

The unquestionable intent of the language used by petitioner was that the judge and the attorney for one of the parties, to a matter about to be heard by the judge, secretly consulted in regard to the merits of the matter. An accusation of such an act by an attorney, an officer of the court, is obviously most serious.

The proceedings disclose that the attorney had absolutely no other basis for his charges than the mere fact that the opposing attorney was seen to go into the judge's chambers and out again in but a few minutes. The mission there was proper and at the suggestion of the court's bailiff, who accompanied him. Nothing occurred in the judge's chambers that could be prejudicial to anybody or in the remotest way suspicious of any wrongdoing.

[3] The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity, and it is his bounden duty to protect the integrity of his court. The judge in this case has served the people for more than a quarter of a century with honor and distinction, rising through promotions to the highest trial court of the state, where he was presiding at the time of the instant proceedings.

[4] The act of the petitioner was a flagrant contempt of the court of which he was an officer and is not excused by the mere assertion that his act was in good faith. Good faith to a client and good faith to a court can never be exemplified by reckless and scandalous charges, not even based upon logical suspicion.

[5, 6] We do not desire to be misunderstood by this opinion. We think it is practically the unanimous opinion of the authorities that summary punishment for contempt of court should be kept down to the irreducible minimum consistent with the welfare of the courts. The summary proceeding is an arbitrary one and should never be used unless unquestionably required, but when so required should be used with courage. While the judgment is not erroneously excessive, the matter of modification lies exclusively in the sound discretion of the trial judge.

The writ is discharged and petitioner remanded.

We concur: CRAIG, J.; DESMOND, J.